

DIGEST OF CASES,

OVERRULED, APPROVED, OR OTHERWISE DEALT
WITH IN THE ENGLISH AND OTHER
COURTS.

WITH

A SELECTION OF EXTRACTS FROM JUDGMENTS
REFERRING TO SUCH CASES.

BY

WILLIAM ANDREW GEORGE WOODS, LL.B.,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW,

AND

JOHN RITCHIE, M.A.,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW

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PREFACE.

THE main object of this work, as stated in the preface to the original edition, is to facilitate the study of Case Law, by presenting to the inquirer, in a form convenient for reference, the history of the various cases that have been adversely discussed or specially considered in the English and other Courts.

A mere alphabetical list of cases, however complete, would have been obviously insufficient by itself to carry out this purpose. For instance, a case of *A. v. B.* may have been disapproved in a case of *M. v. N.*, and subsequently that very case of *M. v. N.* may have been questioned in the case of *X. v. Y.*, and so on. No alphabetical list could have shown this at a glance without numerous and confusing cross-references. We have therefore in the body of the work arranged the cases in the form of a Digest according to their subject-matter, and have, in many instances, given such extracts from the judgments as will show the special point discussed in each case. We have thus collected together under their proper headings those cases in which a given case is specially discussed, approved, &c., and have so arranged them that the inquirer may see at once not only how that case itself has been treated, but also how the cases treating it have been themselves subsequently handled. It has been found impossible to refine very much in the matter of classification, and we have generally been content to gather the cases under one comprehensive heading with here and there a sub-division.

• By the aid of the Appendix all cases actually overruled, questioned, or reversed to the end of 1906 have been included, though it has not been found possible to bring all cases dealt with in a less important manner down to that recent date.

• The name of each of the cases dealt with or commented upon is printed in heavy or Clarendon type, and the name of each of the cases dealing with or commenting upon any of these cases is

printed in light or ordinary Roman type. Where several cases in succession are printed in heavy type they are all dealt with in the next following case in ordinary type.

Every case, whether it be a case commented upon, or a commenting case, has its date given, and also the Court or judge by whom it was decided.

Where a case appears in more than one series of legal reports, the references to all the series are given.

The precise mode in which each case commented upon has been dealt with in the commenting cases has so far as possible been indicated. With regard to overruled cases the principle has almost invariably been adopted that no case is overruled until a Court has definitely said so.

It is estimated that about 30,000 cases are more or less completely dealt with in the work.

In addition to English cases there are a considerable number of Irish and Scotch cases.

The original intention was that the work should be limited to one volume; and until it had been decided to enlarge its size the saving of space was an important consideration. In the earlier part of the work, therefore, whenever a series of cases occurred in which each case treated of some or all of the cases which preceded it, the cases commented upon were generally dealt with in groups. The result has been that in the part of the work in question several cases in heavy type are not infrequently superimposed upon the same commenting case; and that where the name of a case commented upon appears in some only of the consecutive groups, gaps sometimes intervene between its successive appearances, even causing it to extend over several columns. If, however, in these instances, the reader will bear in mind the simple rule, above stated, that each case in heavy type is dealt with in the next case in ordinary type, and will observe that, when a case extends beyond one column, the table of cases indicates each column in which it occurs, he will find no difficulty in following out these cases.

Our special thanks are due to Mr. John Mews, of the Middle Temple, who made several useful suggestions at the outset of the work, and whose Annual Digests have been indispensable to the performance of our task.

We also gratefully acknowledge assistance received from time to time from Mr. A. B. Randall, of Lincoln's Inn.

The alphabetical table of cases has been compiled by Mr. Digby L. F. Koe, of Gray's Inn, to whom we desire to express our indebtedness.

We have freely availed ourselves of the libraries of the Four Inns of Court. We have also derived great advantage from our continuous use of the Inns of Court Bar Library at the Royal Courts of Justice, where the careful noting up of the reports by the librarian, Mr. R. Riches, has enabled us to add numerous cases of whose existence we could not otherwise have known.

WM. A. G. WOODS.

J. RITCHIE.

September, 1907

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DIGEST OF CASES OVERRULED, APPROVED, OR OTHERWISE DEALT WITH.

ACCORD AND SATISFACTION.

Cumber v Wane (1718) 1 Str. 426, *referred to*
Heathcote v Crookshanks (1787) 2 Term
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Cumber v Wane, *approved*
Fitch v. Sutton (1804) 5 East 281, 1 Smith
415.—K B.

Fitch v. Sutton, *commented on*
Steinman v. Magnus (1808) 11 East 890;
2 Campb. 124.—K B.

Cumber v Wane, *questioned*
Finnel's Case (1802) 5 Co Rep 117 n,
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Thomas v. Heathorn (1824) 2 B & C 477,
3 D. & R. 647.—K B, *distinguished*
Sibree v. Tripp (1846) 15 L. J. Ex. 818; 15
M. & W. 23

POLLOCK, C.D.—If *Cumber v. Wane* was law, and a binding authority upon us, undoubtedly we could not come to a conclusion in favour of the defendant. That case was *indubitatus* *assumpsit* for 5*l.*, to which the defendant pleaded that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction, and it was held, on writ of error, after judgment for the plaintiff, that the plea was ill. It does not appear from the report whether the note was payable presently, or whether it was negotiable or not. The facts are not sufficiently stated to make it a binding authority. Pratt, C.J., says, in delivering the judgment of the Court, "As the plaintiff had a good cause of action it can only be extinguished by a satisfaction he agreed to accept; and it is not his agreement alone that is sufficient, but it must appear to the Court to be a reasonable satisfaction. or, at least, the contrary must not appear, as it does in this case. If 5*l.* be, as is admitted, no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment." From the latter part of the judgment I must, with every respect for the great authority of that learned judge, express my dissent. Undoubtedly at that time it was not law; for in *Finnel's Case* it was laid down as

clear matter of law, that, in the case of a bond for 500*l.*, due on the 1st of January, if the obligee accepted 100*l.* in satisfaction the day before, he was at liberty to do so; and the Court never inquired whether the satisfaction was reasonable; they left it to the agreement of the parties. Besides which, it does not appear in *Cumber v. Wane* that the promissory note was negotiable, and therefore that the plaintiff had any benefit from it. The marginal note of that case is:—"Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.*" and was expressly denied to be law by Lord Ellenborough, in argument, in *Heathcote v. Crookshanks*, and Buller, J., referred to a case of *Hardcastle v. Howard* (1786), in which it had been so denied to be law. But whether *Cumber v. Wane* have been overruled or not, it appears to me that it cannot be sustained as an authority that the acceptance of a negotiable security may not be a satisfaction of a claim to a larger amount.—p. 321.

PARKER, B.—In *Thomas v. Heathorn* it does not appear to have been a case of accord and satisfaction, although the bill accepted by the defendant was a negotiable security; it does not appear that it was given by way of satisfaction.—p. 321. **ALDRIDGE and PLATT**, B.B. agreed.

Down v. Hatcher (1839) 8 L. J. Q. B. 190;
10 A. & E. 121, 2 P. & D. 292; 3 Jur.
651.—**DENMAN, C.J.**, *questioned*.
Cooper v. Parker (1855) 24 L. J. C. P. 68; 15
Q. P. 822; 8 C. L. R. 828, 1 Jur. (N.S.) 281, 3
W. R. 245.—**EX CH.**

Cumber v. Wane, *impeached*
Sibree v. Tripp, *followed*.
Goddard v. O'Brien (1882) 9 Q. B. D. 87; 48
L. T. 806; 30 W. R. 548.—**GROVE, J.** and
HUDDESTON, B.

Finnel's Case and **Cumber v. Wane**, *followed*.
Sibree v. Tripp; **Curlew v. Clark** (1840)
18 L. J. Ex. 144; 8 Ex. 375, 6 D. & L.
455.—**EX.**, and **Goddard v. O'Brien**,
explained.

Drogheda Corporation v. Fairtlough (1858)
8 Ir. C. L. R. 98.—**LEFROY, C.J.** (for the
Court), *referred to*.
Foakes v. Beer (1884) 54 L. J. Q. B. 180; 9
App. Cas. 605, 51 L. T. 838; 53 W. R. 233.—
H.L. (EX.), *affirming*, **S. C. nom. Beer v. Foakes**
(1885) 52 L. J. Q. B. 712; 11 Q. B. D. 221.—
C.A. **BRETT, M.R.**, **LINDLEY** and **FRY, L.J.J.**;

which reversed 52 L. J. Q. B. 426.—WATKINS WILLIAMS and MATTHEW, JJ.

SELBORNE, J.O.—The question, therefore, is, nakedly raised by this appeal whether your lordships are now prepared not only to overrule, as contrary to law, the doctrine stated by Sir E. Coke to have been laid down by all the judges of the C. P. in *Pinnel's Case* in 1602, and repeated in his note to Littleton, sect. 314, but to treat a prospective agreement not under seal for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made—the case not being one of a composition with a common debtor, agreed to *inter se* by several creditors. I prefer so to state the question, instead of treating it (as it was put at the bar) as depending on the authority of *Cumber v. Wane*, decided in 1718. It may well be that distinctions which in later cases have been held sufficient to exclude the application of that doctrine existed and were inappropriately disregarded in *Cumber v. Wane*, and yet that the doctrine itself may be law, rightly recognised in *Cumber v. Wane*, and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir E. Coke, may have been criticised as questionable in principle by some persons whose opinions are entitled to respect, but it has never been judicially overruled, on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your lordships would do right, if you were now to reverse as erroneous a judgment of the C. A. proceeding upon a doctrine which has been accepted as part of the law of England for 280 years. The doctrine, as stated in *Pinnel's Case*, is, "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke on Littleton (212 b), it is, "where the condition is for payment of 20l, the obligor or feoffee cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater," adding (what is beyond controversy) that an acquittance under seal in full satisfaction of the whole would (under like circumstances) be valid and binding. . . . All the authorities subsequent to *Cumber v. Wane* which were relied upon by the appellant at your lordships' bar—such as *Schree v. Tripp*, *Curieus v. Clark* and *Godard v. O'Brien*—have proceeded upon the distinction that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber v. Wane*, is not, as I conceive, that sort of benefit which a creditor may derive by getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length or possibly become insolvent, but is some inde-

pendent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any sort of agreement not under seal.—p. 132.

LORD BLACKBURN, after discussing the earlier cases, said.—I must observe that, whether *Cumber v. Wane* was, or was not decided to be law in *Harrieston v. Howard*, it certainly was denied to be law in *Schree v. Tripp*, and that, though it is quite true that *Pinnel's Case*, as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before *Fitch v. Sutton*, unless it be *Cumber v. Wane*, has that part of it which I venture to call the dictum ever been acted upon, and, as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch v. Sutton*, whether the dictum in *Pinnel's Case* was right or wrong.—p. 137.

LORD WATSON.—I do not think it necessary to consider whether it would still be open to this House, if so advised, to overrule the doctrine in *Cumber v. Wane* and *Pinnel's Case*, because I am not prepared to disturb that doctrine.—p. 138.

LORD FITZGERALD, who also concurred, after referring to the resolution in *Pinnel's Case*, discussed *Drughda Corporation v. Fairclough*, and said.—The question did arise directly in that case, but the plea failed on other points, and it was, therefore, not necessary actually to decide it. I refer to it as showing how a judge of great experience [Lefroy, C.J.] considered the law to stand. . . . I should hesitate before coming to a decision which might be a serious intrusion upon that rule, but I concur with Lord Blackburn that it would have been wiser and better if the resolution in *Pinnel's Case* had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of the other creditors.—p. 141.

Cumber v. Wane and *Foskes v. Beer*, distinguished.

Ibbetson v. Neck (1886) 2 Times L. R. 427. HULLSTON, B.—Those cases did not apply for the reason that here the debt in question was an unascertained amount.—p. 139.

Cumber v. Wane, referred to. *Foskes v. Beer*, distinguished.

Bulder v. Bridges (1887) 57 L. J. Ch. 300; 37 Ch. D. 406; 58 L. T. 656.—G.A. COTTON, LINDLEY and LOPEZ, L.JJ.

COTTON, L.J.—All that Lord Selborne decided there [*Foskes v. Beer*] (and none of the other lords who delivered their opinions differed from it) was that, looking at the words of the agreement, which was reduced into writing in that case, it could only be taken as an agreement to receive the sum mentioned, and the instalments mentioned, in consideration of the principal sum therein mentioned, and nothing more, and that to give it a different construction would be to add to that written agreement, which apparently fully expressed the intention of the parties, words which were not there, and to add to those words these words, "interest on those sums." That is an entirely different matter. What is the agreement between the parties here, as shown by the acts to which I have referred? In my opinion that agreement was to give up all claims in respect of all matters mentioned in the certificates. But then we come to another point which

was entered into very fully by Stirling, J. [in the Court below] Was there a consideration? Now, I think the law is generally reasonable, but whether *Cumber v. Bone* was reasonable we have not to consider. An exception to the rule there laid down has been made by judges, whose decisions we ought not to disregard here by making further exceptions, which will reduce that case to something like principle. They lay down thus—that though the payment of a smaller sum cannot be a good consideration for accord and satisfaction of a claim for a larger one, yet if there is anything which can be a new consideration and a new benefit to the person entitled to the larger sum, that will do. . . . These cases . . . do go particularly to this—that if there is a promissory note, a negotiable instrument, for a smaller sum, that may do. The first of the cases relied upon on this point goes to this—that even if it is a promissory note signed by the party who is liable for the larger sum, that will do. That here that is not the case. Here the solicitors themselves gave their cheque for this amount.—p 301

Cumber v. Wane and Fokes v. Beer, followed
Underwood v. Underwood (1891) 63 L. J. P. 109; [1894] P. 201, 4 B. 601; 70 L. T. 390; 42 W. R. 572.—C.A. LINDLEY, KAY and A. L. SMITH, L.J.

Day v. McLean (1880) 58 L. J. Q. B. 293; 22 Q. B. D. 610; 60 L. T. 917; 87 W. R. 488, 53 J. P. 592.—C.A. SMITH, M.R., BOWEN and FRY, L.J., distinguished
Henderson v. Underwriting Association (1891) 63 L. T. 616, affirmed, 65 L. T. 732.—C.A. SMITH, M.R. and KAY, L.J.

COTTEIDGE, C.J.—All that it says is that, in an action before a jury, if there is a plea of accord and satisfaction, and proof that a sum has been tendered in accord and satisfaction, and the money is taken, the taking of it is not conclusive proof that it was intended to be taken in accord and satisfaction.—p. 617. WRIGHT, J. concurred.

Gabriel v. Dresser (1855) 24 L. J. C. P. 81, 15 C. B. 622, 3 C. L. R. 415; 3 W. R. 246, *commented on*.

Bingley v. Bristol Waterworks Co. (1850) 1 H. & N. 369; 26 L. J. Ex. 57.

ALDERSON, B. (delivering the judgment of the Court).—It is supposed that this case had decided that if a plea is bad in part, it was bad in toto, but we do not understand that case so to decide.—p. 387.

POWELL, C.B.—It is no authority for the proposition for which it is cited, and if it were I should not agree with it.

(1821) Jacob 324; 23 R. B. 84.—EDMOND, L.C. **Edwards v. Morgan**, (1824) M'Cle. 534, 18 Price 782, S. C. (1825) M'Cle. & Y. 258.—ALEXANDER, C.B., and **Clarke v. Yonge** (1842) 5 New 523.—LANGDALE, M.R. *discovered*.

Drummond v. St. Alban's (Duke) (1800) 5 Ves. 433.—LOUGHEBOROUGH, L.C., *held not to be ten.*

Jicks v. Salitt (1834) 23 L. J. Ch. 571; 3 De G. M. & G. 782, 18 Jun. 915.

CRANWORTH, L.C.—No doubt the duke ought not to have had an account for a longer period than he could have had the value at law, from the time his title accrued. I confess that in this case *Drummond v. St. Alban's (Duke)* cannot be explained by some doctrine of that sort, I do think it does not square with the other authorities, and cannot be considered as law.—p. 589. KNIGHT BRUCE, L.J. agreed.

TURNER, L.J. to same effect. See judgment, where the cases are discussed.

Hicks v. Salitt, commented on
Hickman v. Upall (1870) 4 Ch. D. 144, 16 L. J. Ch. 245; 36 L. T. 919; 26 W. R. 175.—C.A. JAMES, L.J., BAGGALLAY and BRETT, J.J.A.; varying 2 Ch. D. 617, 24 W. R. 694.—HALL, V.C.

JAMES, L.J.—Now it appears to me, looking at the rule as laid down in *Hicks v. Salitt*, that the principle of the rule is, that in order to disentitle the plaintiff to an account of rents before the institution of the suit, there must be neglect in bringing the suit when they could have brought it.—p. 148.

Hicks v. Salitt, referred to
Thomson v. Eastwood (1877) 2 App. Cas. 215.—H. L. (IR.)

Anon. (1821) 1 Mudd. Ch. P. 3rd ed. p. 141, *commented on*
Moxley v. Cowie (1878) 26 W. R. 854, 47 L. J. Ch. 271, 38 L. T. 908.

FRY, J.—What is the authority adduced to me in support of this contention? It is a passage in 1 Mudd. Ch. P., which is in these words:—"Where one party is allowed to surcharge and falsify, the other may do so too." And it is suggested that this liberty asked to improve his own accounts is a liberty to the defendant to surcharge his own accounts. It does not seem to me to be a felonious mode of expression, as to improving his accounts, to say that he may surcharge himself. To call an undercharge a surcharge, or to call a credit a debit, seems to me to be a suggestion to which I can hardly listen. It appears to me, therefore, that this passage can have nothing whatever to do with it, and, if it means anything with regard to the ordinary rule of taking accounts, it means this: that where there are cross accounts between the plaintiff and defendant, and the plaintiff obtains leave to surcharge the other accounts, a similar right would be given in respect of the cross accounts. It is quite clear to my mind that no such liberty as is now sought for could with propriety be expressed as liberty to the other side to surcharge and falsify. The authority, which is only that of an anonymous case unreported, and the short effect of which is stated in this passage, certainly does not lead me to suppose it ever has been the practice in the Court of Chancery to do anything of the sort. I decline, therefore, to do it.—p. 156.

ACCOUNTS AND INQUIRIES.

And see "PRINCIPAL AND AGENT."

Walker v. Bunkell (1882) 31 W. R. 138.—KAY, J.; *reversed*, (1883) 52 L. J. Ch. 596, 22 Ch. D. 722, 48 L. T. 418; 81 W. R. 661.—C.A. JERRELL, M.R., LINDLEY and BOWEN, L.J.

Dormer v. Fortescue (1744) 8 Ark. 124, **Pettward v. Prescott** (1802) 7 Ves. 511; **Bowes v. East London Waterworks** (1818) 8 Mudd. 375.—LEACH, M.R.; *affirmed*,

Lewes v. Morgan (1817) 5 Price 42, 468, 518; 8 C. (1829) 3 Y. & J. 230, 394—**ALEXANDER, CB**; 8 C. *nom.* **Morgan v. Lewes** (1816) 4 Dow 29, 16 R. 7—**LORDS ELDON AND REDFORD, S. C. nom.** **Morgan v. Evans** (1834) 8 Bligh (N.S.) 777; 3 Cl. & F. 159, see 19 R. 566.—**BROUGHAM, L.C., discussed**
Hickson v. Aylward (1828) 3 Molloy 1—**HART, L.C.**

Lewes v. Morgan, discussed and followed
Hickson v. Aylward, commented on.
Lawless v. Mansfield (1841) 4 Ir. Eq. R. 118;
Dr. & War 556—SUGDEN, L.C.

Lewes v. Morgan, distinguished.
Holland v. Holland (1844) 6 Ir. Eq. R. 407;
Dr. 391
SUGDEN, L.C.—This case is not like that of *Lewes v. Morgan*. There, the relation of attorney and client, in its proper sense, existed as a relation of confidence; but here there is no confidence, and I cannot apply the rule dispensing with the assigning of specific errors on that ground. At the same time I lay so much stress in it, that, as he acted as his own solicitor, I consider him bound to account as another man who was his solicitor, and whom, in the cautious discharge of his duty as administrator, he vigilantly watched, would be.—p. 117.

Coote v. Milltown (1844) 1 Jo. & Lat. 501,
7 Ir. Eq. R. 391.—**SUGDEN, L.C., decrees followed.**
Shore v. Shore (1857) 26 L. J. Ch. 386; 5 W. R. 260.—**KINDERSLEY, V.-C.**

Goblet v. Beechey (1829) 9 L. J. (O.S.) Ch. 100; 3 Sim. 24.—**SHADWELL, V.-C.; reversed,** 1851) 2 Russ. & M. 624.—**BROUGHAM, L.C.**

ACCUMULATION.

Eyre v. Marsden (1838) 7 L. J. Ch. 220;
2 Keen 664; 2 Jur. 583.—**M.R., affirmed,** (1839) 4 Myl. & C. 291; 9 Jur. 450.—**L.C. and Shaw v. Rhodes** (1836) 1 Myl. & C. 135.—**PETYS, L.C. and BOSANQUET, J.; affirmed, nom. Evans v. Hellier** (1837) 5 Cl. & F. 114.—**COTTENHAM, L.C. and LORD BROUGHAM, referred to**
Bourne v. Buckton (1811) 21 L. J. Ch. 193,
3 Sim. (N.S.) 91.—**KINDERSLEY, V.-C.**

Eyre v. Marsden and Shaw v. Rhodes, observed on.

Barrington v. Liddell (1852) 22 L. J. Ch. 1;
2 De G. M. & G. 480; 17 Jur. 241

ST. LEONARDS, L.C.—In *Eyre v. Marsden* it was held that the accumulations were not within the exceptions of the Act, as the grandchildren, for whom the portions were to be raised, were not children of any person taking an interest under the will. Now, independently of the reason given by Lord Langdale, I should have been clearly of opinion that if the grandchildren's parents had been provided for by the will, the case would have been within the provisions of the statute . . . In *Shaw v. Rhodes*, Bosanquet, J. . . was not, as I think, giving any opinion as to what was a sufficient interest in the parents, but whether the provision for the children was in the nature of a portion, so as to bring the case within the exception of the Act. When that case came before the H. L. . . there is no doubt

that during the argument the opinions of the two judges were, that the smallest interest given to the parents of the children was sufficient. Here the sums are clearly portions, and the case is untouched by decision.—p. 8.

Eyre v. Marsden, applied, Jones v. Maggs (1852) 22 L. J. Ch. 90, 9 Hare 605.—**TUNNICLIFFE, V.-C., referred to, Weatherall v. Thornburgh (post)**

Barrington (Lord) v. Liddell, applied, Middleton v. Losh (1852) 22 L. J. Ch. 422; 1 Sm. & G. 61, 17 Jur. 175.—**STUART, V.-C.; discussed, Burt v. Stuart** (1853) 22 L. J. Ch. 1071, 10 Hare 415, 17 Jur. 721.—**WOOD, V.-C., approved but distinguished, Edwards v. Tuck** (1854) 23 L. J. Ch. 204; 8 De G. M. & G. 40; 17 Jur. 921.—**CRANWORTH, L.C., KNIGHT BRUCE and TURNER, L.J., discussed, Varlo v. Faden** (1859) 29 L. J. Ch. 280; 1 De G. F. & J. 211, 6 Jur. (N.S.) 257; 1 L. T. 176.—**CAMPBELL, L.C.**

Edwards v. Tuck, followed.
Varlo v. Faden, discussed.

Roffey v. Greenwell (1839) 8 L. J. Q. B. 336;
10 A. & E. 232; 2 P. & D. 865.—**DENMAN, C.J. (for the Court), distinguished**

Mathews v. Keble (1858) 37 L. J. Ch. 8, 657;
L. R. 3 Ch. 691, 16 W. R. 1218.—**WOOD and SELWYN, L.J., partly affirming and partly reversing** (1867) L. R. 1 Eq. 467; 15 W. R. 1193.—**STUART, V.-C.**

Mathews v. Keble, discussed and applied
Walker, In re, Walker v. Walker (1856) 54 L. T. 794.—**KAY, J.**

Griffiths v. Vere (1803) 9 Ves. 127.—**ELDON, L.C., discussed.**

M'Donald v. Bryces (1838) 7 L. J. Ch. 178;
2 Keen 276; 2 Jur. 295.—**LANGDALE, M.R., dissented from.**

Elborne v. Goode (1844) 13 L. J. Ch. 394;
14 Sim. 105; 8 Jur. 1001.—**SHADWELL, V.-C.**

Griffiths v. Vere, applied.
Rosslyn's (Lady) Trust, Ex parte (1848) 18 L. J. Ex. Ch. 98; 16 Sim. 391; 18 Jur. 27.—**SHADWELL, V.-C.**

Rosslyn's (Lady) Trust, applied
Jaggars v. Jaggars (1883) 53 L. J. Ch. 201; 25 Ch. D. 729, 49 L. T. 667, 32 W. R. 384.—**KAY, J.**

Saunders v. Vantier (1841) 10 L. J. Ch. 354;
Cr. & Ph. 240.—**COTTENHAM, L.C.; affirming** 4 Beav. 115.—**M.R.; distinguished, Oldie v. Brown** (1850) 28 L. J. Ch. 542, 4 De G. & J. 179, 6 Jur. (N.S.) 655.—**CHELMSPFORD, L.C. and TURNER, L.J.; KNIGHT BRUCE, L.J. dissenting; explained, Weatherall v. Thornburgh (post).**

Talbot v. Jevors (1875) 44 L. J. Ch. 646;
L. R. 20 Eq. 255, 28 W. R. 741.—**BACON, V.-C., followed.**

Weatherall v. Thornburgh (1878) 47 L. J. Ch. 658, 8 Ch. D. 261; 39 L. T. 9; 26 W. R. 593.—**O.A. JAMES, COTTON and TREBINGER, L.J.**

Weatherall v. Thornburgh, discussed and applied.
Parry, In re, Powell v. Parry (1889) 60 L. T. 489.—**NORTH, J.**

Saunders v. Vantier, applied.
Goaling v. Goaling (1859) Johns. 265, 5 Jur. (N.S.) 810.—**WOOD, V.-C., discussed.**

Harbin v. Masterman (1871) 40 L. J. Ch. 760; L. R. 12 Eq. 569, 19 W. R. 1053.—**WICKENS, V.-C., commented on**

Wharton v. Masterman (1895) 64 L. J. Ch. 369, [1895] App. Cas. 186; 11 R. 169, 72 L. T. 191, 44 W. R. 449.—H.L. (R.), affirming 8 C. 1000 Harbin v. Masterman (1894) 63 L. J. Ch. 388; [1894] 2 Ch. 184; 7 R. 169; 70 L. T. 357.—C.A. DINGLEY, KAY and A. L. SMITH, L.J., each affirmed STIRLING, J., and also WICKENS, V.-C. (*infra*).

BENBOWELL, L.C.—WICKENS, V.-C., when the case came before him in 1871, intimated an opinion that the rule in *Scanderv. Vastey* was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned judge, and certainly with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favour of individual beneficiaries.—p. 372. LORD MACGARTHEEN concurred. LORD DAVEY, who also agreed, discussed, among other cases, *Weatherall v. Thornburgh* and *Talbot v. Jevors*, *supra*.

Weatherall v. Thornburgh, followed
Wharton v. Masterman, distinguished.
 TRAVIS, in re, *Prior v. Greatorox* (1900) 69 L. J. Ch. 668; [1900] 2 Ch. 641. 88 L. T. 241, 49 W. R. 485.—C.A.; affirming V.-C. of Palatine Court of Lancaster.

ALVERSTONE, M.C.—In the first place I would point out that Lord Davey and the other law lords who addressed the House undoubtedly had not the least intention of overruling *Weatherall v. Thornburgh*. Lord Davey cites it at the end of his judgment, and distinguishes it from the case which was before the House; but I think the real answer was probably given by counsel for the respondents in the course of their argument, that in *Wharton v. Masterman* or *Harbin v. Masterman* the persons who were entitled to the annuities had no interest whatever in the surplus, and therefore there was not any direction, so to speak, to accumulate except for the benefit of the person who was to become entitled, so that the principle of *Scanderv. Vastey* applied. There being no interest of the annuitants in the surplus, the persons entitled became entitled to the surplus, and therefore, the accumulations for them being directed for too long a period, they were entitled to come to the Court and say it ought to be theirs at the end of the twenty-one years. I think *Wharton v. Masterman* in no way intended to overrule or overrule *Weatherall v. Thornburgh*, and that as in *Weatherall v. Thornburgh*, where the Court came to the conclusion that there was no direction in the face of the will as to what was to be done with the income between the end of the twenty-one years and the death of the tenant for life—in other words, that the beneficiary was not intended to be given the income until after the death of the wife—so we must also in this case hold that, with regard to the surplus income between the expiration of twenty-one years and the death of Mrs. Greatorox, the cousins and the charity are not entitled to that income.—p. 607. RIGBY, L.J., to the same effect. COLLINS, L.J. concurred.

Basil v. Lister (1851) 20 L. J. Ch. 641; 9 Hare 177, 15 Jur. 964.—TURNER, V.-C., considered.

Vine v. Raleigh (1891) 60 L. J. Ch. 675; [1891] 2 Ch. 13.—C.A. HINDLEY, LOPES and KAY, L.J.J., varying 68 L. T. 578.—CHITTY, J.

Vine v. Raleigh, applied.

Mason, in re, *Mason v. Mason* (1891) 61 L. J. Ch. 25. [1891] 3 Ch. 467.—STIRLING, J.

Basil v. Lister, *Vine v. Raleigh* and *Mason, in re*, principle applied.
 GARDNER, in re, *Gardner v. Smith* (1901) 70 L. J. Ch. 407; [1901] 1 Ch. 697.—BUCKLEY, J.

Danson, in re, *Bell v. Danson* (1895) 13 R. 683.—CHITTY, J., dictum questioned.
 Clatterbuck, in re, *Fellows v. Fellows* (1901) 70 L. J. Ch. 614, [1901] 2 Ch. 285; 84 L. T. 757, 49 W. R. 538.

TRAVIS, J.—One difficulty has arisen in consequence of a supposed observation of the judge in a case of *Danson, in re*, decided by Chitty, L.J. when Chitty, J., where he is reported as saying: "It is not in my view possible to say that the terms used in the [Interpretation] Act of 1889 import 'money to be laid out in the purchase of land' that could only be effected by an express definition clause 'Land,' therefore, in the definition of the Interpretation Act, means 'corporeal hereditaments' That definition I read into the Act now before me, whose words I consequently find to mean that which they would naturally at first sight appear to mean." The expression was not necessary for the determination of the case, because, as was pointed out by the learned judge there, you might have a permanent investment in consols by virtue of the provisions of the Settled Land Act, 1882, and the decision would be just as good if the judge had said it meant corporeal or incorporeal hereditaments. I think it would be too strong to import into the report of this judgment the meaning sought to be put on it—namely, that land within the meaning of the Accumulations Act, 1892, must mean corporeal hereditaments. The judgment was not corrected by the judge, and I think there must be a slip in the report—p. 615.

Webb v. Webb (1840) 2 Beav. 493.—LANGDALE, M.R., applied.
 Errington, in re, *Errington-Talbot (or Errington) v. Errington* (1897) 76 L. T. 616; 45 W. R. 578.—KEKEWICH, J.

O'Neill v. Lucas (1898) 2 Keen 313.—LANGDALE, M.R., followed.
 Phillips, in re, *Phillips v. Levy* (1880) 49 L. J. Ch. 198, 28 W. R. 340.—MALINS, V.-C., commented on and not followed.
 Pope, in re, *Sharp v. Marshall* (1900) 70 L. J. Ch. 26; [1901] 1 Ch. 64; 40 W. R. 122.—FARWELL, J.

ANIMALS.

MISCHIEVOUS ANIMALS.

Stiles v. Cardiff Steam Navigation Co. (1864) 33 L. J. Q. B. 310, 10 Jur. (N.S.) 1130; 10 L. T. 844, 12 W. R. 1080.—Q.B. Baldwin v. Casella (1872) 41 L. J. R. 167; L. R. 7 Ex. 325, 26 L. T. 707; 21 W. R. 16—EX.; and *Gladman v. Johnson* (1867) 36

L. J. C. P. 153; 16 L. T. 476, 15 W. R. 313—*C.P., approved*
 Appleby v. Percy (1874) 43 L. J. C. P. 367,
 L. R. 9 C. P. 647, 30 L. T. 785; 22 W. R. 704—
 COLERIDGE, C.J. and KEATING, J., BRETT, J.,
dissenting

Anon. (1710) 2 Salk. 642—HOLT, C.J.,
dissenting

Taylor v. Eastwood (1801) 1 East 212
 KENYON, C.J.—The case in Salkeld, which is
 the only authority cited in support of the objec-
 tion to this implication, does not come very
 strongly recommended. For first, it is an
 anonymous case, and next, what is relied upon
 as there said was beside the point in judgment.
 It was rightly decided, that as against a wrong-
 doer the defendant might justify upon his
 possession, which was admitted by the defendant;
 but Lord Holt is made further to say, that which
 cannot be admitted, that where the action is
 transitory, as in that case, for taking the cattle,
 the plaintiff is foreclosed from pretending a
 right to the place, and that it cannot be contested
 on the evidence who had the right—p. 216

GROSE, LAWRENCE and LE BLANC, JJ. to the
 same effect.

Hudson v. Roberts (1851) 20 L. J. Ex. 290;
 6 Ex. 697—POULLOCK, C.B. (for the Court)
applied

Mason v. Keeling (1700) 1 Ld. Raym. 606,
quoted

Cox v. Bulbridge (1860) 13 C. D. (N.S.) 430,
 32 L. J. C. P. 89, 9 Jan. (N.S.) 970, 11 W. R.
 435—*C.P.*

WILLIAMS, J.—If the animal has such vicious
 propensity, and the owner knows of it, he is
 bound to take such care as he would of an animal
 which is *fero nature*, because it forms an excep-
 tion to his class. In some of the books I find
 expressions falling from judges which I am at a
 loss to appreciate. Holt, C.J. says, in *Mason v.*
Keeling, that there is "a great difference between
 horses and oxen,—in which a man has valuable
 property, and which are not so familiar to man-
 kind,—and dogs, the former the owner ought to
 confine, and take all reasonable caution that they
 do no mischief, otherwise an action will be
 against him; but otherwise of dogs, before he
 has notice of some mischievous quality." I
 cannot see what difference it can make whether
 the animal is or is not one in which a man may
 have a valuable property.—p. 439

Mason v. Keeling, *followed*

Sanders v. Teape and Swan (1884) 51 L. T. 263
 —COLERIDGE, C.J. and WILLIAMS, J.

Pickering v. Marsh (1874) 43 L. J. M. C.
 143; 32 W. R. 798—JOSH and ARCH-
 BALD, JJ., *followed*.

Rex v. Dymock (1901) 49 W. R. 618, 17
 Times L. R. 593—REDLEY and DIGHAM, JJ.

CRUELTY TO.

Murphy v. Manning (1877) 46 L. J. M. C. 211;
 2 Ex. D. 397; 35 L. T. 592; 25 W. R. 740
 —KELLY, C.B. and CLARKE, B., *applied*

Budge v. Parsons (1863) 32 L. J. M. C. 93,
 3 B. & N. 382, 9 Jan. (N.S.) 796, 7 L. T.
 784, 11 W. R. 421—WIGHTMAN and
 MENLOE, JJ., *dissenting*

Budge v. McArdle (or McArdle) (1884) 15 Cox
 C. C. 616; 14 L. R. Ir. 174—DOWSE, B.

Budge v. McArdle, *not followed*.

Swan v. Sanders (1881) 50 L. J. M. C. 67;
 11 L. C. 424—GROVE and LINDLEY, JJ.,
approved

Gallagher v. Society for Prevention of Cruelty
 to Animals (1885) 16 Cox C. C. 101; 16 L. R. Ir.
 325—MORRIS, C.J., HARRISON and MURPHY, JJ.

Murphy v. Manning, *approved*

Lewis v. Fernor (1887) 56 L. J. M. C. 45;
 18 Q. B. D. 582, 56 L. T. 236; 35 W. R. 378,
 16 Cox C. C. 176, 51 J. P. 371.—DAY and
 WILLS, JJ.

Colam v. Pagett (1883) 53 L. J. M. C. 64;
 12 Q. B. D. 66, 32 W. R. 289; 48 J. P.
 263—HUDDLESTON, B. and STEPHEN, J.,
commented on

Harper v. Marcks (1891) 63 L. J. M. C. 167;
 [1891] 2 Q. B. 319; 10 L. R. 335, 70 L. T. 804;
 42 W. R. 605, 17 Cox C. C. 758; 58 J. P.
 527

CAVE, J.—The strongest case on behalf
 of the appellant was that of the linnets (*Alpin v.*
Pagett). These linnets were originally wild,
 but they were caught and so tame as to be
 used as decoys. That is equivalent to their being
 made subservient for the use of man. On that
 ground the case can be supported, and, in my
 opinion, on that ground alone—p. 168. WRIGHT,
 J. concurred

Colam v. Pagett, *distinguished*

Harper v. Marcks, *principle applied*

Yates v. Higgins (1896) 1 Q. B. 166, 65 L. J.
 M. C. 31; 44 W. R. 335, 60 J. P. 88.

CAVE, J.—Mr. Colam on behalf of the
 appellant relied on *Colam v. Pagett*, where it
 was held that linnets kept in captivity and
 trained as decoys for the purpose of bird-
 catching were "domestic animals", but there it
 was shown that the linnets were trained to
 perform a particular service, which cannot be
 correctly asserted of the scallig in the present
 case. The decision in *Harper v. Marcks*, where
 it was held that performing hons kept in a cage
 were not "domestic animals" within the meaning
 of the same Acts (Cruelty to Animals Acts, 1840
 and 1884), is a strong authority against the con-
 clusions put forward on behalf of the present
 appellant—p. 168. WRIGHT, J. concurred.

Budge v. Parsons, Murphy v. Manning,
 and Brady v. McArdle (or McArdle),
followed

Renton v. Wilson (1888) 15 Ct. of
 Sess., Judiciary Cases, Gallagher v.
 Society for Prevention of Cruelty to
 Animals, and Lewis v. Fernor, *distinguished*

Ford v. Wiley (1889) 59 L. J. M. C. 145; 23
 Q. B. D. 203, 61 L. T. 774; 37 W. R. 703;
 16 Cox C. C. 683, 53 J. P. 485—
 COLERIDGE, C.J. and HAWKINS, J., *not*
followed

Rege v. McDonagh (1891) 28 L. R. Ir. 204—
 O'BRIEN, C.J., O'BRIEN, JOHNSON and HOLMES,
 JJ. *And see* *Alpin v. Fernor* (1893) 62 L. J.
 M. C. 111, [1893] 2 Q. B. 67, 5 L. R. 467, 69
 L. T. 133, 42 W. R. 95; 17 Cox C. C. 662; 57
 J. P. 456—MATHEW and WRIGHT, JJ.; and
 Wild Animals in Captivity Protection Act, 1900
 (63 & 64 Vict. c. 85), s. 1.

ANNUITY.

See also "REVENUE."

Beauchamp v Borret (1792) *Ponke* p. 148.—KENYON, C.J., *questioned*.

Hicks v Hicks (1802) 3 *East* 12; 4 *Wsp.* 196.
ELLENBOROUGH, C.J.—In the case cited, Lord Kenyon's opinion might have proceeded on the particular circumstances of it; and that seems probable from the stress which he laid on the justice of the case. And if he meant to go beyond that and lay down the doctrine stated generally, I should not be inclined to accede to the authority of the opinion.—p. 13.

Hicks v Hicks, *distinguished*.

Davis v. Bryan (*or* *Bryan*) (1827) 6 B. & C. 651, 5 L. J. (O.S.) K. B. 237; 30 B. R. 491.

DAVLEY, J.—There the grantor of the annuity insisted that the contract was void; the grantee was therefore at liberty to contend for the same thing, and the only point ruled was, that the grantor had a right to set off the payments which he had made on account of the annuity, in an action brought by the grantee to recover back the money.—p. 656. **WOLBOYD** and **LITTLEDALE, L.JJ.** concurred.

Davis v Bryan; Cowper v. Godmond (1838)

2 L. J. C. P. 102; 3 M. & Sc. 219; 9 *Eng.* 748.—**FINDAL, C.J.**, and **Churchill v Bertrand** (1842) 11 L. J. Q. B. 870; 2 G. & D. 548; 3 Q. B. 508; 6 *Jur.* 855.—**DENMAN, C.J.** (for the Court), *approved*.
Molton v Camroux (1840) 18 L. J. Ex. 356; 4 Ex. 17.—**EX CH.** *affirming* 17 *Jur.* 800.—**FOLLOCK, C.B.** (for the Court)

be there said that the memorial was false. But here it is not false. If, however, that case had not been distinguishable from this, I do not think the judges would be baird by so very recent a decision upon this recent statute, from allowing the true interpretation. . *Denn v Dupuis*, in the K. B., and the former case of *Parling v Parkhurst*, in the C. P., are of no weight on the present occasion, the former was decided on the authority of the case now pending, and that case was determined on a mere motion, because we would not overturn the decision of the Court of K. B., in that case, too, the principle was abandoned by the plaintiff's counsel, who merely endeavoured to distinguish the case from that of *Denn v Dupuis* without success. So the decisions all, in fact, rest on the authority of this case—pp. 853, 351.

Caverley v Dudley (1747) 3 *Atk.* 541.—**HARDWICK, L.C.**, *disapproved*.

Jones v. Harris (1804) 6 *Ves.* 186, 7 B. R. 282.

ELDON, L.C.—As to *Caverley v. Dudley*, if I am to decide on such grounds, I may decide just what I please. The L. C. appears to have altered the contract against the very principle he states, as the principle of the judgment, and made the plaintiff take the benefit of a contract, which he neither intended nor had entered into; but which the Court says should have been the only contract. I disclaim any such power.—p. 494.

PROPERTY CHARGEABLE.

Davies v Ashford (1815) 14 L. J. Ch. 473; 15 *Sim.* 42, 6 *Jur.* 612.—**SHADWELL, V.-C.**

Boughton v Boughton (1848) 1 H. L. Cas. 406.—GOTTESHAM, L.G., *arguing*, 8. C. *non*.
Boughton v James (1844) 1 Coll. C. 20, 3 Jur 329.—KNIGHT BRUCE, V.-C., *followed*.

Tench v. Cheese (1855) 24 L. J. Ch 716, 6 De G M & G 453, 1 Jur (N.S.) 689; 3 W R 500, 582.—CHARNWORTH, L.C., KNIGHT BRUCE and TURNER, L.J.

Tench v. Cheese, followed
Mathews v Kable (1868) 37 L. J. Ch 8, 657, L R 3 Ch. 691, 16 W. R. 1213.—WOOD and SELWYN, L.J.

Tench v Cheese, commented on and explained
Falkner v. Grace (1851) 9 Halc 280.—TURNER, V.-C., *approved*.

Bedford v. Bedford (1865) 35 Beav. 584.—ROMILLY, M.R., *explained*
Allan v Gott (1872) 41 L. J. Ch. 571, L R 7 Ch. 439, 26 L. T. 412, 20 W. R. 427.

JAMES, L.J.—In **Tench v. Cheese**, a testator gave his real and personal estate to trustees, in trust to pay an annuity to M. P. S. and, if she should have children, to raise 4,000*l.* for the younger children. Upon consideration of **Boughton v Boughton**, the Court held that the rule in **Roberts v. Walker** (1880) 1 Russ. & M. 762.—LEACH, M.R., did not apply. One or two expressions of the L.C. and Turner, L.J. were relied upon in support of the contention of the appellant in this case. One was an expression used by the L.C. who said there was a "direction to self," and Turner, L.J. used these words "The mere fact of the real and personal estate being given together does not constitute them a mixed fund for the payment of debts, legacies, or annuities; but in order to effect that purpose, there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will." From that it was contended that the case establishes as a rule of law that there must be an absolute conversion out and out. Now that was not really necessary for the decision of that case, and the distinction between an absolute direction and a discretionary power to sell was not before their lordships, and I do not understand that case as laying it down that the only case in which this exception from the general rule is to be found, is where there has been a direction to convert the real estate. Otherwise the rule would exclude a case in which a testator says expressly that he means his real estate to be the primary fund. There must be other modes of ascertaining whether that is the intention. The decision was simply that where there is a mere gift of real and personal estate together, that fact alone does not constitute them a mixed fund for the payment of legacies or annuities. It appears to me that that case does not compel us to say there must be an absolute conversion in order to bring the case within the meaning of the rule in **Roberts v. Walker**. . . . I think that decision [**Falkner v. Grace**] was quite right, because the gift was of a moiety of the estate, which in my opinion would be exactly the same thing as a gift out of a share. It stands in the same way as a gift out of a specific portion, and therefore that case is unaffected by **Tench v. Cheese**. . . . **Bedford v. Bedford** was a case where the property was given for the purpose of answering

the immediate object with an ultimate direction to sell. That is a sufficient indication of an intention to make it a mixed fund, and that decision is not inconsistent with **Tench v. Cheese**.—p. 574. MELLISH, L.J. agreed.

Boughton v. Boughton, Tench v. Cheese and Falkner v. Grace, distinguished.

Allan v Gott, discussed.
Howard v Dryland (1877) 38 L. T. 21.—HALL, V.-C.

Allan v Gott, referred to
Luckcraft v. Priolman (1879) 38 L. J. Ch. 636.—HALL, V.-C.

Turner v. Turner (1783) 1 Bro. C. C. 316; Anbl 778.—LOUGHBOROUGH, ASHURST and HOTHAM, LRS. COMMRS., *discussed*
Taylor v. Martindale (1811) 10 L. J. Ch. 339; 12 Nim. 158, 5 Jun 648.—SHADWELL, V.-C.

Taylor v. Martindale, followed.
Joint v. Richards (1882) 11 L. R. Ir. 278.—SULLIVAN, M.R.

Stelfox v. Sugden (1859) Johns 234.—WOOD, V.-C., *explained*
Carter v. Salt (1867) Ir. R. 1 Eq. 97.—WALSH, M.R.

Stelfox v. Sugden, distinguished.
Bell v. Bell (1872) Ir. R. 6 Eq. 239.—SULLIVAN, M.R.

Stelfox v. Sugden, considered.
Wormald v. Muxcen (1881) 17 Ch. D. 167; 44 L. T. 400, *reversed*, (1881) 50 L. J. Ch. 482, 776, 45 L. T. 115, 29 W. R. 753, 795.—G.A. JESSE, M.L., JAMES and LUSH, L.J.

FRY, J.—In my opinion the annuitant is entitled to receive her annuity out of the rents and profits accruing, not merely during her life but afterwards. There is no limitation of time expressed for the application of the rents and income for the benefit of the testator's wife, and the will contains no direction that any residue of the rents and income shall, during the life of the testator's widow, be paid to anyone else, though it provides generally that any residue shall be paid to the testator's sister with remainder to her children. The only difficulty which I feel in coming to this decision arises from **Stelfox v. Sugden**, which was very properly pressed upon me by Mr. Dunning, but I do not think it is conclusive in his favour, otherwise I should follow it. In that case there was a bequest of an annuity out of rents and income as in this case, but the will provided for the destination of the surplus during the life of the annuitant, which was the ground on which the annuity was decided to be a charge on the income only.—p. 168.

Stelfox v. Sugden, commented on.
Bell v. Bell, followed.
Moore's Estate, In re (1887) 19 L. R. Ir. 365.—MONROE, J.

RIGHT TO CAPITAL SUM

Prendergast v. Lushington (1846) 5 Hare 171; 11 Jur. 565.—WIGRAM, V.-C., *affirmed*.

nom. **Prendergast v. Prendergast** (1816) 16 L. J. Ch. 125, 3 H. L. Cas. 195, 14 Jul. 989—COTTENHAM, L.C. and **Day v. Day** (1853) 22 L. J. Ch. 878, 1 Dacw. 569; 17 Jul. 588—KINDERSELEY, V.-C., considered and not followed.
Power v. Hayne (1869) L. R. 8 Eq. 265, 17 W. R. 783.—MALINS, V.-C.

Day v. Day, not followed.
Power v. Hayne, followed.
Shoe v. Hale (1807) 13 Ves. 401, 9 B. R. 198.—GRANT, M.B., and **Bradley v. Feikoto** (1707) 3 Ves. 323, 1 R. R. 7.—ADDEN, M.B., *disseminated*.
Hutton v. May (1876) 3 Ch. D. 148; 21 W. R. 754.—MALINS, V.-C.

Hutton v. May, explained.
Roper v. Roper (1876) 3 Ch. D. 711, 35 L. T. 155; 24 W. R. 1013.
 MALINS, V.-C.—I laid down the rule on that subject in . . . *Hutton v. May*, that where there is merely a declaration that the widow shall not have the value of her annuity, that goes for nothing; but in order to prevent her having the value there must be a gift over. I held in that case that the widow was not entitled to have the value of the annuity, because there was a gift over, and I directed that an annuity should be purchased for the widow, and retained by the trustees, and paid to her during her life—p. 721.

Power v. Hayne, followed.
Day v. Day, not followed.
Dwyer, In re (1888) 57 L. J. Ch. 942, 58 L. T. 942, 36 W. R. 788—KIRKWOOD, J.

Stokes v. Cheek (1860) 29 L. J. Ch. 922; 28 Bev. 620—ROMILLY, M.B., *approved*.
Hutton v. May; **Hunt-Foulston v. Furber** (1876) 3 Ch. D. 285, 21 W. R. 756.—HALL, V.-C., and **Roper v. Roper**, referred to.
Yates v. Compton (1725) 2 P. Wms. 308.—KING, L.C.; **Barnes v. Rowley** (1797) 8 Ves. 305.—LOUGHBOROUGH, L.C., which was followed in **Dawson v. Hearn** (1831) 1 Russ. & M. 606, 9 L. J. (O.S.) Ch. 249; 32 B. R. 295.—TROUGHAM, L.C., *disseminated*.
Bayley v. Bishop (1808) 9 Ves. 6; 7 B. R. 432.—GRANT, M.B.; and **Palmer v. Crauford** (1819) 8 Swabs. 482; 2 Wils. 79.—FLUMER, M.B., *principle disseminated and not applied*.
Mabbott, In re, **Pitman v. Holborrow** (1891) 60 L. J. Ch. 279, [1891] 1 Ch. 707; 64 L. T. 447, 39 W. R. 537.—KIRKWOOD, J.

DURATION.

Savery v. Dyer (1752) Ansh. 139, Buck. 162—HARDWICKER, L.C.; and **Innes v. Mitchell** (1803) 9 Ves. 212, 5 B. R. 360.—ELDON, L.C., referred to.
Blewitt v. Roberts (1811) 10 L. J. Ch. 312; Cr. & Ph. 274; 5 Jun. 979—COTTENHAM, L.C., reversing 9 L. J. Ch. 209; 10 Sim. 491.—SHADWELL, V.-C.

Blewitt v. Roberts, *disseminated*.
Stokes v. Heron (1815) 12 Cl. & F. 161, 9 Jun. 563.—H.L. (Ch.) **LORDS BROUGHAM, COTTENHAM and CAMPBELL**; *reversing in part*, 8 C. 1011.
Heron v. Stokes, 2 Dr. & War. Sh.—BUDDEN, L.C. *And see post*, col. 19.

Blewitt v. Roberts, *doubted*.
Stokes v. Heron, **Hedges v. Harpur** (1846) 9 Bev. 179 (*reversed, post*), and **Savery v. Dyer**, *disseminated*.
Yates v. Maddan (1851) 3 Mac. & G. 532, 21 L. J. Ch. 24; 16 Jun. 45, reversing [1849] 18 L. J. Ch. 310; 16 Sim. 613, 13 Jun. 331.—SHADWELL, V.-C.

TRITTO, L.C.—It might seem from some of the expressions used by Lord Cottenham in *Stokes v. Heron*, that if an annuity has duration beyond the life of the first taker, without any limit expressly assigned to that duration, no other period can be fixed for its duration short of perpetuity. This, however, would be contrary to his own decision in *Blewitt v. Roberts*, and to the decision in *Hedges v. Harpur*. In *Blewitt v. Roberts* a testator gave to his wife 600l. per annum during her life, and after her death the said annuity to be divided. . . . The V.-C. held that the bequest passed the capital of the fund producing the annuities; but the L.C. (whether rightly, I think it may be fairly doubted) reversed the decision, and held that life annuities only were given. . . . These decisions are in accordance with the rule laid down by Lord Hardwicke in *Savery v. Dyer*, although, indeed, it was not necessary for the purpose of the decision, he then laid it down as a rule that, "if one gives by will an annuity, not existing before, to A." (that is, an annuity not existing at the date of the will, but created by the will), "A. shall have it only for life."—p. 540.

Stokes v. Heron, *disseminated and applied*.
Kerr v. Middlesex Hospital (1852) 22 L. J. Ch. 355; 2 De G. M. & G. 576, 17 Jun. 49, 1 W. R. 98.—C.A. ST. LEONARDS, L.C. and **KNIGHT BRUCE, L.J.**, **CRANWORTH, L.J.** *dissenting*.

Stokes v. Heron, **Innes v. Mitchell**, **Blewitt v. Roberts**, **Yates v. Maddan** and **Wilson v. Maddison** (1843) 12 L. J. Ch. 420; 2 Y. & C. C. C. 372, 7 Jun. 572.—**KNIGHT BRUCE, V.-C.**, *disseminated and not applied*.
Hedges v. Harpur (1858) 27 L. J. Ch. 742; 3 De G. & J. 129, 4 Jun. (N.S.) 1209; 6 W. R. 842.—**KNIGHT BRUCE and TURNER, L.J.**, *reversing* (1846) 9 Bev. 479; 10 Jun. 578.—**LANGDALE, M.B.** (*supra*).

Stokes v. Heron, *distinguished*.
Mansegh v. Campbell (1858) 28 L. J. Ch. 61; 3 De G. & J. 232; 4 Jun. (N.S.) 1207; 7 W. R. 72.—**CHELMSTON, L.C.**, *affirming* 28 Bev. 544.—**ROMILLY, M.B.**

Stokes v. Heron, **Hedges v. Harpur** and **Mansegh v. Campbell**, *distinguished*.
Leti v. Raudall (1860) 30 L. J. Ch. 110; 2 De G. & J. 388, 6 Jun. (N.S.) 1359, 3 L. T. 455; 9 W. R. 130.—**CAMPBELL, L.C.**, *affirming*, (1856) 3 Sim. & N. 83.—**STUART, V.-C.** *And see* "WILL."

Stokes v. Heron and **Blewitt v. Roberts**, *not applied*.
Bent v. Cullen (1871) 40 L. J. Ch. 250; L. R. 6 Ch. 235; 19 W. R. 398.—**HATHERLEY, L.C.**

Bent v. Cullen, observed on
Morgan, *In re, Morgan v. Morgan (post)*

Lett v. Randall, disavowed
Hodges v. Harpur, distinguished
Drow v. Harry (1874) 1 R. R. 8 Eq. 260—C.A.
O'HAGAN, L.C. and CHRISTIAN, L.J., *reversing*
1 R. 7 Eq. 413—CHATTERTON, V.C. See
judgments.

Evans v. Walker (1876) 3 Ch. D. 211, 25
W. R.—MALINS, V.C. *not followed*.
Blight v. Hartnoll (1881) 19 Ch. D. 294, 51
L. J. Ch. 162, 45 L. T. 524, 30 W. R. 513;
affirmed on another point, (1883) 23 Ch. D. 218,
52 L. J. Ch. 672, 48 L. T. 543; 31 W. R. 555
—C.A. JESSE, M.R., LINDLEY and BOWEN, L.J.
See "WILL."

FRY, J.—In the first place, it has been suggested that a gift to A for life with remainder to B, is a gift of an annuity to B in perpetuity, because the limitation is expressed in the one case, and is not expressed in the other. And undoubtedly that appears to be the view which was entertained by Malins, V.C., in *Evans v. Walker*. He there said this "I understand the law to be that when there is a gift of an annuity to one for life, or to several for lives, and then a gift afterwards to another person, without any restriction, that means that the last taker is to have the capital from which the annuity was produced. In my view, that statement of the law is inconsistent with the earlier cases of *Dunnett v. Roberts*, *Lett v. Randall*, and others, and cannot, I think, be insisted upon as the view which has been adopted by the Court for many years in the construction of gifts of annuities. Those cases appear to me to decide that the mere want of limitation in the last gift of the annuity does not import that the annuitant is to take anything more than for life, and for that there is a very good reason. The duration of the life of the first taker is expressed not for the purpose of limiting the gift to the first taker, but of limiting the commencement of the gift to the second or the successive takers, and, therefore, the principle of *expressio unius est exclusio alterius* does not apply. Therefore, I think that the argument on that ground fails.—p. 297.

Stokes v. Heron (supra, col. 18), disavowed.
Lett v. Randall, applied.
Foister's Estate, *In re* (1889) 33 L. R. 1r. 269
—MONROE, J. See judgment, where the cases are reviewed.

Blight v. Hartnoll, approved.
Morgan, *In re, Morgan v. Morgan* [1893] 3
Ch. 222, 62 L. J. Ch. 789, 69 L. T. 407.
—C.A.

LINDLEY, L.J.—I cannot help thinking that in *Bent v. Cullen* (*supra*, col. 18) the L.C. (Lord Hatherley) did for a moment fail to observe the difference between giving a person a portion of the income of a fund and something payable out of it. . . I do not think Lord Hatherley throws any doubt at all on the soundness of the view expressed more recently by Fry, J., in *Blight v. Hartnoll* that if an annuity is a charge as distinguished from a gift of a portion of the fund, the annuity is not a perpetual annuity.—p. 228.

LOPPS, L.J.—But I do find that *Bent v. Cullen*, although it has been subsequently referred to, is a case about which very little has been said.

It appears to be a decision which has been repeatedly avoided. There has been, it appears to me, rather a desire in no way to deal with it.—p. 230.

A. L. SMITH, L.J.—The only doubt I have had has been by reason of the great authority of Lord Hatherley in *Bent v. Cullen*, for it is apparent to anyone who reads this will and then reads the will in that case that the two cases are uncommonly like each other. There are, however, differences in this will which have been pointed out. First of all, the annuitants in this will are put in a bunch, and some of them are, clearly to demonstration, not intended by the testator to take more than an annuity for life. It is said that the others do take more than an annuity for life—that they take an annuity for perpetuity. That state of things Lord Hatherley had not before him in the will which he then had to construe. *Bent v. Cullen*, as it has been pointed out, has not been acted upon, and whether it is right or wrong I really do not know, but it lays down no canon of construction.—p. 232.

Tweedale v. Tweedale (1810) 10 Sim 153;
9 L. J. Ch. 147; 4 Jun. 263—SHADWELL, V.C. *quoted*.

Hill v. Potts (1862) 31 L. J. Ch. 380, 8 Jun. (N.S.) 556, 6 L. T. 787, 10 W. R. 489.

WOOD, V.C.—Mr. Jacob was very much dissatisfied with that decision, and it was intended to appeal, but it was compromised.—p. 380

Badham v. Mee (1830) 1 Russ & M. 631; 32
R. R. 304—LUGACI, M.R. *distinguished*.
Soames v. Martin (1839) 8 L. J. Ch. 367; 10
Sim 287—SHADWELL, V.C.

Soames v. Martin, Badham v. Mee, and
Knapp v. Noyes (1768) Amb. 462.—
CAMDEN, L.C. *disavowed*
Gardner v. Barber (1861) 18 Jun. 508.—
WOOD V.C.

Soames v. Martin, followed.
Gardner v. Barber, observed on.
Knapp v. Noyes, explained.

Wilkins v. Jodrell (1879) 18 Ch. D. 564, 49
L. J. Ch. 26; 41 L. T. 519, 23 W. R. 224.

MALL, V.C.—The next question, which is the important one, is whether the annuity determined when the youngest child attained twenty-one, and it is upon the authorities a question of very considerable difficulty, the judgments and views of the V.C. of England and of Wood, V.C., being apparently opposed to one another. Wood, V.C., considered that a gift for maintenance or education would of itself convey to the mind that it was only to last during minority, though not actually in terms so confined. That, I think, must be taken to be his view, from *Gardner v. Barber*. On the other hand, the view of the V.C. of England in *Soames v. Martin* seems to have been different. He considered that there was nothing to confine a provision for a person's maintenance and education to the minority of that person. It was given for two purposes—maintenance and education; and while maintenance would certainly last beyond minority, education would not necessarily cut with minority. I have already said what was Wood's, V.C., view in *Gardner v. Barber*. I think it plain, from the observations made by Wood, V.C., in commenting upon the decision of the V.C. of England in *Soames v. Martin*,

that Wood's, V.-C., decision in *Gardner v Barber* was greatly influenced by what he supposed Lord Camden to have said in *Knapp v. Jagers*. It was, however, pointed out to me by Mr Graham Hastings in the course of the argument, and I quite agree, that that was an entire fallacy. When Lord Camden said "maintenance and education are confined to minority," he was, as I consider, nicely referring to the terms of the will then before him, being such that in that particular case they were so confined, and was not laying down any general rule that maintenance and education in such a clause or provision would ordinarily and *per se* determine with minority. I have thus pointed out what my view would be in such a case as the present if it were unaffected by authority, and I have also adverted to what appears to have been the mistake of Wood, V.-C., as to the judgment of Lord Camden. Under these circumstances, and considering especially that there was a context in *Gardner v Barber*, it appears to me that I am not bound by the decision in that case, and I think that the decision of the V.-C. of England in *Stewart v. Chambers* is a sound and good decision, more strictly applicable to the case before me, and therefore I adopt and follow that decision in this case.—p. 571.

Lewes v Lewes (1818) 17 L. J. Ch. 125; 16 Sim. 266—V.-C., *Soames v. Martin*, and *Wilkins v. Jodrell*, approved.
Williams v. Papworth (1900) 69 L. J. P. C. 129, [1900] A. C. 563, 83 L. T. 181—V.-C.
LORDS HOUSEHOLD; MACNAGHTEN, LINDLEY, SIR R. COUCH, and SIR H. STROONG.

VALUATION.

Todd v. Bielby (1859) 27 Beav. 353.—ROMILLY, M.R., *followed*.
Potts v. Smith (1869) 39 L. J. Ch. 131, L. R. 8 Eq. 683; 17 W. R. 1053.—JAMES, V.-C.

Wroughton v. Colquhoun (1847) 1 De G. & Sm. 357; 11 Jur. 140.—SHADWELL, V.-C., *followed*.
Carr v. Ingleby (1891) 1 De G. & Sm. 362.—LEACH, M.R., *not followed*.
Gratrix v. Chambers (1860) 2 Giff. 321.—STUART, V.-C., *disputed and distinguished*.
Sinclair, in re, *Allen v. Sinclair* (1897) 66 L. J. Ch. 514, [1897] 1 Ch. 921, 76 L. T. 452; 45 W. R. 596.

KEKEWICH, J.—*Carr v. Ingleby* is reported only as a note to *Wroughton v. Colquhoun*. There is a statement of facts, and this, with the order, which is set out at length, justifies what is said in *Seton on Decrees* (5th ed. vol. ii. p. 1884), but there is no report of argument or judgment, and to this extent the case is unsatisfactory as a guide, standing as it does alone. I have found some later cases in which it is cited, but in none of them is there any comment on it, and the only case which it appears to have influenced is *Gratrix v. Chambers*, where Stuart, V.-C., held that a provision as to forfeiture of an annuity prevented the application of *Wroughton v. Colquhoun*. That decision is open to two observations regarding the case in hand—first, there was no valuation of the annuity in fact, though one was urged by counsel as the proper method of arriving at the proper result, and secondly, the V.-C. took advantage of a

charge of the annuity on a share of the estate to direct it to be paid in full out of that share, until exhausted. Here there has been a valuation, and the only fund out of which the annuity can possibly be paid is that with which the petition seeks to deal.—p. 516.

PAYMENT.

Hindle v. Taylor (1855) 20 Beav. 109.—ROMILLY, M.R., *partly reversed*, (1856) 25 L. J. Ch. 78, 5 De G. M. & G. 377, 1 Jur. (N.S.) 1029, 4 W. R. 62.—CRANWORTH, L.C.

Mitchell v. Moorman (1826) 1 Y. & J. 21—ALEXANDER, C.B., *followed*.
Mitchell v. Holmes (1878) 42 L. J. Ex. 98, L. R. 8 Ex. 119, 28 L. T. 72, 21 W. R. 412.—KELLY, C.B., MARTIN and PIOTT, B.A.

Longuet v. Seawen (1719) 1 Ves. sen. 402.—HARDWICKE, L.C., *applied*.
Bulwer v. Astley (1841) 13 L. J. Ch. 329, 1 Ph. 122; 8 Jur. 528.—LYNDHURST, L.C.

Bulwer v. Astley, *distinguished*.
Grant, in re, *Walker v. Maitmain* (1883) 52 L. J. Ch. 552, 48 L. T. 937, 31 W. R. 709.—PEARSON, J.

Bulwer v. Astley; Younge v. Farze (1856) 20 Beav. 380.—ROMILLY, M.R.; and *Yates v. Yates* (1860) 29 L. J. Ch. 872, 28 Beav. 637; 6 Jur. (N.S.) 1023.—ROMILLY, M.R., *principle applied*.

Maffett, in re, *Jones v. Mason* (1888) 57 L. J. Ch. 1017, 39 Ch. D. 534, 59 L. T. 499, 37 W. R. 9.—CHITTY, J.

Maffett, in re, *Jones v. Mason and Yates*.
Yates, *explained*.

Bacon, in re, *Gissell v. Leathes* (1893) 63 L. J. Ch. 445, 3 H. 459; 68 L. T. 522, 41 W. R. 478.

KEKEWICH, J.—In *Maffett*, in re, Chitty, J., had to consider how an annuity for which a testator's estate was liable ought to be paid as between the tenant for life and remainderman, and, according to the head-note, he held that the annuity must be capitalised and borne by the tenant for life and remainderman in proportion to the value of their respective interests. Not being able to extract this from the reported judgment, or to understand precisely what was done, I thought it right to send for the order. That order declares that the sum certified to have been paid to the annuitant out of income, and all future payments of such annuity, or the sum necessary to purchase an annuity in lieu of the said annuity, ought to be raised or provided for by a sale or mortgage of a sufficient portion of the testator's estate; and it directs a sale or mortgage of the freehold or leasehold property of the testator for the purpose of raising the costs payable thereout, and also the sum certified to have been paid out of income as above mentioned, and such sum as may be necessary for the purpose of securing the future payments of the annuity. That directly confirms the view I have expressed respecting the rights of the parties, and makes precisely such a declaration, and gives such a direction as that view would justify and suggest. . . . It will, I think, be found that other authorities are in harmony with this,

1, at any rate, any apparent departure from it due to special circumstances. In *Yates v. Yates* for instance, the practical difficulty was caused by the fact that, until sold, a large part of the real estate on which the annuity was charged produced no income.—p. 447

And see "ESTATE"

Yates v. Yates, commented on
Smith's Settlement Trusts, 10 (1900) 49
 2 J. Ch. 712, [1900] 2 Ch. 829, 83 L. T. 364.
 9 W. R. 44.—REKLEWICH, J. See "SETTLED
 AND."

ARRARENS.

Cupit v. Jackson (1821) 13 PRICE 721;
 McClell 495, 28 R. R. 735.—ALEXANDER,
 C.B., observed on
Roberts v. Hughes (1830) Beat 417.—
 ANNERS, L.C.

Cupit v. Jackson, discussed and distinguished
Graves v. Hicks (1841) 10 L. J. Ch. 183, 11
 ib. 536.—SHADWELL, V.C.

Cupit v. Jackson, followed.
White v. James (1858) 28 L. J. Ch. 179; 26
 conv. 191, 4 Jun. (N.S.) 1214, 7 W. R. 35.—
 O'MILLY, M.R.

Graves v. Hicks and White v. James,
referred to.
Hall v. Hunt (1861) 2 J. & H. 76.—WOOD,
 C.C.

Graves v. Hicks, applied.
Cupit v. Jackson, discussed.
Taylor v. Taylor (1874) 13 L. J. Ch. 314, L. R.
 7 Eq. 384, 30 L. T. 49; 22 W. R. 349.—HALL,
 C.C.

Cupit v. Jackson, followed
Horton v. Hall (1874) L. R. 17 Eq. 437, 22
 W. R. 391.—HALL, V.C.

Hall v. Hunt, followed.
Graves v. Hicks, not applied
Scottish Widows' Fund v. Craig (1882) 51
 J. Ch. 863, 20 Ch. D. 208, 30 W. R. 463.—
 ALB, V.C.

Scottish Widows' Fund v. Craig, not applied
Bailey v. Badham (1885) 54 L. J. Ch. 1067,
 1 Ch. D. 84, 53 L. T. 18; 33 W. R. 770.—
 ACON, V.C.

Graves v. Hicks and Taylor v. Taylor,
doubted
Tucker, In re, Tucker v. Tucker (1893) 62
 J. Ch. 442; [1893] 2 Ch. 323, 3 R. 436; 69
 T. 85, 41 W. R. 505.—NORTH, J.

Birch v. Sherratt (1867) 36 L. J. Ch. 925;
 L. R. 2 Ch. 644; 17 L. T. 153; 16 W. R.
 80.—CAIRNS and ROSE, L.J.; *reversing*
 L. R. 4 Eq. 58.—STUART, V.C., *dis-*
tinguished.

Taylor v. Taylor, Horton v. Hall, Scottish
Widows' Fund v. Craig, and Tucker, In re,
discussed.

Hambro v. Hambro (1894) 63 L. J. Ch. 627,
 1894 2 Ch. 664, 8 R. 413, 70 L. T. 681, 43
 T. R. 22.—NORTH, J. And see "RENT-
 CHARGE." *Harlinge Rents, Greenwich, In re,*
Barry Commissioners v. Green (1896) 65 L. J.
 Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148, 45
 W. R. 74.—STIRLING, J.

Cupit v. Jackson and Graves v. Hicks, dis-
cussed.

Hall v. Hunt, followed.

Blackburne v. Hope-Edwards (1900) 70 L. J.
 Ch. 99; [1901] 1 Ch. 119, 83 L. T. 370; 48
 W. R. 701.

BUCKLEY, J.—The question I have to decide
 is whether, under the deed, payment of the
 rent-charge is to be enforced by a sale of the
 inheritance. There are cases in which, when
 rent-charges have been created, although there
 was no express power of sale, the Court has
 given its assistance by ordering a sale. The
 earliest of those cases is *Cupit v. Jackson*, and
 the result of the cases is that, subject to the
 decision of the Court, the owner of a rent-charge
 is entitled to an order for sale of the inheritance,
 but that the Court will refuse to make the
 order in certain cases; for instance, where it is
 inadvisable to wait for a time.—*Graves v. Hicks*—
 or in the case instanced by North, J., in *Tucker*.
In re, the amount of the arrears being small.
 That shows the sort of discretion which the Court
 exercises where there is no term. But what is
 the effect of vesting a term in trustees, as in the
 present case? In *Hall v. Hunt*, Wood, V.C.,
 thought that the existence of a term altered the
 rights of the parties. The V.C. was asked to
 make an order for sale of the fee simple for pay-
 ment of the arrears of a rent-charge of 500*l.*
 and a sum of 5,000*l.*, and he made an order
 for sale based on the rent-charge, and not on the
 5,000*l.* . . . Although that was a decision on the
 construction of a particular will, it . . . shows
 that the Court ought to consider whether the
 existence of the term is consistent with the right
 to have a sale ordered by a Court of equity.—
 p. 101.

May v. Bennett (1826) 1 Russ. 370; 25 R. R.
 72.—GIFFORD, M.R., *followed.*

Wright v. Callender (1852) 21 L. J. Ch. 787;
 2 De G. M. & G. 652, 16 Jur. 647.—CRANWORTH
 and KNIGHT BRUCE, L.Js.

Wright v. Callender, distinguished.

May v. Bennett, doubted.
Baker v. Baker (1858) 27 L. J. Ch. 417; 6
 H. L. Cas. 616, 4 Jur. (N.S.) 491; 6 W. R.
 410.—H. L. (E.) CHELMSFORD, L.C., LORDS
 BROUGHAM, CRANWORTH and WENSLEYDALE,
reversing (1858) 25 L. J. Ch. 79, 7 De G. M. & G.
 681; 2 Jur. (N.S.) 127.—KNIGHT BRUCE, L.J.,
 TURNER, L.J. *dissenting.*

LORD BROUGHAM said he should have come to
 the same decision as the L.J. did in *Wright v.*
Callender, and he thought that case was clearly
 distinguishable. He could not say that he
 equally approved of *May v. Bennett*, as to
 which, if he had had to decide it, he should
 not have come to the same conclusion at which
 Lord Gifford had there arrived.—p. 418.

Baker v. Baker, explained.

Mason, In re, Mason v. Robinson (1878) 47
 L. J. Ch. 669, 8 Ch. D. 411; 26 W. R. 754.—
 JESSE, M.R. And see post

May v. Bennett and Wright v. Callender,
adopted.

Carmichael v. Gee (1880) 5 App. Cas. 588, 19
 L. J. Ch. 829; 43 L. T. 227; 29 W. R. 293.—
 H. L. (E.); *affirming* S. C. *nom. Gee v. Mahood*
 (1878) 43 L. J. Ch. 667, 11 Ch. D. 891, 40 L. T.
 668; 27 W. R. 543.—C.A. JAMES, BRETT and

COTTON, L.J., which reversed (1878) 47 L. J. Ch. 641. 9 Ch D 151; 39 L. T. 90, 26 W. R. 789—HALL, V.-C.

SELBORNE, J.C.—This case seems to me to fall within the principles of *May v Bennett* and *Wright v Gledhill*, and to be quite different from *Baker v Baker*—p 596 LORDS HATHERLEY, BLACKBURN and WATSON agreed.

Carmichael v. Gee, explained.

Campbell, in re (1901) 71 L. J. K. B. 170, [1902] 1 K. B. 113, 85 L. T. 708.—C A COLLINS, M.R., STIRLING and MATTHEW, L.J. And see "REVENUE."

In re Mason, Mason v. Robinson (supra), followed.

Baker v Baker (supra), distinguished.

Taylor, in re, Halsey v. Randall (1884) 38 L. J. Ch. 1161, 60 L. T. 717; 43 W. R. 13

PEARSON, J.—That which distinguishes this case from *Baker v Baker*, where it was decided that the widow was not entitled to have the annuity made good out of *capias*, is the circumstance that in that case there was no absolute gift of the annuity in the first instance.—p. 1163.

DISTRESS.

Buxton v. Monkhouse (1810) 4 Coop 41.—ELDON, L.C., applied.

Sollory v. Leaver (1869) 39 L. J. Ch. 72, 1 R. 9 Eq. 22, 21 L. T. 158, 18 W. R. 59.—MALINS, V.-C.; 8 L. C. (1871) 40 L. J. Ch. 398.—MALINS, V.-C.

Sollory v. Leaver, considered and affirmed.

Kelsey v. Kelsey (1874) L. R. 17 Eq. 495; 30 L. T. 82; 22 W. R. 438.

MALINS, V.-C.—But if it is said that I decided *Sollory v. Leaver* without having my attention drawn to *Foster v. Foster* [(1700) Prec Ch. 122, 2 Vern 386], *Mantley v. Lovelace* [(1888) 1 Dr & Wal. 303], and *Chap v. Jackson* (supra, col. 28), I answer that the decision was not made in the absence of authority, for I proceeded upon the decision of Lord Eldon in *Buxton v. Monkhouse*.

There Lord Eldon gave the very reason upon which I decided *Sollory v. Leaver*, that the trustee had power to distress. In *Sollory v. Leaver* the annuitants had a power of distress, and I thought the case was analogous, the principle being that the Court will not help those who have power to help themselves, and I refused to appoint a receiver—p. 500.

Buttery v. Robinson (1826) 3 Bing. 392; 11 Moore 262, 4 L. J. (O.S.) C. P. 108; 28 R. R. 656—BEST, C.J.; and Sollory v. Leaver, referred to.

Roper v. Roper (1876) 3 Ch D 714 (supra, col. 17)

Craig v. Duffus (1840) 6 Bell's App. Cas. 308—COTTENHAM, L.C., LORDS BROUGHAM and CAMPBELL, and Breadalbane (Marquis) v. McGregor (1818)—COTTENHAM, L.C., LORDS BROUGHAM and CAMPBELL, discussed.

Renfrew Magistrates (or Robm) v. Hoby (1856) 2 Jur. (N.S.) 647, 2 Macq. H. L. Cas. 478, 4 W. R. 632.—H. L. (SC.)

CRANWORTH, L.C. saw no ground for questioning the propriety of the decision in *Craig v. Duffus* except on one point, as to which he observed.—I confess that in the course of this argument a doubt has occurred to my mind, whether it might not have been successfully contended that what took place at the trial, or before the trial, at the opening of the intended trial, in *Craig v. Duffus*, might by far implication have been held to amount to a consent by the Court and the parties that the order for the trial by jury should be discharged. And if Lord Campbell be correct, as I have no doubt he is, that the Court, with the consent of the parties, might discharge any prior interlocutor, then it would have laid the matter open, and it would have been a matter investigated by the Court, according to its ordinary course of investigation, not embarrassed by any reference to a jury.

Then there was *Breadalbane (Lord) v. McGregor*, as to which I own I am puzzled; not that I think it bears upon the present case, but I cannot understand by what authority an appeal was entertained from an interlocutor which directed an issue. It is said that it was not an issue directed by the Lord Ordinary. That is not material; for I observe, in looking at the statute, by the 15th section of the 59 Geo. 3, c. 85, it is enacted "that it shall not be competent by representation, reclaiming petition bill of advocation, appeal to the H. L. or otherwise, to bring under review any interlocutor by the said Divisions, Lords Ordinary, or judge of the Admiralty ordering a trial by jury." It is quite clear that the appeal in that case was an appeal (at least, as I read it) against an interlocutor directing a trial by jury. I cannot, therefore, reconcile that with the statute—pp. 649, 650.

Bickett v. Morris (1866) L. R. 1 H. L. (Sc) 47; 12 Jur. (N.S.) 803; 14 L. T. 835.—H.L. (SC.) CHELMSFORD, L.C., LORDS CRANWORTH and WESTBURY (and see "WATER"). distinguished from Craig v. Duffus, Dudgeon v. Thomson and Renfrew Magistrates v. Hoby.

Burgess v. Morton (1895) 65 L. J. Q. B. 321, [1896] A. C. 136; 73 L. T. 718.—H.L. (C.)

LORD WATSON.—There are several decisions of this House in cases coming from Scotland which appear to me to affirm that the judgment of a Court below, pronounced *extra curiam curie*, is in the nature of an arbiter's award, and that, as a general rule at least, no appeal from it will lie. An appeal was held, on that ground, to be incompetent in *Craig v. Duffus*, *Dudgeon v. Thomson* and *Renfrew Magistrates v. Hoby*. All of these cases had the following features in common—First, the action had been remitted to the Jury Court by an interlocutor which was not subject to review; secondly, the parties had agreed either before the trial commenced or before the jury were asked to consider their verdict, to

APPEAL.

1. TO HOUSE OF LORDS.
2. TO COURT OF APPEAL.
3. FROM JUDGE IN CHAMBERS.

1. TO HOUSE OF LORDS.

When Appeal lies.

Dudgeon v. Thomson (1854) 1 Macq. H. L. Cas. 714—CRANWORTH, L.C., approved.

withdraw the action from jury trial and to accept the decision of the Court, in one instance upon a proof to be taken by commission, and in the others upon the notes of the presiding judge and the productions before him, and finally, the Court referred to was a division of the Court of Session, so that the appeal was against the first and only decision which had been given upon the evidence. I may add that all of these cases involved questions of law arising upon the facts when they were ascertained. The subsequent decision of the House in *Buckett v. Morris* does not touch upon the authority of these precedents, although it establishes an exception in cases where the party holding the original judgment has stated no objection to an appeal from it to an intermediate Court.—p. 823.

HALSBURY, L.C. and *LORD SHAND* to the same effect.

From Court of Session

Mackay v. Dick (1881) 6 App. Cas. 251.—*H.L. (SC.) SELBORNE, L.C. and LORDS BLACKBURN and WATSON, applied.*
Shepherd v. Henderson (1881) 7 App. Cas. 49.—*H.L. (SC.) LORDS PENKANCE, BLACKBURN and WATSON.* And see "MARINE INSURANCE."

Mackay v. Dick, followed.
McLean v. Clydesdale Banking Co. (1883) 9 App. Cas. 95.—*H.L. (SC.) SELBORNE, L.C. and LORDS BLACKBURN and WATSON.*

Courts in Ireland.

Gosford (Earl) v. Irish Land Commission (1899) 68 L. J. P. C. 69, [1899] A. C. 435; 81 L. T. 330.—*H.L. (IR.) HALSBURY, L.C., LORDS MACNAGHTEN, MORRIS and SHAND, followed.*
Reg. v. Barton and Gt. S. & W. Ry. of Ireland (1902) 71 L. J. P. C. 80, [1902] A. C. 268; 87 L. T. 82.—*H.L. (IR.) HALSBURY, L.C., LORDS SHAND, DAVEY and BRAMPTON.*

Parties to Appeal

Reehart v. Battersby (1849) 2 H. L. Cas. 388, 14 Jur. 229.—*H.L. (IR.) COTTENHAM, L.C., LORDS BROUGHAM and CAMPBELL, observed on.*
Wearing v. Ellis (1856) 6 De G. M. & G. 596, 26 L. J. Ch. 15; 2 Jur. (S.S.) 1149.
GRANTWORTH, L.C.—I may observe, however, with reference to that case, that though I should be very unwilling to express any doubt about a decision of the H. L., especially in a case which has been very much considered, yet that it seems a startling proposition, as stated in the marginal note, that a person being improperly made a defendant and against whom a decree has been pronounced (other than of dismissal of the bill with costs) could not be heard to appeal. That is a proposition which I think is too broadly stated. I have no doubt but that the object of that appeal was that the bankrupt might get relief, as it were, in bankruptcy or insolvency, and not on the ground that he was improperly made a party.—p. 608.

And see *Luddy's Trustees v. Peard* (1886) 55

L. J. Ch. 881, 38 Ch. D. 500, 55 L. T. 137; 35 W. B. 44.—*KAY, J.*

Staying Proceedings pending Appeal.

Oddie v. Woodford (1821) 1 Myl & Cr. 625.—*COTTENHAM, L.C., followed.*
Price v. Salusbury (1863) 11 W. R. 1011.—*ROMILLY, M.R., not followed.*
Galloway v. London Corporation (1865) 11 Jar. (S.S.) 537, 12 L. T. 623, 13 W. B. 393.—*KNIGHT BRUCE and TURNER, L.JJ.*

Emmerson v. Ind. Coops & Co. 34 W. B. 436.—*CHITTY, J., varied.* (1886) 55 L. J. Ch. 908, 55 L. T. 429, 34 W. B. 778.—*O.A. COTTON, LINDLEY and LOPES, L.JJ.*

Winchilsea (Earl) v. Garrett (1833) 2 L. J. Ch. 115, 1 Myl & K. 253.—*LEACH, M.R.; reversed, nom. Nicol v. Vaughan* (1834) 1 Cl. & F. 195, 7 Bligh (S.S.) 395, 35 R. R. 60.—*H.L. (E.) BROUGHAM, L.C. See S.C. nom. Nicol v. Vaughan* (1831) 5 Bligh (S.S.) 505.—*H.L. (E.) BROUGHAM, L.C. and LORD LYNCHBURST; and* (1832) 6 Bligh (S.S.) 104.—*H.L. (E.) BROUGHAM, L.C.*

Wilson v. Church (1879) 12 Ch. D. 454, 28 W. R. 281.—*O.A. COTTON and BRETT, L.JJ.; JAMES, L.J., dissenting; and Walburn v. Ingilby* (1883) 3 L. J. Ch. 21; 1 Myl & K. 61, 30 W. B. 270.—*BROUGHAM, L.C., considered.*

Bradford v. Young, Falconer's Trusts, in re, (1884) 28 Ch. D. 18, 51 L. J. Ch. 368, 51 L. T. 559, 33 W. B. 159.

PEARSON, J.—I have looked at the authorities on the point, and particularly at what was said by the L.JJ. in *Wilson v. Church*, where an application was made to stay the distribution of a fund in the hands of trustees, pending an appeal to the H. L. Cotton and Brett, L.JJ. were of opinion that the application ought to be granted, but James, L.J. dissented. As I am not acquainted with all the facts of that case, I do not know exactly what the grounds of his dissent were. But, looking at what was said by Lord Brougham in *Walburn v. Ingilby*, it appears to be by no means the settled rule of the Court that, without any special ground being shown, a fund which has been ordered to be paid out should be retained in Court simply because there is an appeal from the order. Such a rule would, as Lord Esher pointed out in *Ingham v. Baxley* (1868) 15 Ves. 180; 9 R. R. 276, "palsy the arm of justice."—p. 20.

[In the result the C. A. (BAGGALLAY, LINDLEY and PHIL, L.JJ.) decided that on security being given by the applicant, the payment out should be stayed till the hearing of the appeal. The applicant, however, declined to give the proposed security, and the application was dismissed.]

Barker v. Lavery (1885) 54 L. J. Q. B. 241, 14 Q. B. D. 769; 33 W. R. 770.—*O.A. SELBORNE, L.C., BRETT, M.R. and LINDLEY, L.J., distinguished.*
McCarthy v. Cork Steam Packet Co. (1886) 16 L. R. Ir. 194.

DOWSE, B.—I think that one lays down no hard and fast rule as to granting a stay of execution. The case cited does not merely with the question of staying an execution for the plaintiffs

costs pending an application to the II L—
p. 196. ANDREWS, J. concurred.

Evidence

Noel v. Noel (1823) 12 Price 211, 26 R. R. 660.—RIDGON, L.C. and LORD REDBURN, L.C., varying **S. C. v. Noel v. Henley** (Lord) (1819) 7 Price 241—RICHARDS, C.B., *dissevered*.

Attwood v. Small (1835-8) 6 Cl. & F. 232.—H.L. (R.) LORDS BROUGHAM and LYNDRUST, *reversing* (1832) Younge 407.—LYNDHURST, C.B.

Attwood v. Small and MacCabe v. Hussey (1831) 2 Dow & Cl. 410; 5 Bligh (N.S.) 715.—H.L. (R.) LORDS BROUGHAM, L.C., *obsevered on*.

Banco de Portugal v. Waddell, Hooper, In re (1880) 5 App. Cas. 161; 49 L. J. 113, 33; 42 L. T. 698, 28 W. R. 477.—H.L. (B) CAIRNS, L.C., LORDS SELBORNE and BLACKBURN.

LORD SELBORNE.—I think it worth while to add a few words on the subject of the appellants' endeavour to introduce upon this appeal evidence which was neither used in, nor offered to, the Court below. Some cases were referred to, one of which, *MacCabe v. Hussey*, has no bearing upon the point at all. In that case evidence had been rejected in the Court below, the question of the propriety of the rejection of that evidence was raised by the appeal; and the appellants counsel insisted that the House ought not to look at the rejected evidence to see whether, if it had been admitted, it would have made any difference or not, but that if it held it to have been improperly rejected it should simply send the case back. The House very properly took a different view of the matter; but it is quite obvious that that had no bearing upon the general question. With regard to the general question, Lord Lyndhurst, in *Attwood v. Small*, following Lord Brougham, put the matter upon so proper a footing that it appears to me worth while to remind your Lordships of what he said:—"With respect to the cases that have been cited, it does not appear to me that they go far to decide the present question." The question there was, whether the answer in the cause, which had not been read or entered as read in the Court below, was to be read in this House. "*Noel v. Noel* was a mere question of construction of a will—there was no dispute as to the facts,—the will having referred to a settlement, it appeared to the noble lords who decided that case, that it was impossible properly to determine the construction of the will without looking into the settlement. There was no dispute that there was such a settlement, no dispute as to a question of fact, it would have been idle therefore to have sent it back to the Court below to hear further evidence and to receive the settlement; the Court, therefore, called for the settlement." . . . "I think, therefore, the general rule ought to prevail in this case, viz., that as this evidence was not tendered in the Court below, it ought not to be offered before the appellate tribunal." And I must add that in the whole of my experience, which extends over a considerable period of time, such a thing never has happened as that this House has allowed any evidence to be introduced which was not used in the Court below.—p. 170.

And see "BANKRUPTCY."

Costs.

Walsh v. Trimmer (1867) 36 L. J. Q. R. 318; L. R. 2 H. L. 208, 16 L. T. 722, 15 W. R. 1150.—H.L. (B) CHELMSFORD, L.C., LORDS CRANWORTH and WESTBURY; *reversing* **S. C. v. Trimmer v. Walsh** (1865) 32 L. J. Q. R. 20, 364, 4 B. & S. 18, 10, 9 Jur. (N.S.) 381, 1266, 8 L. T. 549, 11 W. R. 63, 784—EX. CH. and *affirming* (1862) 7 L. T. 352—Q.B., and **Peck v. North Staffordshire Ry.** (1863) 4 B. & S. 627—Q.B., *commented on*.

Gann v. Johnson (1871) L. R. 6 C. P. 461, 40 L. J. C. P. 227, 24 L. T. 753, 19 W. R. 952.

WILLES, J.—In *Walsh v. Trimmer* . . . the Court of Ex. Ch. had reversed the decision of the Court of Q. B., and the H. L. reversed the decision of the Ex. Ch. It is clear that the costs applied for in that case and granted were the costs of the appeal to the Ex. Ch. The H. L. did there what was done in *Peck v. North Staffordshire Ry.* There is no case in which the H. L. has given costs to the appellant on a constructive reversal by the Court of Ex. Ch. of the Court below. . . . *Peck v. North Staffordshire Ry.* . . . was a somewhat remarkable decision. The conclusion at which the Court arrived was practically correct; for, no doubt, the Ex. Ch., on affirmation of the decision of the Court below, gives costs to the respondents; and so where there was a constructive affirmation of the Court below by the Ex. Ch., by reason of the H. L. reversing the decision of the Ex. Ch., the H. L. would give the costs of the proceedings in the Ex. Ch. But the correct and regular mode of obtaining those costs would appear to be by application to the H. L. . . . One cannot help thinking that the decision in *Peck v. North Staffordshire Ry.*, though very convenient, seems rather like an assumption by the Court from which the appeal originally came of a jurisdiction given by sect. 41 of the Common Law Procedure Act, 1854, to the Court above. It proceeded on a constructive affirmation by the Ex. Ch. of the Court below.—p. 463.

SMITH, J.—With respect to *Peck v. North Staffordshire Ry.*, I confess I feel some difficulty in seeing on what legal foundation the Courts proceeded.—p. 465.

Anderson v. Morice (1876) 46 L. J. C. P. 11; 1 App. Cas. 713; 35 L. T. 566, 25 W. R. 14; 3 Asp. M. O. 290.—H.L. (R) LORDS CHELMSFORD and KATHERLEY; LORDS O'HAGAN and SELBORNE *dissenting; affirming* (1875) 44 L. J. C. P. 10, 511; L. R. 10 C. P. 58, 603; 32 L. T. 355; 24 W. R. 30—EX. CH., which *reversed* (1874) 31 L. T. 603; 23 W. R. 180—C.P., *commented on*.

Price v. Monmouthshire Canal and Ry. Cos. (1870) 4 App. Cas. 197; 49 L. J. Ex. 130; 40 L. T. 630; 27 W. R. 666.—H.L. (S) CAIRNS, L.C., and LORD SELBORNE, LORDS PENZANCE, and O'HAGAN *dissenting on one point*.

CAIRNS, L.C.—I am anxious, my lords, to say a word upon the subject of costs, more particularly because I observe that in . . . *Anderson v. Morice* a question was raised as to costs in the case of an appeal where the numbers for affirming and for reversing the judgment appealed against were equal. I did not myself take part in that decision, but I observe that what was ultimately done was that nothing was said in the order upon the subject of costs. Some

observations, however, then fell from some members of your lordships' House, which appear to give countenance to the idea that the reason why nothing is said about costs when there is an equal division of votes is, that it is somewhat contrary to justice or to the practice of the House to give costs where there is any division of opinion. Now, my lords, I apprehend that that is not at all the principle upon which your lordships proceed in a case like the present. There are upon these occasions always two separate motions proposed to the House. The first is the motion that the decree appended against be reversed. That motion may be rejected by a majority, or it may be carried by a majority, or the numbers of contents and non-contents may be equal, and thereupon the decree stands affirmed. But in all these cases, if anything is

472.—C.A. BRAMWELL, BAGGALLAY and THRESEGER, L.J., *followed*.

Reg. v. Whitechurch (or Whitechurch, Ex parte) (1881) 50 L. J. M. C. 99; 7 Q. B. D. 534; 15 L. T. 379; 20 W. R. 922; 45 J. P. 617; 46 L. J. 131.—C.A. BRAMWELL, BRETT and COTTON, L.J.

Reg. v. Steel (1876) 46 L. J. M. C. 1, 2 Q. B. D. 37; 35 L. T. 531; 25 W. R. 31; 13 Cox C. C. 354.—C.A. COLERIDGE, C.J., MELLISH, L.J., BRETT and AMPHLETT, J.J.A., *explained and followed*, Reg. v. Fletcher, Hume, Ex parte (1876) 46 L. J. M. C. 4, 2 Q. B. D. 43; 35 L. T. 638; 25 W. R. 145; 13 Cox C. C. 358.—C.A. MELLISH, L.J., BRETT and AMPHLETT, J.J.A., *followed*, Woodhall, Ex parte (or Woodhall, In re) (1888) 57 L. J. M. C. 71, 20 Q. B. D. 500; 41 L. T. 11; 36 W. R. 655; 52 J. P. 581, R., LINDLEY and BOWEN, L.J.

Reg. v. Pardo (1889) 58 L. J. Q. B. 553, 2905, 61 L. T. 647, 37 W. R. 132.—C.A. ESHER, M.R., LINDLEY, L.J., *distinguished*, CHOWN OFFICE. and Farnell (1860) 59 L. J. P. 62; 2 L. T. 713. 38 W. R. 374; —C.A. COTTON, LINDLEY and

O. v. O. Shee and Farnell, *applied*.

Reg. v. Barnardo, *dismissed*
Att. Gen. v. Kinsman (1893) 82 L. R. Ir. 220.—C.A. PORTER, M.R., FALLES, C.B., FITZGIBBON and BARRY, L.J.

Reg. v. Whitechurch and Woodhall, Ex parte, *followed*
Schofield, Ex parte (or Hook v. Schofield) (1891) 60 J. J. M. C. 157, [1891] 2 Q. B. 423, 64 L. T. 780, 39 W. R. 580; 17 Cox C. C. 308; 56 J. P. 4.—C.A. ESHER, M.R., BOWEN and KAY, L.J.

Schofield, Ex parte, *applied*, Payne v. Wright (1892) 61 L. J. M. C. 114; 66 L. T. 148; 17 Cox C. C. 400, 56 J. P. 564.—C.A. ESHER, M.R., and PAYNE, L.J.; Rex v. D'Esmeunt (1801) 85 L. T. 501; 20 Cox C. C. 48.—C.A. COLLINGS, M.R., STIRLING and MATHEW, L.J.

Mellor v. Denham, Reg. v. Whitechurch, Schofield, Ex parte, Payne v. Wright, and Reg. v. Barnardo, *dismissed*.

Seaman v. Burley (1896) 65 L. J. M. C. 208; [1896] 2 Q. B. 344; 75 L. T. 91; 45 W. R. 1; 18 Cox C. C. 403; 60 J. P. 772.—C.A. ESHER, M.R.—The appellant has been summoned before the justices, and they, assuming the [poor] rate to be valid, have issued a distress warrant. If this does not produce payment, the justices will in due course make an order for the imprisonment of the appellant. All the cases—Mellor v. Denham, Reg. v. Whitechurch, Schofield, Ex parte, and Payne v. Wright—decide that it is not necessary that the proceedings must end in imprisonment; it is enough if they may end in imprisonment.—p. 209.

KAY, L.J., and A. L. SMITH, L.J., also discussed the cases. See judgments.

Seaman v. Burley, *distinguished*.
Southwark and Vauxhall Water Co. v. Hampton Urban Council (1899) 68 L. J. Q. B. 207; [1899]

for ordering costs to be paid by the appellant would not be carried, consequently the effect would be the same as if nothing were said about costs. I am anxious to guard against the idea going abroad among the public that the reason is the division of opinion, for there might well be a division of opinion amongst your lordships, and yet be an order that the appellant was to pay the costs. The true reason is that, in such a case as I have supposed, a motion ordering the appellant to pay costs could not be carried.—p. 219.

LORD SELBORNE to the same effect.
And see "RAILWAY."

Barford Corporation v. Lenthall (1748) 2 Atk. 551.—HARDWICK, L.C.; Moore v. Shalcross (1677) Macq. Pract. 420; Symonds v. Deane (1678) Macq. Pract. 421, MacKervey v. Ramsays (1845) 9 Cl. & F. 818.—H.L. (80) LORDS CAMPBELL, COTTEHAM and BROUGHAM; and Bowes v. Shand (1877) 46 L. J. Q. B. 561, 2 App. Cas. 455; 36 L. T. 857, 25 W. R. 780.—H.L. (R) CAJES, L.C., LORDS HATHERLEY, O'HAGAN, BLACKBURN and GORDON, *referred to*.

West Ham Union v. St. Matthew, Bethnal Green (1899) 65 L. J. M. C. 501; [1899] A. C. 477, 75 L. T. 288, 69 J. P. 740.—H.L. (M) HALBURN, L.C., LORDS WESCHELL, MACNAGHTEN and MORRIS, *reversing* 64 L. J. M. C. 161; [1895] 1 Q. B. 662; 14 R. 302; 72 L. T. 847; 45 W. R. 419, 59 J. P. 244.—C.A. ESHER, M.R., LOPES and RIGBY, L.J.

And see "POOR LAW."

2 To COURT OF APPEAL.
Criminal Cause or Matter

Mellor v. Denham (1880) 49 L. J. M. C. 89, 8 Q. B. D. 467; 42 L. T. 498, 44 J. P.

1 Q. B. 273, 79 L. T. 612, 47 W. R. 177; 63 J. P. 100—C.A.

A. L. SMITH, L.J.—No doubt there is a series of decisions since *Mellor v. Deukhan*, in which it has been decided what are criminal causes or matters in respect of which there is no appeal to this Court from the Q. B. D. The last case reported is one relating to the enforcement of a poor rate—*Seaman v. Driley*—and it was then held by this Court that the proceedings were “a criminal cause or matter,” and consequently that no appeal would lie. The Summary Jurisdiction Act, 1879, was not brought to our attention in that case, for the very good reason that it had already been decided in *Reg. v. Price* (1880) 49 L. J. M. C. 49, 5 Q. B. D. 300, 42 J. P. 439, 28 W. R. 616; 44 J. P. 248—COCKBURN, C.J., LUSH and BOWEN, J.J., that in granting a distress warrant for a rate justices act ministerially under sect. 4 of the Act of 1879, and not as a court of summary jurisdiction, because the rate itself is the order, and therefore that the Act of 1879 did not apply. But with regard to a general district rate under the Public Health Act, 1875, . . . the justices in such a case are not acting ministerially, but have to adjudicate upon the matter which is brought before them as a court of summary jurisdiction. . . . A doubt like that in this case is taken out of the category of criminal matters. It is made a civil debt.—p. 209. RIGBY and COLLINS, L.J.s, concurred.

And see “RATES”

On Case Stated.

Walsall Overseers v. L. & N. W. Ry. (1878) 48 L. J. Q. B. 65; 4 App. Cas. 80, 39 L. T. 153, 27 W. R. 189.—H.L. (S) CAIRNS, L.C., LORDS PENANCE and O'HAGAN; reversing 47 L. J. Q. B. 711, 8 Q. B. D. 457, 38 L. T. 665, 26 W. R. 705—C.A. COCKBURN, C.J. and BRETTE, L.J.; BRAMWELL and COTTON J.J. dissenting; and *Reg. v. Savin* (1880) 6 Q. B. D. 809; 29 W. R. 638—C.A. SELBOURNE, L.C., BAGGALLAY and BRETTE, L.J.s, principle applied.

Reg. v. Swindon New Town Local Board (1879) 49 L. J. Q. B. 522; 42 L. T. 614; 28 W. R. 80; 44 J. P. 505—C.A. COLERIDGE, C.J., BRETTE and COTTON, J.J.s, distinguished.

Illingworth v. Bulmer East Highway Board (1884) 53 L. J. M. C. 60, 32 W. R. 150—C.A. BRETTE, M.R.—These cases fall within the principle of the decision in *Walsall Overseers v. L. & N. W. Ry.* and *Reg. v. Savin*, and not within the principle of the judgment in *Reg. v. Swindon Local Board*.—p. 61.

COTTON, L.J.—*Reg. v. Swindon Local Board* is different from this case. Here the proceedings took place under the provisions of the Highway Act, 1835 (5 & 6 Will. 4, c. 50). Section 105 of that statute gives a right of appeal to quarter sessions, then sect. 107 enacts that no proceedings shall be removed by certiorari into the superior Court, but sect. 108 provides that the court of quarter sessions may state the facts specifically for the determination of the Court of K. B., in which case it shall be lawful to remove the proceedings by certiorari, or otherwise, into the Court of K. B. If, therefore, a special case is stated for the opinion of the Q. B. D., pursuant to the provisions of sect. 108, there is no new

O.C.

jurisdiction given to the Q. B. D.: it then exercises its original jurisdiction, and not any new appellate jurisdiction, such as that which was created by the Public Health Act, 1875, s. 269. That is the distinction between the present case and *Reg. v. Swindon Local Board*. There was by the circumstances of that case no original jurisdiction existing prior to the statute under which that appeal was brought, and by that statute an appeal was given by way of special case to “a superior Court”—*th. BOWEN, L.J. concurred.*

Peterborough Corporation v. Wilsthorpe Overseers (1883) 53 L. J. M. C. 83; 12 Q. B. D. 1, 50 L. T. 189; 32 W. R. 548, 48 J. P. 873.—C.A. BRETTE, M.R. and BOWEN, L.J., **Holborn Guardians v. Chertsey Guardians** (1885) 54 L. J. M. C. 53, 187; 15 Q. B. D. 76, 53 L. T. 666, 33 W. R. 341, 608.—C.A. BRETTE, M.R., BAGGALLAY and BOWEN, L.J.s; reversing *in the merits*, 14 Q. B. D. 289, 52 L. T. 102—HAWKINS and A. L. SMITH, J.J., and **Dewsbury and Heckmondwike Waterworks Board v. Penistone Union** (1886) 2 Times L. R. 375—C.A. LINDLEY and LOPES, L.J.s, followed.

Lodge v. Huddersfield Corporation (1893) 67 L. J. Q. B. 571, [1893] 1 Q. B. 847, 839, 78 L. T. 582, 62 J. P. 515.—C.A. A. L. SMITH and CHITTY, L.J.s.

Application or Motion for New Trial

Sagden v. St. Leonards (Lord) (1875) 45 L. J. P. 49, 1 P. D. 154, 34 L. T. 379, 24 W. R. 860.—C.A. COCKBURN, C.J., JESSEL, M.R., JAMES and MILLER, L.J.s, and BAGGALLAY, J.A., distinguished. And see “WILL.”

Krehl v. Burrell (1878) 10 Ch. D. 420; 48 L. J. Ch. 252, 39 L. T. 461, 27 W. R. 284.—C.A., varying 47 L. J. Ch. 353; 7 Ch. D. 551, 81 L. T. 372—JESSEL, M.R. THESIGHER, L.J. (for self, JAMES and BAGGALLAY, L.J.s.)—There [*Sagden v. St. Leonards (Lord)*] the facts proved in evidence at the trial in support of the will were not contradicted by evidence, or even disputed, and the appeal, therefore, did not really involve a question of disputed facts, but raised the question somewhat in the same way as if the facts had been stated in the form of a special verdict, whether, upon such facts, the will and codicils which were the subject of dispute ought to have been admitted to probate, and, further, the objection to the appeal, upon which the Court decided, was rather the objection that the appellants should have applied to the judge who tried the action for a rehearing, before appealing, than such an objection as arises in this case.—p. 429.

Krehl v. Burrell, explained

Love v. Lowe (1879) 10 Ch. D. 439; 48 L. J. Ch. 283, 40 L. T. 238; 27 W. R. 300.—C.A. JESSEL, M.R., JAMES and BRAMWELL, L.J.s. [Counsel read the following passage from the judgment in *Krehl v. Burrell* “We, by no means say that, even if the verdict and judgment in another case were to follow one another without any interval of time, that fact would make any difference in the treatment by us of the case, provided only the judge clearly takes

upon himself the trial of specific questions of fact, and finds his verdict upon them as a matter separate from the judgment which he gives upon that verdict.]

JAMES, L.J.—The passage you have read from the judgment in *Krehl v. Burrell* was not meant to apply to a case where the judge merely commenced his judgment by saying that he had to decide a question of fact; it was intended to refer to a case where, in the first instance, at the commencement of the trial, the judge said, "I will try the question of fact first," and definite issues of fact were accordingly settled for trial.—p. 483

It does not signify whether the verdict on the facts is given on a day prior to the judgment on the whole case, or whether both are given at the same time, provided that before the trial begins there is a distinct announcement that the issues of fact are to be tried separately. That is what we meant by the passage which has been read from the judgment in *Krehl v. Burrell*.—p. 484.

Krehl v. Burrell, distinguished.

Dollman v. Jones (1879) 12 Ch. D. 553, 27 W. R. 877.

JAMES, L.J.—In *Krehl v. Burrell* we went as far as we could towards assimilating the practice of the Ch. D. to that of the Common Law Divisions. Where a judge has done what the M.R. did in that case, defined an issue and found a verdict upon it, we follow the rule of the Common Law Divisions, and the objection that such a practice was unknown in the Court of Ch. is got over. In the Court of Ch. there was no such thing as a motion for a new trial. There was an appeal, and on appeal every question came before the C.A. That practice has never been abolished, and where the judge does not do what was done in *Krehl v. Burrell*, it continues in force.—p. 555

BRETT, L.J.—It was held, in *Krehl v. Burrell*, that Ord. XXXIX. r. 1 does not generally apply to cases in the Ch. D. The Court in that case was somewhat astute in going as far as it could in assimilating the practice in the different Divisions, but when it was decided that the order does not apply generally in the Ch. D., it seems to follow that the Court cannot go the whole way in such assimilation.—p. 556.

Krehl v. Burrell, limited.

Potter v. Cotton (1879) 5 Ex. D. 137; 49 L. J. Ex. 158, 41 L. T. 460, 28 W. R. 160

BRAMWELL, L.J.—The reasoning in *Krehl v. Burrell* may seem to show that the motion for a new trial is right. I cannot, however, agree with the judgment in that case at all events; the decision must be confined to cases where at the trial of the action the facts are found separately, and judgment is reserved, and is pronounced at a subsequent time.—p. 138

BRETT and COTTON, L.JJ. to the same effect

Potter v. Cotton, referred to.

Krehl v. Burrell and Lowe v. Lowe (supra, col. 34), explained

Jones v. Hough (1879) 49 L. J. Ex. 211; 5 Ex. D. 115; 42 L. T. 108.—C.A. COCKBURN, C.J., BRAMWELL, COTTON and THESIGER, L.JJ.

Yette v. Foster (1878) 3 C. P. D. 487, 38 L. T. 742; 26 W. R. 745.—C.A. BRAM

WELL, BAGGALLAY and THESIGER, L.JJ.; affirming **BRETT, L.J.**, followed
DAVIES, J., Felix (1878) 4 K. L. D. 32, 48 L. J. Ex. 3; 39 L. T. 322, 27 W. R. 108.—C.A. JAMES, BRETT and COTTON, L.JJ., affirming **BRAMWELL, L.J.** And see "ELECTION."

Extension of Time

McAndrew v. Barker (1878) 17 L. J. Ch. 340, 7 Ch. D. 701; 37 L. T. 810; 26 W. R. 317.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ., observed on and limited. And see col. 38

West Jewell Tin Mining Co., In re, Little's Case (1878) 8 Ch. D. 806.—C.A. JAMES, BRETT and COTTON, L.JJ., distinguished

Blyth and Young, In re (1880) 13 Ch. D. 416, 41 L. T. 746, 28 W. R. 266.—C.A. JAMES, BAGGALLAY and COTTON, L.JJ.

JAMES, L.J.—With regard to *McAndrew v. Barker*, I wish to say that I think it was a little too strong to say that the Court has no discretionary power to enlarge the time for appealing unless there has been conduct on the part of the respondent raising an equity against him. The Court did not intend to lay down a rule in every case. It was not intended, for instance, to apply to the case of inevitable accident.—p. 120

Little's Case, considered and distinguished
Blyth and Young, In re, observations approved

New Callao Co., In re (1882) 22 Ch. D. 481, 52 L. J. Ch. 283, 48 L. T. 251, 31 W. R. 185.—C.A. JESSUP, M.R., COTTON and BOWEN, L.JJ.

New Callao Co., In re, approved

Manchester Economic Building Society, In re (1883) 53 L. J. Ch. 115, 24 Ch. D. 488; 49 L. T. 798; 32 W. R. 325.—C.A. BRETT, M.R., COTTON and BOWEN, L.JJ.

COTTON, L.J.—This, I think, may be laid down, that when the rules and the Act of Parliament say "that an appeal is to be within a certain time, unless special leave shall be given by the C.A. to bring the appeal after that time," the Court does not grant leave unless there is something which, in the opinion of the Court, entitles the person who applies for extension of time to be relieved against the bar established by the orders and the Act of Parliament. It has been called an equity, but that is not a proper term—it is something which entitles him to ask for the indulgence of the Court, to ask to be relieved from the legal bar that there is in the orders and the Act of Parliament. But it is contended by the respondents (though I think that was not persisted in) that it must be an equity arising from the conduct of the respondent who is opposing the application. That, in my opinion, is erroneous. There were certain observations, undoubtedly, of the late M.R. to support that view, that the person who insisted upon the time is entitled to say, "I have done nothing which raises an equity against me, and therefore you are not to be relieved." That, I think, was almost abandoned in argument, and I should not have referred to it except that it is unfortunate that misapprehensions should exist as to that point, for in *New Callao Co. In re*, the M.R. concurred in the expression of opinion which I then stated, and which James, L.J. had already

stated in another case, that in order that the appellant might be relieved from lapse of time it was not necessary to show that there was something in the conduct of the respondent which entitled the appellant to be relieved, it was sufficient if he satisfied the Court that there was something either in the acts of the respondent or from other circumstances which entitled him to be relieved, and to be allowed to appeal, notwithstanding the time had lapsed—p. 121.

Little's Case, explained.

Collins v. Paddington Vestry (1880) 19 L. J. Q. B. 264, 612; 5 Q. B. D. 368; 42 L. T. 573, 28 W. R. 588.—C.A. BAGGALLAY, BRAMWELL and THESIGER, L.JJ.

BAGGALLAY, L.J.—The counsel for the plaintiff has relied upon *Little's Case* as one in which the U. A. held that a notice of an intention to appeal should be treated as a notice of appeal, but in that case application was made to the registrar in due time to set down the appeal, and it was in consequence of his declining to do so, on the ground that the notice was not a notice of appeal, but only of an intention to appeal, that the matter was brought before the U. A., and the order then made was an order, not to extend the time for appealing, but to set down the appeal upon the footing that a sufficient notice had been given—p. 61.

Collins v. Paddington Vestry, distinguished. Shubbrook v. Tufnell (1882) 9 Q. B. D. 621, 46 L. T. 719, 30 W. R. 740.—C.A.

JESSEL, M.R.—That case is distinguishable from the present, for there the arbitrator only submitted one point to the Court, there being other matters in the action, so that in whatever way the Court decided that point the case went back to the arbitrator. The first clause of the head-note is too wide; the Court did not decide the general proposition there laid down, but only held that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory. Here, if we differ from the Court below, final judgment has to be entered for the defendant, and there is an end of the action.—p. 622 LINDLEY, L.J., concurred.

Collins v. Paddington Vestry, referred to. Roy v. Kettle (1886) 55 L. J. Q. B. 470, 17 Q. B. D. 761, 54 L. T. 875, 31 W. R. 776.—WILLS and GRANTHAM, JJ.

Reg. v. Kettle and Collins v. Paddington Vestry, explained.

Cusack v. L. & N. W. Ry. (1891) 60 L. J. Q. B. 208, [1891] 1 Q. B. 847, 64 L. T. 45, 30 W. R. 244; 55 J. P. 941.—C.A. ESMER, M.R., BOWEN and FRY, L.JJ.

ESMER, M.R.—I do not agree that it was decided in *Reg. v. Kettle* that the Court has no discretion to grant an extension of time for appealing under Ord. LIX r. 16. There is no doubt that that was the tendency of *Collins v. Paddington Vestry*, and that it looks as if at the time when that case was decided a much stricter view of the rules was taken by the Court, and some of the judges of the U. A. considered either that there was no discretion in such a case, or that, if there was a discretion, it ought never to be exercised; but that strict view has since been

withdrawn from by nearly every judge of the U. A. I think we ought to say that the Court has a discretion, which must not be exercised loosely, but according to the circumstances of each particular case and that under the circumstances of the present case the application for an extension of time should be granted.—p. 208.

McAndrew v. Barker (col. 36), followed. Hughes v. Little (1886) 56 L. J. Q. B. 96, 18 Q. B. D. 32, 55 L. T. 476; 35 W. R. 36.—C.A. ESMER, M.R., LINDLEY and LOPES, L.JJ.

Hughes v. Little, discussed.

McNair v. Audenshaw Paint Co. (1891) 60 L. J. Q. B. 770 [1891] 2 Q. B. 502, 65 L. T. 292; 40 W. R. 36.—C.A. BOWEN and KAY, L.JJ.

Standard Discount Co. v. La Grange (1877) 47 L. J. C. P. 3, 3 C. P. D. 67, 37 L. T. 372, 26 W. R. 25.—C.A. BRAMWELL, BRETT and COTTON, L.JJ., commented on Blakey v. Latham (1889) 43 Ch. D. 23; 38 W. R. 795.—C.A. COTTON and FRY, L.JJ.

Standard Discount Co. v. La Grange, approved.

Riddell, in re, Strathmore (Earl), Ex parte (1888) 57 L. J. Q. B. 259, 20 Q. B. D. 512, 58 L. T. 888, 36 W. R. 532, 5 Morrell 59.—C.A. applied. And see "BANKRUPTCY."

Salaman v. Warner (1891) 60 L. J. Q. B. 624; [1891] 1 Q. B. 734, 39 W. R. 517.—C.A. ESMER, M.R., FRY and LOPES, L.JJ.

Salaman v. Warner, followed.

Jones v. Insole (1891) 61 L. T. 709; 39 W. R. 629.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Salaman v. Warner and McNair v. Audenshaw Paint Co., considered.

Gardner, in re, Loug v. Gardner (1894) 71 L. T. 412.—C.A. LINDLEY, LOPES and DAVEY, L.JJ.

Salaman v. Warner, test applied.

Herbert Reeves & Co., in re (1901) 71 L. J. Ch. 70, [1902] 1 Ch. 29, 85 L. T. 408; 50 W. R. 252.—C.A. v. WILLIAMS, ROMER and COZENS-HARDY, L.JJ.

Brandon v. Brandon (1856) 25 L. J. Ch. 896, 7 De G. M. & G. 365; 4 W. R. 533.—GRANWORTH, L.J.; and Walmsley v. Foxhall (1868) 32 L. J. Ch. 672; 1 De G. J. & S. 451, 11 W. R. 792.—KNIGHT BRUCE and TURNER, L.JJ., considered.

Curtis v. Sheffield (1882) 21 Ch. D. 1; 51 L. J. Ch. 535, 46 L. T. 177, 30 W. R. 561.—C.A.

JESSEL, M.R.—The case of *Brandon v. Brandon* was a very singular one. The case was heard in 1825, and anybody looking at the Master's report and knowing our law could have seen that there was a blunder in it. The report stated that there was a widow and found who were the next of kin, and through some slip in drafting it omitted the widow from the persons entitled to the personality. The decree followed this error and declared that the personal estate belonged to the next of kin as found by the Master, leaving out the widow. This manifest blunder escaped notice until 1846. Some steps were taken in that year, when the Master made a report finding that the testator's widow was

entitled to a share, it having apparently escaped notice that the decree in 1825 had confirmed the Master's previous report which excluded the widow. An exception was taken to the report of 1816 but nothing was done, and the matter slept till 1856, when the widow's representatives applied for leave to appeal from the decree of 1825. The real question had been raised in 1846, just after the expiration of the twenty years, and the case was beyond argument, being that of a manifest and obvious blunder.

Walmley v. Forhall was under the five years' rule and the application was made within nine years from the date of the decree. It is material to observe that the time for appealing was then five years and the appellant was three-and-a-half years over the time. The time for appealing now is one year, and the present appellant is forty-five years after the time. I think that as a distinction between the two cases. Again, all that can be taken to have been decided in that case was that the irregularity in the decree was a sufficient special circumstance when it was called to the attention of the Court before anything else had happened. As I understand it in that case no change had taken place since the making of the decree in 1854 until December, 1862, when a child died. The plaintiffs in 1863 applied for leave to appeal, and urged that there ought to have been no declaration as to cross-remainders, and that the decree was irregular in deciding a future right. And then it was said, and said truly enough, that in 1854 the Court had not before it the proper parties to argue the question, for that parties affected by it might afterwards come into existence. Whereas here, as I said before, every person who could by any possibility be interested was of age and was present at the argument. So that we have in *Walmley v. Forhall* two circumstances which do not occur here, first of all a short lapse of time, and secondly the fact of a change in the parties—p 6 COTTON and LINDLEY, L.JJ concurred.

Craig v. Phillips (1877) 47 L. J. Ch. 239; 7 Ch. D. 249, 37 L. T. 772, 26 W. R. 293—C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.JJ, *approved*.

Edsall v. Payne (1889) 58 L. J. Ch. 265, 40 Ch. D. 520, 59 L. T. 801, 911, 37 W. R. 309.—C.A. COTTON, LINDLEY and LOPES, L.JJ, *affirmed*, see *post*.

From County Court

The Amstel (1877) 47 L. J. P. 11; 2 P. D. 186, 37 L. T. 138, 26 W. R. 69—C.A. JAMES, BAGGALLAY and COTTON, L.JJ, *followed*.

Kay v. Briggs (1889) 58 L. J. Q. B. 182; 22 Q. B. D. 343; 60 L. T. 775, 37 W. R. 291—C.A. EBBER, M.R., LOPES and RIGBY, L.JJ.

Edsall v. Payne (*supra*), *affirmed*
Kay v. Briggs, *approved*.

Payne (or Lane) v. Edsall (1891) 60 L. J. Ch. 644; [1891] A. C. 210; 61 L. T. 666, 40 W. R. 66.—H.L. (B.) HATSBURY, L.C., LORDS BRAMWELL, HERSCHILL, MACNAGHTEN and FIELD. See judgment of LORD HERSCHILL.

Kay v. Briggs, *held inapplicable*

Hawkins v. G. W. Ry (1895) 14 R. 300.—C.A. EBBER, M.R., LOPES and RIGBY, L.JJ.

LOPES, L.J.—The [Judicature] Act of 1891 is an Act to amend the Judicature Acts, and I think that it is clear that the legislature must have intended to alter the law as laid down in *Kay v. Briggs*, and to grant an appeal in the case of appeals from county courts, whenever leave to appeal is given either by the Div. Court or by the C. A.—p 361

Security for Costs

Uail v. Brearley (1878) 47 L. J. C. P. 380, 3 C. P. D. 206; 38 L. T. 249; 26 W. R. 371.—C.A. COCKBURN, C.J., BRAMWELL, BRETT and COTTON, L.JJ, *not followed*.

Spencer, In re, Spencer v. Hat (1881) 45 L. T. 396—C.A. JESSEL, M.R., LUSH and LINDLEY, L.JJ.

Ivory, In re, Hankin v. Turner (1878) 10 Ch. D. 372; 39 L. T. 285, 27 W. R. 20—C.A. CAIRNS, L.C., BAGGALLAY, BRETT and COTTON, L.JJ, *explained*.

Polini v. Gray, Stula v. Freeman (1879) 11 Ch. D. 741, 49 L. J. Ch. 41, 40 L. T. 861.—C.A. JESSEL, M.R.—In *Ivory, In re*, the appellant, who was a pauper receiving parish relief, was ordered on the 2nd November to deposit 20*l.* in Court, and it appears by a note at the end of the report that on the 27th November the appeal was dismissed for want of prosecution. But no particulars are stated from which we may tell why the order to dismiss was made so early. The appellant may not have appeared, or he may have appeared and said that he did not mean to go on with the appeal. It was a peculiar case, and the Court probably thought it was merely a speculative appeal.—p 743 BRETT and COTTON, L.JJ, concurred.

Rourke v. White Moss Colliery Co. (1878) 1 C. P. D. 556; 35 L. T. 160—C.A. JAMES and MELLISH, L.JJ, BAGGALLAY, J.A. and QUAIN, J., *explained*.

Farrer v. Lacy, Hartland & Co (1885) 28 Ch. D. 482, 54 L. J. Ch. 808, 52 L. T. 38; 33 W. R. 265—C.A.

BAGGALLAY, L.J.—The action in *Rourke v. White Moss Colliery Co.* was of a very special nature. The plaintiff was a workman employed by a contractor who was executing a work for the company, but acting under the orders of the contractor. The action was against the company, on the ground that it was answerable for the negligence of the engineer who was its servant, the decision was adverse to the plaintiff, on the ground that the plaintiff and the engineer were engaged in a common employment under the orders and control of the contractor. It was pressed on the C. A., of which I was at the time a member, and I well remember the case, that it would be a denial of justice to the plaintiff, who had been reduced to poverty by the accident, if he could not appeal without giving security for costs. It was also urged in his favour that the point had never been before a Court of error; but the decision went, not on that, but on the ground that, having regard to the whole circumstances of the case, it would have been a denial of justice to allow the plaintiff to appeal without giving security: it was not intended

to lay down any such general rule as is now contended for.—p. 484. BOWEN and FRY, L.J.J. concurred.

Pooley's Trustees v. Whetham (1886) 56 L. J. Ch. 41, 33 Ch. D. 76, 55 L. T. 162.—C.A. GOTTON, LINDLEY and HOPES, L.J.J., *distinguished*.

Clough, In re, Bradford Banking Co. v. Cure (1887) 55 Ch. D. 7; 55 L. J. Ch. 338; 56 L. T. 104; 35 W. R. 353.—C.A. GOTTON, L.J.—In that case the notice of the application [for security] was given very late, here within two days from the notice of appeal. The applicants, therefore, have been very prompt. We have this additional circumstance: the appellant is not the party really prosecuting the appeal, and that the person really promoting it is a person of substance well able to pay costs.—p. 8.

LINDLEY and HOPES, L.J.J. to the same effect.

Costs.

Golding v. Dias (1808) 10 East 2.—K.B., *overruled*.

Ricketts v. Lewis (1880) 1 D. & Ad. 197; 8 L. J. K. B. 324; 2 C. & J. 11; 2 Tyr. 13, 18.—TENTHEDEN, C.J. *And see* S. C. (1884) 8 Blyth (N.S.) 158; 2 C. & F. 100, 1 Blyth (N.S.) 196.—ABINGDON (HART).

Denny v. Hancock (1870) 40 L. J. Ch. 193, L. R. 6 Ch. 138; 23 L. T. 686, 19 W. R. 51.—JAMES and MELLISH, L.J.J., *reversing* 18 W. R. 668.—MALINS, V.-C., *applied* Mathews, Ex parte, Cherry, In re (1871) 40 L. J. Bk. 90, L. R. 12 Eq. 596; 19 W. R. 1005.—BACON, C.J.

Shrewsbury (Earl) v. Trappes (1660) 2 De G. F. & J. 172.—KNIGHT BRUCE and TURNER, L.J.J., *Topham v. Portland (Duke)* (1863) 82 L. J. Ch. 606; 1 De G. J. & S. 603; 8 L. T. 679; 11 W. R. 813.—KNIGHT BRUCE and TURNER, L.J.J.; and **Walford v. Walford** (1868) 1 L. R. 3 Ch. 812, L. R. 5 Ch. 455, n (1), 19 L. T. 233; 16 W. R. 1161.—WOOD and SELWYN, L.J.J., *distinguished*.

Barclay v. Garrick (1870) 39 L. J. Ch. 661; L. R. 6 Ch. 453; 22 L. T. 502, 18 W. R. 387, 530.—GIFFARD, L.J.

Barclay v. Garrick, *not followed*.

Merry v. Nickalls (1873) 42 L. J. Ch. 479, L. R. 8 Ch. 205; 28 L. T. 296, 21 W. R. 305. [Counsel asked that the costs of the application might be costs in the cause, and cited **Barclay v. Garrick**. The C.A. (Selborne, L.C., James and Mellish, L.J.J.) thought that there must have been some special circumstances in that case. The defendant came there to ask for an indulgence, and must pay the costs of the application.]

Merry v. Nickalls, *followed*.

Cooper v. Cooper (1876) 45 L. J. Ch. 667, 2 Ch. D. 192; 24 W. R. 623.—C.A. JAMES and MELLISH, L.J.J., BAGGATLAY, J.A.

Cooper v. Cooper, *observations of MELLISH, L.J., explained*.

Att.-Gen. v. Swansea Improvements and Tramways Co. (1878) 48 L. J. Ch. 72; 9 Ch. D. 46,

26 W. R. 840.—C.A. JESSEL, M.R., BRETT and GOTTON, L.J.J.

Merry v. Nickalls, *distinguished*.

Atlan v. Young (1879) 11 Ch. D. 136, 10 L. T. 538.—C.A.

JESSEL, M.R.—As the plaintiff obtains a benefit by this order, I think it will be reasonable that the costs of this application should be costs in the appeal, notwithstanding the general rule in **Merry v. Nickalls**—p. 139. BAGGATLAY and BRAMWELL, L.J.J. concurred.

Staying Proceedings.

Wilson v. Church (1879) 48 L. J. Ch. 690; 11 Ch. D. 576; 41 L. T. 50, 27 W. R. 843.—C.A. JESSEL, M.R., BRETT and GOTTON, L.J.J., *explained*.

Otto v. Lindford (1881) 51 L. J. Ch. 102, 18 Ch. D. 394, 46 L. T. 35.—C.A. JESSEL, M.R., GOTTON and BRETT, L.J.J.

Att.-Gen. v. Swansea, &c. Tramways Co. and Otto v. Lindford, *considered*.

Cropper v. Smith (1883) 24 Ch. D. 305; 49 L. T. 518, 32 W. R. 212.—C.A.

BRETT, M.R.—Then, in order that the C. A. and the Court below may not incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other, the rule imposes this limitation, that although the jurisdiction is co-ordinate, and although it is alternative, yet the C. A. will not exercise its jurisdiction until it knows whether the co-ordinate jurisdiction of the Divisional Court has been exercised, and how. That seems to me to be the true reaching of the 17th rule. But then it is said that the rule has been construed differently in **Att.-Gen. v. Swansea, &c. Tramways Co.** In that case an appeal had been brought by the defendants from a judgment of Hall, V.-C., and an application was made to him to stay the proceedings under that judgment pending the appeal. Therefore there was an application to the Court below, but the V.-C. did not decide it either one way or the other, but ordered the motion to stand over for a week to await the result of an application to the C. A. to advance the hearing of the appeal. The defendants made that application to the C. A., but they also joined with it an application to the C. A. to stay proceedings pending the appeal. Now inasmuch as the V.-C. had not entertained the application before him so as to decide it either one way or the other, and the applications before both Courts were pending at the same time, it seems to me that the 17th rule was plainly broken, and thereupon the decision of the C. A. was, "We cannot entertain this application until there has been a decision in the Court below." The V.-C. then heard the application, and granted a stay of the proceedings. Then it was thought right for the defendants to go to the C. A. and say, "We have dropped our application to the C. A. to stay proceedings." This shows that they were under the impression that they might have come to the C. A., not making a new application by way of appeal, but going on with the old application, otherwise they could not say they had dropped it. It is obvious then that the counsel engaged in the case did not understand the decision of the Court to be that the motion by the C. A. must be an appeal strictly so called. It is true that the M.R. (Jessel) used phraseology which might be read as showing

that he thought it must be an appeal. He says, "The rest of the motion must stand over to await the result of the application to the V.C. to stay the proceedings. Probably what Mellish, L.J. meant" (in *Cropper v. Smith*, vol. 11) "was that the motion might be heard without being formally set down as an appeal." What does that mean? It surely did not mean that the only thing that Mellish, L.J. meant was that the motion need not be put in a list, because putting it in a list has nothing to do with the law or with the rule. I think he meant that the motion was not strictly an appeal. But the M.R. goes on to say, "It must necessarily be a motion by way of appeal, for this Court and the Court below cannot have co-ordinate jurisdiction." The last part of this sentence is, I think, incorrect. It is quite true that under the 17th rule the motion in the C.A. must be by way of appeal, because there cannot be an application to the C.A. to stay the proceedings, unless the Court below has refused to stay them, and then, although the motion in the C.A. is under its original jurisdiction, yet it is correct to say that it is by way of appeal, because it is made for the purpose of getting a different decision from that which has been come to by the Court below. Therefore all the expressions of Sir G. Jessel, except this last one, that the Court below and this Court cannot have co-ordinate jurisdiction, seem to me to be strictly correct. The M.R. having dropped that expression, it is not to be assumed that my brother Cotton and I, because we concurred in the decision (probably without saying anything), are to be taken to have agreed to every word which fell from the M.R., it being our business only to see before we concurred in a decision that it is in our opinion right and substantially put upon right grounds, and not to correct any error in grammar, any supposed inaccuracy of expression. . . . The plaintiff there (*Otto v. Ludford*) appealed from an order directing him to pay costs. . . . The plaintiff asked for leave to give short notice of motion to restrain the defendant from enforcing the certificate for costs, pending the appeal, and the M.R. says, "Have you applied to the Court below?" The plaintiff's counsel thereupon cited *Wilson v. Church*, and the M.R. says, "That was a case of an entirely different description. The plaintiffs there were seeking for an injunction to restrain the trustees from parting with the trust funds pending the appeal. That was not an application to stay proceedings under the order appealed from, for that order did not give any directions for dealing with the funds, and the Court below having dismissed the action, had no jurisdiction to grant such an injunction. In the present case, the plaintiff is seeking a stay of proceedings under the order appealed from, which application the V.C. has jurisdiction to entertain, and it ought to be made to him in the first instance." That is nothing more than rule 17—p. 809.

COTTON and BOWEN, L.J.J. to the same effect.

Cropper v. Smith, judgment of BOWEN, L.J., *approved*.

Bennet & Sons v. Darnley & Co. (Lancaster) Ltd. (1884) 11 Pat. Cas. Rep. 261—C.A. LINDLEY, LOPES and L.J.J.; *affirming* ROMER, J.

Fresh Evidence

Hastie v. Hastie (1876) 45 L. J. Ch. 288; 1 Ch. D. 562; 34 L. T. 13; 24 W. R.

561—C.A. JAMES and MELLISH, L.J.J., *BAGGALLAY, J.A., Limited*.
DICKS v. DICKS (1880) 13 (1) D. 652; 28 W. R. 525—C.A.

JESSEL, M.R.—With respect to the form of the application, the decision in *Hastie v. Hastie* only applies to affidavits and documentary evidence—p. 551 JAMES and COTTON, L.J.J. concurred.

Costs of Appeal

Harrison v. Cornwall Minerals Ry. (1881)

51 L. J. Ch. 98, 18 Ch. D. 334, 45 L. T. 498—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J.J.; *varying* (1880) 49 L. J. Ch. 831, 16 Ch. D. 66; 44 L. T. 406—HALL, V.C.; C.A., *affirmed*, *nom.*
Fenton v. Harrison (1885) 8 App. Cas. 780, 19 L. T. 372.—H.L. (B) SELBORNE, L.C. and LORDS BLACKBURN, WATSON and PITCHELLE, *disapproved*.
Robinson v. Dicks (1883) 23 Ch. D. 98; 48 L. T. 740; 31 W. R. 871—C.A.

JESSEL, M.R.—In a case like this where the costs cannot have been materially increased by the notice [to vary the order] of the plaintiff, I think that the costs ought not to be apportioned—p. 89. LINDLEY and BOWEN, L.J.J. concurred.

3 FROM JUDGE IN CHAMBERS.

In Chancery Division.

Dickson v. Harrison (1878) 47 L. J. Ch. 761; 9 Ch. D. 243, 38 L. T. 794, 26 W. R. 780—C.A. JESSEL, M.R., BRETT and COTTON, L.J.J., *explained*.

Hentley v. Newton (1881) 19 Ch. D. 826; 51 L. J. Ch. 225, 45 L. T. 465; 30 W. R. 72—C.A. BAGGALLAY, L.J.—The marginal note in that case is perhaps to some extent misleading. It has been generally conceived that the effect of the judgment was that in all cases of appeal from the judge in Chambers to the judge in Court the twenty-one days should be calculated from the day when the order was made and not from the time when the order was perfected, and I was myself under that impression until my attention was more particularly drawn to it. That case, it will be noticed, was a case of a refusal to make an order, and therefore, if the analogy of Ord LVIII. r. 15, was adopted, the time would run from the making of the order; and when you turn to the judgments of the learned judges in that case it will be seen that they did not intend to lay down that in all cases the twenty-one days were to be computed from the day when an order was made, but that, there being no distinct provision as to this matter in the rules of the Court, the judges in the Ch. D. would adopt by analogy the course pointed out by Ord LVIII. r. 15.—p. 334.

LUSH and LINDLEY, L.J.J. to the same effect. And see now R. S. C., 1883, Ord. LVIII. r. 15.

Holloway v. Cheston (1881) 51 L. J. Ch. 208; 19 Ch. D. 516, 30 W. R. 120—CHITTY, J., *not followed*.

Butler's Wharf Co. v. In re, Anderson v. Butler's Wharf Co. (1882) 51 L. J. Ch. 694, 21 Ch. D. 131; 30 W. R. 728.—HALL, V.C.

Johnson, In re, Manchester and Liverpool Banking Co. v. Heales (1880) 59 L. J. Ch.

99, 42 Ch. D. 505, 61 L. T. 160; 37 W. R. 765—KAY, J. *approved*
 Giles, In re, Real and Personal Advance Co., Mitchell (1890) 59 L. J. Ch. 226, 43 Ch. D. 391; 42 L. T. 375, 38 W. R. 273—C.A. COTTON, LINDLEY and LOPES, L.J.

In Queen's Bench Division.

Watson v. Pettis (No. 1) (1898) 67 L. J. Q. B. 970, [1899] 1 Q. B. 54; 79 L. T. 330; 47 W. R. 68—C.A. A. L. SMITH and COLLINS, J.J., *applied*
 Loug v. Great Northern and City Ry. (1902) 71 L. J. K. B. 598; [1902] 1 K. B. 818; 86 L. T. 410; 50 W. R. 102—C.A. COLLINS, M.R., ROMER and MATTHEW, L.J.

APPORTIONMENT.

Plumbe v. Neild (1860) 29 L. J. Ch. 618; 6 Jur. (N.S.) 529, 8 W. R. 337.—KINDERSLEY, V.-C., *commented on*
 Dale v. Hayes (1871) 40 L. J. Ch. 244; 21 L. T. 12, 19 W. R. 299.
 STUART, V.-C.—I cannot say that I quite follow the reasoning of the decision in *Plumbe v. Neild* if profits have accrued after the death of a testator, I think the proper hands to receive them are those of the tenants for life, and the persons who seek to deprive them of such profits must show a clear right on their own part to do so.—p. 246.

Roseingrave v. Burke (1878) Ir. R. 7 R. 186.—CHATTERTON, V.-C., *approved*
 Jones v. Ogle (1872) 42 L. J. Ch. 334, L. R. 8 Ch. 192; 28 L. T. 245, 21 W. R. 239—C.A. SELBORNE, L.C., JAMES and MELLIISH, J.J., *considered*
 Capron v. Capron (1874) 48 L. J. Ch. 677, L. R. 17 R. 288, 29 L. T. 826; 23 W. R. 817
 MALINS, V.-C.—That case *Jones v. Ogle* turned upon the particular words of the will, which were, "As to the share and interest which I have in the Lilleshall Iron Company, I bequeath the dividends and income thereof to my uncle J. T. Ogle for his life, and after his death the same share and interest shall belong to his two daughters in equal shares", and the decision of the Court of Appeal, affirming the view of the Master of the Rolls, turned on the effect of those words. Now, if a man says, "I give all the dividends I am able to give," does not that include the whole of the dividends, irrespective of any apportionment? So, in this case, the testator could do what he pleased with his property, and if he had used the words, "I give my lands, and all the rents accruing for or in respect thereof," that would have been, like *Jones v. Ogle*, an express gift of accruing rents, and I should have held it so, the cardinal point in construing wills being to ascertain the testator's intention. But I am bound to say there are some observations of the Lord Chancellor which seem rather to imply a doubt whether the Act of 1870 is to apply to wills already made, or made before the passing of the Act. There is, however, no decision on the subject, and therefore I cannot regard it as fettering my opinion in this case, and I think the true answer is this—that if the legislature had intended the Act not to apply

to instruments already executed, they would probably have said so—p. 630

Capron v. Capron, *applied*
 Browning v. Pike (1882) 51 L. J. P. 29; 7 P. D. 61; 16 L. T. 821, 30 W. R. 567, 46 J. P. 360.—HANSEN, P.

Capron v. Capron and Hasluck v. Pedley (1874) 44 L. J. Ch. 148; L. R. 19 R. 271, 23 W. R. 165—JESSEL, M.R., *followed*
 Constable v. Constable (1879) 11 Ch. 681, 48 L. J. Ch. 621, 10 L. T. 610

FRY, J.—In the latter case the M.R. used this language, which I adopt: "The Act does not affect the meaning of the will; it only alters its legal operation. A devise of Blackacre, before the Act, caused the accruing rents now it does not, not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different."—p. 686.

Jones v. Ogle, Hasluck v. Pedley and Constable v. Constable, *referred to*
 March, In re, Mander v. Harris (1884) 54 L. J. Ch. 113, 27 Ch. D. 166, 51 L. T. 380, 32 W. R. 941.—C.A. LINDLEY, COTTON and HARGREAVES, L.J.

Hasluck v. Pedley, *referred to*
 Lucas, In re, Parish v. Hudson (1885) 55 L. J. Ch. 101, 54 L. T. 30.—C.A. ESMER, M.R. and BOWEN, J.J.; FRY, J.J. *dissenting*

Hasluck v. Pedley, *approved*
 Lucas, In re, Parish v. Hudson, *not applied*
 Glass v. Paterson [1902] 2 Ir. R. 660—Q.B.D., KENNY, J. *dissenting*

Hasluck v. Pedley and Capron v. Capron, *applied*.

Didger, In re, Brompton Hospital for Consumption; Lewis (1892) 62 L. J. Ch. 146, [1893] 1 Ch. 44, 67 L. T. 549, 41 W. R. 104—NORTH, J.

Londesborough (Lord) v. Somerville (1854) 23 L. J. Ch. 646, 19 Ben. 295.—ROMILLY, M.R., *followed*.

Schofield v. Radfern (1863) 1 N. R. 465, 9 Jur. (N.S.) 485—KINDERSLEY, V.-C., *not applied*

Bulkeley v. Stephens (1863) 3 N. R. 105; 10 L. T. 225—STUART, V.-C. *See "ESTATE."*

Londesborough (Lord) v. Somerville and Bulkeley v. Stephens, *explained*, Freeman v. Whitbread (1865) 35 L. J. Ch. 137; L. R. 1 R. 266; 13 L. T. 550; 14 W. R. 188—KINDERSLEY, V.-C.; *followed*, Bulkeley v. Stephens (1865) 65 L. J. Ch. 597; [1866] 2 Ch. 241, 74 L. T. 409; 44 W. R. 490—STIRLING, J.

Lock v. De Burgh (1851) 20 L. J. Ch. 934; 4 De G. & Sm. 470, 15 Jur. 961.—KNIGHT-BURGE, V.-C., *not followed*

Fletcher v. Moore (1857) 26 L. J. Ch. 530; 3 Jur. (N.S.) 456, 5 W. R. 421—KINDERSLEY, V.-C.

Lock v. De Burgh and Fletcher v. Moore, *discussed*.

Plimmer v. Whiteley (1859) 29 L. J. Ch. 247, Johns. 585; 5 Jur. (N.S.) 1416; 1 L. T. 280, 8 W. R. 120.—WOOD, V.-C.

Markby, In re (1839) 4 Myl & Cr. 484; 8 Jur. 767.—COTTESHAM, L.C., *discussed*

Plimmer v. Whiteley, *approved*
 Fletcher v. Moore, *explained and qualified*.

Wardrop v. Cuffield (1861) 33 L. J. Ch. 605; 10 Jur. (N.S.) 194, 9 L. T. 759, 12 W. R. 458.

KINDERSLEY, V.-C.—In *Fletcher v. Moore* I assumed, too hastily, perhaps, that the decision in *Lock v. De Burgh* assumed that both branches of that clause went on the same footing, and I considered that that case threw a doubt upon what appeared to me to be the true construction of the statute. I have now, however, the advantage of Wood, V.-C.'s decision, and taking that to be right, there is no doubt that the decision in *Lock v. De Burgh* is right also, and I am bound to assume that Knight Bruce, L.J., had in his mind the idea of the distinction between the two branches of this clause, though he did not express it. I am glad of this opportunity of saying that some of the reasoning in *Fletcher v. Moore* cannot be supported consistently with the view I now take of the statute. The question, however, in *Fletcher v. Moore* was between a tenant for life and trustees for accumulation, and as to the rents of the half-year accruing at the time when the former attained twenty-one, and not between a tenant for life's representatives and remaindermen. So that in that case the Act had no application. I feel that I rightly decided the case on the merits of it, but not rightly as to the effects of the Act. Lord Cottonham's decision in *Merkey, In re*, is thought by Wood, V.-C. to have been consistent with his view in *Hummer v. Whiteley*, but in reaching the judgment of Lord Cottonham it is difficult to say whether he took the same view or not—p. 608.

Campbell v. Campbell (1844) 7 Beav. 482—

LANGLEDALE, M.R., *disapproved*.

Shipperdon v. Tower (1844) 8 Jur. 485—

KNIGHT BRUCE, V.-C., and St. Aubyn v. St. Aubyn (1861) 30 L. J. Ch. 917, 1 Dr. & Sm. 611, 6 L. T. 519, 9 W. R. 922—KINDERSLEY, V.-C., *followed*.

Wheeler v. Tootel (1867) 36 L. J. Ch. 221; L. R. 3 Eq. 571, 15 L. T. 629, 15 W. R. 982.

MALINS, V.-C.—If there had been no authority on this question, my conclusion would have been in favour of the petitioner, because, looking at the will itself, there can be no question of the testator's intention. His object was merely to provide for the ordinary accumulation until his nephew came of age, and that then he should be let into possession, and, of course, have the whole rents and dividends. But the question is not untouched by authority, for the point has been decided in three different cases, and though *Shipperdon v. Tower* is contradicted by *Campbell v. Campbell*, yet there is a second decision in favour of an apportionment, viz. *St. Aubyn v. St. Aubyn*. . . and I cannot distinguish that case from the present.—p. 222.

Shipperdon v. Tower and St. Aubyn v. St. Aubyn, *followed*.

Donaldson v. Donaldson (1870) 40 L. J. Ch. 64; L. R. 10 Eq. 635; 23 L. T. 550, 18 W. R. 1104.—HAGON, V.-C.

Shipperdon v. Tower, *followed*.

Clive v. Clive (1872) L. R. 7 Ch. 433; 41 L. J. Ch. 986; 26 L. T. 409, 20 W. R. 477.

JAMES, L.J.—*Shipperdon v. Tower* was decided as long ago as 1844, and no attempt has been made to shake or question it. We must, therefore, take it to be the *curæ curiæ*, and also the

settled understanding of conveyancers, that the Apportionment Act did apply to cases of this kind. The new Act of the 38 & 34 Vict. c. 85, extended the principle of the Act of 4 & 5 Will. 4, c. 22, in the same direction, so as to make it applicable to every form of reservation of income, which was in all cases to be treated as if it were interest accruing *de die in diem*, so that there might be no more questions on this subject—p. 437. MELLISH, L.J. concurred.

Cline's Estate, *In re* (1871) L. R. 18 Eq. 213, 30 L. T. 249; 22 W. R. 512—MALINS, V.-C., *considered and followed*.

Lawrence v. Lawrence (1884) 26 Ch. D. 795; 53 L. J. Ch. 982, 50 L. T. 715, 32 W. R. 791.

PEARSON, J.—All the cases, I think, in the books touching the Apportionment Act were cited to me by counsel in the argument, and I am bound to say, having since looked at them, that there is no one of them that really decides this case. The only one which seems to decide it is the case before the late Malins, V.-C. (*In re Cline's Estate*), in which he expressed his opinion, but without argument. The case was not opposed at all, and I think, therefore, Mr. Hardy was perfectly justified in saying that this case ought to be considered without reference to that decision. In so doing, I feel certain I am doing what my learned predecessor would have done if he were here, because I am sure he would say that having given his opinion upon the former case without hearing argument against that opinion he was quite prepared to consider this case as if it were entirely new and to alter his opinion if argument induced him to do so.—p. 798.

[His lordship, however, decided in accordance with the opinion of Malins, V.-C.]

Whitehead v. Whitehead (1878) L. R. 16 Eq. 528, 29 L. T. 289—MALINS, V.-C., *limited*.

Pollock v. Pollock (1871) 44 L. J. Ch. 168; L. R. 13 Eq. 329, 30 L. T. 779; 22 W. R. 726.

[In *Whitehead v. Whitehead* Malins, V.-C., said, "I think that a specific legacy is not within the Apportionment Act, 1870."]

MALINS, V.-C. said that with regard to the report of *Whitehead v. Whitehead* he certainly did not intend to lay down the rule so broadly as there stated. On the contrary, he did not think that, as a general rule, a specific bequest was not apportionable—p. 168.

APPRENTICE.

Jackson v. Warwick (1797) 7 Term Rep. 121, *distinguished*.
Grant v. Welchman (1812) 16 East 207.

Jackson v. Warwick, *commented on*.

Westlake v. Adams (1858) 5 C. B. (N.S.) 248, 27 L. J. C. P. 271, 4 Jur. (N.S.) 1021.

Rex v. St. Marylebone (1824) 4 D. & R. 475, *approved*.

Reg. v. Fordingbridge (1868) 27 L. J. M. C. 290, El. Bl. & El. 678; 4 Jur. (N.S.) 951; 6 W. R. 649.

Royce v. Charlton (1881) 8 Q. B. D. 1; 45 L. T. 712, 30 W. R. 271, 16 J. P. 197—**GROVE AND BOWEN, JJ. overruled.**
Eaton v. Western (1882) 9 Q. B. D. 636, 52 L. J. Q. B. 11.—**C.A. JESSEL, M.R., SIR J. HANMER and JINDLEY, JJ.**
JESSEL, M.R.—The judges felt themselves bound by the decision in that case, and therefore gave leave for this appeal, in order that the decision in *Royce v. Charlton* might be reviewed. I must say I think that case was not rightly decided, and we decide the present case on the first point with the understanding that it in effect overrules *Royce v. Charlton*.—p. 640

Leslie v. Fitzpatrick (1877) 47 L. J. M. C. 22, 3 Q. B. D. 229, 37 L. T. 446.—**KELLOR AND LUSH, JJ. questioned.**

Monkin v. Morris (1884) 53 L. J. M. C. 72, 12 Q. B. D. 352; 32 W. R. 661; 48 J. P. 444.
COLLIERIDGE, C.J.—But if in a contract with an infant you put anything in which cannot possibly be for his benefit, the whole contract is invalidated. . . . The master has stipulated to find him reasonable work during the whole time of the apprenticeship; that is an absolute stipulation for work being found and wages paid, whether there is a turnout or not. Having made this, the master then, for his own protection, inserts a contractual stipulation that he need not find him work nor pay him wages if there is a turnout. I think that this is fatal to the deed, and that the case was rightly decided on principle. I think that it was also rightly decided on authority, and that the older cases remain of force covering the matter, and that the qualified decision in *Leslie v. Fitzpatrick* does not bind us to decide contrary to them.—p. 73 **WILLIAMS, J.** agreed.

Meakin v. Morris, rightly explained.

Farmers and Cleveland Dairies Co. v. Riley (1899) 9 Times L. R. 260.—**COLLIERIDGE, C.J. and CAVE, J.**

Meakin v. Morris, followed.

Corn v. Matthews (1893) 62 L. J. M. C. 61, [1893] 1 Q. B. 310; 4 R. 240, 68 L. T. 480; 41 W. R. 261, 67 J. P. 407.—**C.A. FISHER, M.R., LINDLEY AND SMITH, JJ.**

Meakin v. Morris and Corn v. Matthews, distinguished.

Green v. Thompson (1899) 68 L. J. Q. B. 719; [1899] 2 Q. B. 1; 80 L. T. 691; 48 W. R. 31; 63 J. P. 466.—**DARLING AND CHANNELL, JJ.**

Meakin v. Morris, Green v. Thompson, and Farmers and Cleveland Dairies Co. v. Riley (supra), approved.

Morrison, Fleet & Co. v. Fletcher (1900) 17 Times L. R. 96

Gylbert v. Fletcher (1929) Cro. Car. 179, followed.

Fellows v. Wood (1888) 59 L. T. 513; 52 J. P. 822.—**MANISTY AND STEPHEN, JJ., explained.**

De Francesco v. Barnum (1889) 59 L. J. Ch. 151, 43 Ch. D. 165; 62 L. T. 40, 38 W. R. 187; 64 J. P. 420.

CHITTY, J.—That case [*Gylbert v. Fletcher*] has never been questioned from that time to this, and it is cited in the various text-books as an authority.—p. 163.

I ought to say one word about *Fellows v. Wood*,

which was cited as an authority for granting an injunction against an infant, where the infant had entered into a contract. On carefully reading the report I am persuaded that the defendant in that case was not an infant at the time when the injunction was granted, and it was not a contract of apprenticeship, it was a mere contract of service. There is ground also for thinking that, after the infancy had terminated, the defendant did continue to serve, and then, although he might have vacated the employment at a fortnight's notice, what he did was to go away, and then, in breach of an article to be found in the contract of employment, he served the plaintiff's customers for his own benefit. That is what he was doing, and that is what he was restrained from doing. . . . In *Fellows v. Wood* there could have been no ground for avoiding the contract not to serve the plaintiff's customers as being an unlawful restraint of trade.—pp. 154, 155.

Fellows v. Wood, followed.

De Francesco v. Barnum, explained.

Cornwall v. Hawkins (1872) 11 L. J. Ch. 485, 26 L. T. 607, 20 W. R. 653.—**V. C., distinguished.**

Evans v. Ware (1892) 62 L. J. Ch. 296; 67 L. T. 285, [1892] 3 Ch. 502; 3 R. 32, 67 L. T. 285.—**NORTH, J.**

Fellows v. Wood and Evans v. Ware, followed.

Morrison, Fleet & Co. v. Fletcher (1900) 17 Times L. R. 96.—**JEUNE, P.**

Eades v. Vandepuit (1781) 5 East 39, n.; 1 Doug. 1, questioned.

Foster v. Stewart (1811) 8 M. & S. 101; 15 R. R. 459.

ELLENBOROUGH, C.J.—When this case was before me at nisi prius, the plaintiff's right to recover was rested upon *Eades v. Vandepuit*, and it occurred to me at that time, and afterwards still more strongly upon looking into that case, that it is but a very loose note; for as to the defendant Vandepuit, who was in the King's service, suppressing an action for work and labour could have been maintained, yet it was work and labour for the King and not for Vandepuit; and therefore in his character of captain of a ship-of-war he could not have been the object of such an action. It does not, however, appear by the note of that case what the form of the action was, if the captain had enticed away the apprentice, perhaps he might have been liable to tort. But under the uncertainty both of fact and form which attends that case, I think no very material argument is to be derived from it.—p. 197.

Wise v. Wilson (1844) 1 Car. & K. 662, discussed.

Phillips (or Philps) v. Chiff (1859) 4 II. & N. 168, 28 L. J. Ex. 153, 5 Jur. (S.S.) 74, 7 W. R. 295.—**EX.**

Soam v. Bowden (1678) Finch 396, and **Newton v. Rowse** (1687) 1 Vern. 460, commented on.

Hirst v. Tolson (1851) 2 Mac. & G. 134; 19 L. J. Ch. 411, 2 Hall & T. 359, 15 Jur. 350, disapproved.

Whincup v. Hughes (1871) L. R. 6 C. P. 78; 40 L. J. C. P. 104; 24 L. T. 76, 19 W. R. 439

Winstone v. Linn (1823) 1 B. & C. 460.
 2 D. & R. 465. 1 L. J. (n.s.) K B 126.
 Phillips v. Chiff (supra). Raymond (or
 Rayment) v. Minton (1866) 35 L. J. Ex.
 153. 1 L. R. 1 Ex. 244. 12 Jm. (N.S.) 175.
 11 L. T. 367. 11 W. R. 675. 1 H. & C.
 371.—*See* Cox v. Mathews (1861) 2 F.
 & F. 397, and Whinnop v. Hughes,
applied.
 Leary v. Brook (1891) 60 L. J. Q. B. 578.
 [1891] 1 Q. B. 131. 61 L. T. 158. 39 W. R. 180.
 55 J. P. 265.—A. L. SMITH, J.

ARBITRATION.

1. THE SUBMISSION
2. THE ARBITRATOR
3. THE UMPIRE
4. THE AWARD
5. COSTS
6. (COMPULSORY) REFERENCES.

1 THE SUBMISSION.

And see "INJUNCTION," and "L. C. ACT."

Dowse v. Coze (1823) 1 L. J. (n.s.) C. P. 127.
 10 Moore 273; 3 Bing. 20. 28 R. R. 565.—C. P.
reversed, now Biddell v. Dowse (1827) 5 L. J.
 (n.s.) K B 128. 6 B. & C. 255. 9 D. & R. 404.
 28 R. R. 574.—EX. CH.

Biddell v. Dowse, *approved*.

Thorp v. Cole (1837) 5 L. J. Ex. 24. 2 C.
 M. & R. 367. 4 Dowd 437.—EX. CH. PARKER, B.
disentangling.

Halfhide v. Fenning (1788) 2 Bro. C. C. 386.
 —KENYON M.R. *Disapproved*. Thompson v.
 Charnock (1799) 8 Term Rep. 139. Street v.
 Ragby (1802) 6 Ves. 815. Waters v. Taylor
 (1808—1819) 16 Ves. 10. 2 V. & B. 299. 13 R. R.
 91.—ELDON J.C. *followed*. Dimsdale v. Robertson
 (1844) 2 Jo. & Lat. 58; 7 Ir. Eq. R. 536.—
 SUGDEN, L.C. *See* judgment. *And see post*.

Street v. Ragby, *dictum not applied*.

British Empire Shipping Co. v. Somerset (1857)
 26 L. J. Ch. 759; 3 K. & J. 183.—WOOD, V.-C.

Halfhide v. Fenning, *disapproved*.

Brown v. Overbury (1856) 25 L. J. Ex. 169.
 11 Ex. 715; 4 W. R. 252.—ALDERSON and
 MARTIN, BB. *approved*.

Scott v. Avery (1856) 5 H. L. Cos. 811; 25
 L. J. Ex. 908. 2 Jur. (N.S.) 815. 4 W. R. 716.—
 H. L. (E). CRANWORTH, L.C., LORDS CAMPBELL
 and BROUGHAM, assisted by the JUDGES; *affirming*
 S. C. *nom.* Avery v. Scott (1858) 22 L. J.
 Ex. 157, 287; 8 Ex. 487; 17 Jur. 810.—EX. CH.
 CRANWORTH, L.C.—That [*Halfhide v. Fenning*]
 was a bill for an account of partnership trans-
 actions. The plea to that bill was, that the
 articles contained an agreement that any differ-
 ence which should arise should be settled by
 arbitration, and the M.R. allowed that plea.
 But I think that case cannot be relied upon,
 because it has been universally treated as having
 proceeded upon an erroneous principle.—p. 847

Dimsdale v. Robertson, *discussed*.

Scott v. Liverpool Corporation (1858) 28 L. J.
 Ch. 230; 3 W. G. & J. 534. 5 Jur. (N.S.) 105. 7
 W. R. 153.—CHELMSFORD, L.C.

Dimsdale v. Robertson, *commented on*.

Cooke v. Cooke (1867) L. R. 1 Eq. 77; 36
 L. J. Ch. 480. 16 L. T. 315. 15 W. R. 981.
 WOOD V.-C.—In *Dimsdale v. Robertson* Lord
 St. Leonards felt considerable difficulty in con-
 tending with a stream of authority of great force,
 in which several learned judges, including Lord
 Eldon, without actually overruling *Halfhide v.*
Fenning, expressed strong doubts as to the sound-
 ness of the principle involved. He preferred,
 however, following Lord Kenyon's decision. It
 is true that the particular covenant not to sue,
 as a process to take any remedy other than that
 specifically pointed out by the agreement, which
 occurred in both these cases, does not exist in
 the case before me; but Lord St. Leonards relied
 upon other points which do not exist in the
 present case. These observations of Lord
 St. Leonards have been commented on by the
 present L.C. in *Scott v. Liverpool Corporation*,
 which fell within the principle of *Scott v.*
Avery. It is impossible to pass over the
 decision in *Dimsdale v. Robertson*, both on
 account of the high authority of the judge by
 whom it was decided, and because it seems to
 have been entirely overlooked in the discussion
 of several similar cases. In that instance Lord
 St. Leonards, after reviewing the authorities on
 the subject, arrived at a conclusion apparently
 at variance with them. In the view which I
 have taken of this case it is unnecessary for me
 to consider the propriety of the decision in
Dimsdale v. Robertson, but I cannot forbear
 remarking that the circumstances upon which
 Lord St. Leonards relied, as giving greater effect
 to the agreement to refer in that case, namely,
 the power to make the submission a rule of
 Court, and the legislative authority given to
 arbitrators of examining witnesses on oath,
 hardly appear sufficient to distinguish the case
 from others in which these conditions are not
 found, because these provisions are mere direc-
 tions as to the mode in which the reference is to
 be conducted, or means for enabling the parties
 to give greater efficacy to it, by suing out attach-
 ment for disobedience, and do not operate until
 the case has been withdrawn from the action
 of the regular tribunals—a withdrawal which,
 according to the earlier decisions, the parties
 have no power to effect—p. 86.

Scott v. Avery, *discussed*, Horton v. Sayer
 (1850) 29 L. J. Ex. 28; 4 H. & N. 623; 5 Jur.
 (N.S.) 989. 7 W. R. 763.—EX. CH. *considered*, Lee
 v. Page (1861) 30 L. J. Ch. 857. 7 Jur. (N.S.)
 768. 9 W. R. 754.—STUART, V.-C. *See*
 "PARTNERSHIP."

Scott v. Avery, *applied*.

Horton v. Sayer, *not applied*.
 Treloven v. Holman (1862) 31 L. J. Ex. 308.
 1 H. & C. 72; 8 Jur. (N.S.) 1080. 6 L. T. 127.
 10 W. R. 652.—MARTIN, B. (for the Court).

Scott v. Avery, *principle applied*.

Dawson v. Fitzgerald (Lord Otho) (1876)
 45 L. J. Ex. 898; 1 Ex. D. 257. 35 L. T. 220;
 21 W. R. 773.—O.A. JESSEL, M.R., COLERIDGE,

C.J. and POLLOCK, B. *reversing* 43 L. J. Ex 19, L. R. 9 Ex 7; 29 L. T. 776, 23 W. R. 162—EX.

Scott v. Avery and Tredwen v. Holman, *discussed*, *Edwards v. Aberystwyth Ship Insurance Society* (1876) 1 Q. B. D. 563, 31 L. T. 457, 3 Asp. M. C. 151—EX. CH.; *reversing* (1875) 44 L. J. Q. B. 67, 31 L. T. 779, 23 W. R. 304—Q. B.; *explained*, *Minifie v. Ry. Passengers Assurance Co.* (1881) 44 L. T. 552—POLLOCK, B. and STEPHEN, J.

Scott v. Avery, referred to.

Collins v. Locke (1879) 48 L. J. P. C. 68; 4 App. Cas. 674, 41 L. T. 293, 28 W. R. 189—P. C. SIR M. SMITH (for the Court), *distinguished*.

Dawson v. Fitzgerald, explained.

Viney v. Bignold (or *Norwich Union*) (1887) 57 L. J. Q. B. 82, 20 Q. B. D. 172, 58 L. T. 26, 36 W. R. 479.—WILLS and GRANTHAM, JJ. *See judgments.*

Collins v. Locke, discussed.

Swaine v. Wilson (1889) 59 L. J. Q. B. 76; 24 Q. B. D. 252, 62 L. T. 309, 38 W. R. 261. 54 J. P. 484.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Scott v. Avery, applied.

Tainor v. Phoenix Fire Assurance Co (1891) 65 L. T. 825—COLERIDGE, C.J. and COLLINS, J.; **Scott v. Mercantile Accident and Guarantee Insurance Co** (1892) 66 L. T. 811—C.A. ESHER, M.R., FRY and LOPES, L.JJ.; **Calodonian Insurance Co v. Gilmour** (1892) [1893] A. C. 88, 1 R. 110, 57 J. P. 228—H.L. (80) HERSCHELL, L.C., LORDS WATSON, ASHBOURNE and FIELD. *See Arbitration (Scotland) Act, 1894* (87 & 58 Vict. c. 18).

Scott v. Avery, followed.

Spurrier v. La Cloche (1902) 71 L. J. P. C. 101; [1902] A. C. 446, 86 L. T. 631, 51 W. R. 1.—P. C. LORDS MACNAGHTEN, DAVEY, ROBERTSON, LINDLEY and SIR P. NORTH.

Williams and Stepney, in re (1891) 60 L. J. Q. B. 636, [1891] 2 Q. B. 257; 65 L. T. 208, 39 W. R. 583—C.A. ESHER, M.R., LOPES and KAY, L.JJ.; *reversing* [1891] 1 Q. B. 700.—MATHEW and DAY, JJ., *distinguished*.

Wilson and Eastern Counties Navigation Co., in re (1891) [1892] 1 Q. B. 81; 61 L. J. Q. B. 237, 65 L. T. 858.

MATHEW, J.—It was argued that the judgment of the C.A. in *Williams and Stepney, in re*, amounts to a statement of the law to the effect that a submission may be overridden by the Act [Arbitration Act 1889], but that one only decided that the Act might add things which were not in the submission, unless the intention that they should not be added was expressed in the present case a contrary intention is expressed in the submission.—p. 84.

A. L. SMITH, J. to the same effect.

Carlson Tinplate Co. v. Hughes (1891) 60 L. J. Q. B. 640, 65 L. T. 118.—DENMAN and WILLES, JJ., *distinguished*.

Baker v. Yorkshire Fire Insurance Co. (1891) 61 L. J. Q. B. 838; [1892] 1 Q. B. 144, 66 L. T. 161.

COLERIDGE, C.J.—It is contended that the policy must be signed by both parties in order to bring it within the Arbitration Act, 1889. But that Act nowhere says that both parties must sign. *Carlson Tinplate Co. v. Hughes* has been cited to us as an authority for this contention; but I do not agree that it is. In that case, no doubt, it was necessary that both parties should sign. The parties there had never been *ad idem*, and there was no complete contract. The two notes that constituted the contract in that case differed in material particulars, and therefore one of the parties, who was unwilling, could not be compelled to submit to arbitration. But that does not apply to this case at all. Here there is a perfectly good contract, one of the conditions of which is that all disputes arising under it shall be referred to arbitration.—p. 830.

A. L. SMITH, J.—As regards *Carlson Tinplate Co. v. Hughes*, I think that the decision arrived at in that case depended entirely on the facts peculiar to that case.—p. 840.

North London Ry. v. G. N. Ry. (1883) 52 L. J. Q. B. 380, 11 Q. B. D. 30, 48 L. T. 685; 31 W. R. 440—C.A. BURNETT and COTTON, L.JJ.; *reversing* 47 L. T. 383.—FIELD and STEPHEN, JJ., *discussed and distinguished*.

London and Blackwall Ry. v. Cross (1886) 31 Ch. D. 351, 55 L. J. Ch. 313; 54 L. T. 309; 34 W. R. 201.—C.A.

LINDLEY, L.J.—Now, notwithstanding the argument that if the claimant is wrong he cannot recover on the award, and therefore the company need not attend before the arbitrator, it is quite obvious that all prudent men (and railway companies must act as prudent people) would watch the proceedings before the arbitrator, and must therefore incur costs. Notwithstanding that, and notwithstanding the apparent enlargement by the Judicature Act, 1873, s. 25, of the power of the Court to grant an injunction, the C.A. has decided, in *North London Ry. v. G. N. Ry.*, that the practice settled by Lord Tenterden in *East and West India Dock, &c. Co. v. Gatliffe* [20 L. J. Ch. 217, 3 Mac & G. 155. *See "LANDS CLAUSES ACT"*] as long ago as 1851, has not been altered by the Judicature Acts, and that there is still no right or jurisdiction in the Ch. D. of the High Court to restrain a person from proceeding for compensation under the Lands Clauses Consolidation Act, on the ground that he is not entitled to compensation. The decision in that case must not be understood as going further than that. The grounds upon which it proceeds are perfectly explained by the M.R. and by Cotton, L.J. The case does not decide that in no case is it right to restrain persons from proceeding to arbitration. There are cases in which it is quite right to do so. . . Having arrived at the real grounds of the decision in *North London Ry. v. G. N. Ry.* we have to consider whether there is any substantial difference between that case and this. That there is a difference has been pointed out by Mr. Romer, viz., that Mr. Cross here is assuming to take proceedings in the name of the ferry company, and, it is alleged, without authority. . . It is right I should make a few observations upon the reasons given by Chitty, J. [in the Court below], for distinguishing this case from that of *North London Ry. v. G. N. Ry.* He put it on this ground, that Mr. Cross was

proceeding without authority, and that therefore there was jurisdiction to restrain him from using the names of his alleged principals, and he referred to the doctrine that if an action is brought by a person without authority it can be stopped. That is, no doubt, quite true but upon what principle is that done? It is upon the principle that the Court can control the proceedings before itself, and if a person without authority is bringing an action in the name of another it is an abuse of the process of the Court, and the Court can stop it. That seems to me not to apply to a case of this kind, and I think that this is not the right way of raising the question whether Mr. Cross has authority to go on. He must go on at his peril—pp 368—370. FRY and LOPIN, L.J. to the same effect

North London Ry. v. G. N. Ry., discussed
Hayward v. East London Waterworks Co. (1844) 14 L. J. Ch. 523. 28 Ch. D. 138, 52 L. T. 175.—CHITTY, J.

North London Ry. v. G. N. Ry. and London and Blackwall Ry. v. Cross, principle applied
Haily and Fisher v. Mullet (1886) 3 Times L. R. 71.—CHITTY, J.

London and Blackwall Ry. v. Cross, not applied.
Birmingham and District Land Co. v. L. & N. W. Ry. (1888) 40 Ch. D. 268; 50 L. T. 527.—C.A. COTTON, LINDLEY and BOWEN, L.J., affirming 57 L. J. Ch. 121, 36 Ch. D. 650, 36 W. R. 414.—KEKEWICH, J.

North London Ry. v. G. N. Ry. and London and Blackwall Ry. v. Cross, followed.
Wood v. Lilhes (1892) 61 L. J. Ch. 158.—CHITTY, J.

North London Ry. v. G. N. Ry., explained and applied. Holmes v. Millage (1893) 62 L. J. Q. B. 580; [1893] 1 Q. B. 651. 1 R. 332, 68 L. T. 205; 41 W. R. 354, 57 J. P. 551.—C.A. LINDLEY and BOWEN, L.J., discussed, Richardson v. Mathias School Board (1893) 62 L. J. Ch. 943; [1893] 3 Ch. 510; 3 R. 701, 69 L. T. 308; 42 W. R. 27.—KEKEWICH, J.

North London Ry. v. G. N. Ry. and London and Blackwall Ry. v. Cross, distinguished
Kitts v. Moore & Co (1891) 12 R. 43; 61 L. J. Ch. 152, [1893] 1 Q. B. 253, 71 L. T. 676, 43 W. R. 81.—C.A.

LINDLEY, L.J.—In *North London Ry. v. G. N. Ry.* there was an agreement to refer; one party wanted to refer, and the other did not, and the other brought an action to stop the reference. There was no impeaching the agreement or anything of the kind. . . . and when you look at the judgments of Brett and Cotton, L.J., you find they said that the Courts of equity never did such a thing; they said—and there was the important part of the decision—that sect. 25 of the Judicature Act had not extended the jurisdiction of the Court to do it. That was the decision, they never meant to say that in cases where the Court of equity used to interfere the power was gone. Whether the Appeal Court has taken too narrow a view of, or placed too narrow a construction upon, sect. 25 is another matter altogether. I do not consider I am at liberty to discuss the question. . . . That case does not

touch the principle, and I protest altogether against being thought to flatter away a case which I am bound to follow. . . . *London and Blackwall Ry. v. Cross* was really a case under the Lands Clauses Act, and amounts to this, that, notwithstanding sect. 25 of the Judicature Act, the Court will not alter the practice which has prevailed under the Lands Clauses Act since it was settled by Lord Truro some fifty years ago. When Lord Truro decided *East and West India Docks, &c. Co. v. Guttle* there was a considerable difference of opinion. The inconveniences were pointed out by him, and also by Lord Cottenham, who thought the best way was to allow a person to bring an action or file a bill, and have his rights determined before the arbitration. Lord Truro thought that that was inconvenient, and that the best way under the Lands Clauses Act was to let the parties have an arbitration and get their rights determined. . . . What we said in *London and Blackwall Ry. v. Cross* was that, notwithstanding sect. 25 of the Judicature Act, we should not alter, but would stand by, the practice as it had been settled in *East and West India Docks, &c. Co. v. Guttle* (see col. 54)—p. 47.

A. L. SMITH, L.J., who also discussed *North London Ry. v. G. N. Ry.*, said—I do not think anyone would stand up and argue that sect. 25 of the Judicature Act, 1873, was intended to curtail the jurisdiction of the Court, which seems to have been the point that was specially argued in *Mann v. Tinsdale* (1894) 63 L. J. Q. B. 454. [1894] 1 Q. B. 671.—C.A. See "INJUNCTIONS," in which case Lord Halsbury held that it was intended to enlarge it; but he stands by himself at the present—p. 50.

North London Ry. v. G. N. Ry. and Kitts v. Moore & Co., referred to
Derwentport Corporation v. Torer (1902) 71 L. J. Ch. 754, [1902] 2 Ch. 182, 86 L. T. 612.—JOYCE, J.

Woolley v. Clarke (1822) 1 L. J. (os.) K. B. 38, 2 D. & R. 158, S. C. now *Woolley v. Kelly*, 1 H. & C. 68, 25 R. R. 312.—K. B.

Hayward v. Mutual Reserve Association (1891) [1891] 2 Q. B. 236, 65 L. T. 491. 89 W. R. 624.—DENMAN and WILLS, JJ., approved.

MacAlpine v. Calder (1893) 62 L. J. Q. B. 607, [1893] 1 Q. B. 545; 4 R. 314; 68 L. T. 126, 41 W. R. 436.—C.A. LINDLEY and BOWEN, L.J.

Blythe v. Lafone (1859) 28 L. J. Q. B. 161; 1 EL. & EL. 435. 5 Jan. (N.S.) 364, 7 W. R. 189.—Q. B., overruled.

Mason v. Haddon (1859) 6 C. B. (N.S.) 526.—WILLES and BYLES, JJ., followed.
Randell v. Thompson (1876) 45 L. J. Q. B. 713; 1 Q. B. D. 748; 35 L. T. 193; 24 W. R. 665, 687.

[In this case the C. A. (Jessel, M.B., Kelly, C.B., Mellish, L.J., and Denman, J.) affirmed the decision of the Q. B. D. on the point on which they overruled *Blythe v. Lafone*, but reversed it on another point.]

BLACKBURN, J. (in the Q. B. D.).—What is the effect of the agreement here made? It was entered into after the matters in dispute had arisen, and was signed by the agents on both sides, and was expressed to refer the disputes existing at that time to a certain arbitrator. The first question is whether such agreement to refer existing and not future differences as

within sect 11 of the Common Law Procedure Act, 1854 The Court of Q. B., in *Hythe v*

Davis v Starr (1889) 58 L. J. Ch. 808; 41 Ch. D. 242, 60 L. T. 797; 37 W. R. 181 —

existing of future differences shall be referred to arbitration, and to what sort of instrument it applies; and in that respect we follow the decision of the C. P., and dissent from that in *Hythe v. Lafone* — p. 715

FIELD, J. to the same effect

QUAIN, J. agreed on this point

Randell v. Thompson, distinguished

Moffat v. Canneline (1878) 39 L. T. 102 — C.A. *BRANWELL, COTTON* and *THESIGER, L.J.* affirming 26 W. R. 914 — *COCKBURN, C.J.* and *MELLOB, J.* (who had dissented from *Randell v. Thompson*)

THESIGER, L.J. — The facts in *Randell v. Thompson* were that the particular named arbitrator took upon himself the arbitration and proceeded in it for three months, and before he made his award one of the parties revoked the submission. It is clear that, the submission being to a named arbitrator, there was no power in the Court to appoint any other arbitrator, but here there is a general agreement such as to enable one of the parties, if the other does not appoint, to appoint his nominee as the sole arbitrator. — p. 108.

Randell v. Thompson, followed

Deutsche Springstoff Actien Gesellschaft v. Bischof (1887) 57 L. J. Q. B. 4; 20 Q. B. D. 177, 36 W. R. 557. — *STEPHEN* and *CHARLES, JJ.*

Wade-Gery v. Morrison (1877) 37 L. T. 270.

— *BACON, V.-C., distinguished*

Turnock v. Sartoris (1889) 43 Ch. D. 150, 62 L. T. 208, 38 W. R. 840. — C.A.

COTTON, L.J. — In that case there were two contemporaneous agreements, one of which contained, and the other did not contain, a stipulation for reference to arbitration, and the learned judge decided that those two agreements must be treated as together forming one agreement, and that therefore the clause as to reference to arbitration, which was found only in one of the two parts of that agreement, was to apply to matters arising under either of the documents which, taken together, made up the agreement. That is entirely different from the present case. — p. 155. *ROWEN* and *FRY, L.J.*, concurred

Turnock v. Sartoris, distinguished

Ives and Baker v. Williams (post, col. 60).

Russell v. Pellegrini (1856) 26 L. J. Q. B. 75, 6 El. & Bl. 1090, 3 Jun. (N.S.) 184, 5 W. R. 71 — Q. B.; *dissented from*, *Dunnt v. Lazard* (1858) 27 L. J. Ex. 399. — *XX.*, referred to, *Minifie v. Roy. Passengers Assurance Co.* (1881) 44 L. T. 562 (post, col. 60).

the whole of the dispute between himself and the servant to arbitration. But in the present case the defendants are ready to refer the whole matter to arbitration — p. 497

CHITTY, L.J., to the same effect

Renshaw v. Queen Anne Residential Mansions Co., followed

Davis v Starr, explained

Parry v. Liverpool Malt Co (1899) 69 L. J. Q. B. 161, [1900] 1 Q. B. 339; 81 L. T. 621 — C.A. *LINDLEY, M.R.* — Counsel have satisfied me that in *Davis v Starr* I went wrong on the facts. I do not think that I was wrong in the law. The principle of the decision was right, because we came to the conclusion that the applicant there, who sought to enforce the arbitration clause, was not, in the language of the Act, at the time when the proceedings were commenced, not still remained, 'ready and willing' to do particular things necessary for the proper conduct of the arbitration. . . I prefer myself the observations made and the view taken on similar facts in *Renshaw v. Queen Anne Mansions Co.* I also think it was the view we took of the facts in *Davis v Starr* which has led to this controversy, and I very much regret it — p. 163

ROMER, L.J. to the same effect.

Wallis v. Hirsch (1856) 26 L. J. C. P. 72, 1 C. B. (N.S.) 316. — C.P., *distinguished*.

Hirsch v. Im Thurn (1856) 27 L. J. C. P. 254; 4 C. B. (N.S.) 559, 4 Jur. (N.S.) 587, 6 W. R. 605 — C.P.

Willesford v. Watson (1872) L. R. 5 Eq. 572.

— *WICKENS, V.-C., affirmed*, (1873) 42 L. J. Ch. 90, 44 L. R. 8 Ch. 473, 28 L. T. 428, 21 W. R. 350. — C.A. *SELBOURNE, L.C.*, *JAMES* and *MELLISH, L.J.*; *considered*, *Gillet v. Thornton* (1875) 14 L. J. Ch. 898; L. R. 19 Eq. 599, 23 W. R. 487. — *HALL, V.-C.*, *Plews v. Baker* (1878) 43 L. J. Ch. 212, L. R. 16 Eq. 364. — *BACON, V.-C., approved*, *Law v. Garrett* (1878) 8 Ch. D. 76 — C.A. *JAMES, BAGGALLAY* and *THESIGER, L.J.* — *Ind see col. 60.*

Willesford v. Watson, distinguished

Percy v. Young (1879) 14 Ch. D. 200; 4 L. T. 710, 28 W. R. 815. — C.A. *JESSEL, M.R.*, *BAGGALLAY* and *THESIGER, L.J.*

JESSEL, M.R. — The great object of these clauses is to prevent the delay and expense of litigation but we must not forget in deciding upon them that they do deprive one of the parties, that is the one who objects to the arbitration, of the right to resort to the ordinary tribunals of the country, and he is entitled to say, "show me that I have agreed to refer this matter to an arbitrator." I say so because it was attempted

to be argued before us, and *Willesford v. Watson* was cited to show, that the Court would not decide that point. I must say that when Lord Selborne's decision comes to be examined it appears to me to show by inference the contrary, for in referring the construction of the articles, and the question as to certain acts which were alleged to be outside the agreement, to the decision of the arbitrator, he went very carefully through the case and very carefully through the provisions as to the reference to arbitration, and showed that they were so wide that they not only included the construction of the document itself, but also the question as to whether the acts complained of were or were not within the terms of the matters referred to arbitration. Of course persons can agree to refer to arbitration not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause.—p. 208.

And see post, col. 62.

Willesford v. Watson, *dicta* of WICKENS, V.-C., *questioned*.

Russell v. Russell (1880) 14 Ch. D. 471; 49 L. J. Ch. 268; 42 L. T. 112.

JESSEL, M.R.—The only case which has been cited directly bearing upon the point is a case before Wickens, V.-C. of *Willesford v. Watson*, in which, although the point was not decided by him because he thought it was a proper case in which to make the order to refer to arbitration, yet he says this: "Such orders have been frequently made by Courts of law. The construction which these Courts have put on the clause seems to have been that, whenever the agreement to refer covers the question which the action raises, the matter should be referred, even although it is properly one of law, and even though the defendant's case may be properly raiseable in a cross action; in fact, in all cases except where there is a question of actual fraud. In cases of actual fraud the Court refuses to interfere on two grounds: first, because when personal fraud is in issue the case is properly one of publicity, and for a jury; and secondly, because the parties to a contract can hardly be supposed to have endeavoured to refer to a conventional tribunal any attempt by one of them to cheat the other. But in all other cases the Courts of law seem to consider that the defendant is entitled to the reference when he once has shown that the point is one which the plaintiff agreed to refer." That is not a statement of the V.-C.'s own judgment, but of what he understood to be the practice in the Courts of law, and it is very singular that the industry of counsel has not furnished me with a decision at law laying down anything of the kind, and I am not at present aware from what source the V.-C. derived his conclusions. Different minds are differently affected by a consideration of the same circumstances, but, speaking for myself, I am by no means persuaded that these reasons are sufficient, or that the Courts of common law have ever laid down that they are.—p. 476.

And see post, col. 61.

Willesford v. Watson, *Plews v. Baker*, *Wallis v. Hirsch* and *Hirsch v. Im Thurn* (*supra*, col. 58), *approved*.

Russell v. Russell and *Seligmann v. Le Bouteiller* (1884) L. R. 1 C. P. 681.—C.P., *referred to*.

Randegger v. Holmes (1866) L. R. 1 C. P. 671.—C.P., *followed*.

Mimie v. Ry. Passengers Assurance Co. (1881) 44 L. T. 552.—POLLOCK, B. and STEPHEN, J.

Willesford v. Watson and *Law v. Garrett* (*supra*, col. 58), *dicta considered*.

La Compagnie du Ségénal v. Woods (1883) 53 L. J. Ch. 166; 40 L. T. 527; 32 W. R. 111.—KAY, J.

Willesford v. Watson, *adopted*.

Lyon v. Johnson (1889) 58 L. J. Ch. 626; 40 Ch. D. 579; 60 L. T. 223, 37 W. R. 427.—KAY, J.

La Compagnie du Ségénal v. Woods, *followed*.

Pini v. Roncoroni (1892) 61 L. J. Ch. 218; [1892] 1 Ch. 633; 66 L. T. 255; 40 W. R. 297.—STIRLING, J.

Chappell v. North (1891) 60 L. J. Q. B. 554; [1891] 2 Q. B. 252; 65 L. T. 23; 40 W. R. 16.—DENMAN and WILKS, JJ., *approved*.

Brighton Marine Palace and Pier Co. v. Woodhouse (1893) 62 L. J. Ch. 637; [1893] 2 Ch. 486; 3 R. 565; 68 L. T. 669; 41 W. R. 488.—NORTH, J.

Chappell v. North, *discussed*.

Ives and Barker v. Willans (1894) 63 L. J. Ch. 78, 521; [1894] 2 Ch. 478; 7 R. 243; 70 L. T. 674; 42 W. R. 396, 483.—C.A. LINDLEY, LOPES and KAY, L.J.J., *distinguished*.

Bartlett v. Ford's Hotel Co. [1895] 1 Q. B. 850; 64 L. J. Q. B. 452; 72 L. T. 529; 84 W. R. 433; 41 R. 408; 59 J. P. 437.—C.A.; *affirmed, nom.* *Ford's Hotel Co. v. Bartlett* (1896) 65 L. J. Q. B. 166; [1896] A. C. 1; 73 L. T. 665; 44 W. R. 241.—H.L. (E.) HALESBURY, L.C., LORDS WATSON, MACNAGHTEN, MORRIS, SHAND and DAVEY.

LOPES, L.J.—In *Chappell v. North* it was held that any application for leave to administer interrogatories was a step in the proceedings within the meaning of the section [Arbitration Act, 1889, s. 4]. Denman, J. said in that case: "But then it is said that the plaintiff had since the delivery of the counter-claim taken steps in the proceedings, and three different matters were relied on as being such steps. The first was that he had obtained a series of consents from the defendant for the extension of the time for the delivery of reply. No doubt if the consent had been refused the plaintiff would have had to take out a summons, and that summons would have been a step." That observation of the learned judge appears to have been cited by North, J. with approval in *Brighton Marine Palace and Pier Co. v. Woodhouse*. Then there is *Ives and Barker v. Willans*. In that case a notice by the defendant requiring a statement of claim was held not to be a step in the proceedings for this purpose. But in that case there is no intervention of the Court.—p. 851. BIGBY, L.J., concurred.

Ford's Hotel v. Bartlett, and *Brighton Marine Palace and Pier Co. v. Woodhouse*, *discussed*.

Zalinfo v. Hammond (1898) 67 L. J. Ch. 370; [1898] 2 Ch. 92; 78 L. T. 466.—STIRLING, J.

Chappell v. North, followed.

County Theatres and Hotel, Ltd. v. Knowles (1902) 71 L. J. K. B. 851; [1902] A. K. B. 480; 86 L. T. 132.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

Hodgson v. Railway Passengers' Assurance Co. (1882) 9 Q. B. 12, 188.—C.A. JESSEL, M.R., LINDLEY and BOWEN, LJJ., explained and distinguished.

Pox v. Railway Passengers' Assurance Co. (1885) 54 L. J. Q. B. 505; 52 L. T. 672.—C.A.; reversing 52 L. T. 549.—MATHEW and A. L. SMITH, JJ.

BRETT, M.R.—In this case the Master was not satisfied that the proceedings ought to be stayed, nor was the judge, but the Div. Court differed from the judge and stayed the proceedings in the action; but the Div. Court did not differ on the point of discretion, for the Div. Court thought the Court was bound by a decision of the C. A. in *Hodgson v. Railway Passengers' Assurance Co.* I am, however, of opinion that that case laid down no general rule of law, and I think the Div. Court were misled by the impression that that case was decided on some general rule of law, and not, as it seems to me, on the facts of that case, which satisfied the judge and the Court that that action ought to be stayed.—p. 307.

BOWEN, L.J. to the same effect.

BAGGILLAY, L.J.—It has been said that *Hodgson v. Railway Passengers' Assurance Co.* establishes that in such a case as this the burden of proof is on the plaintiff; but on looking at the report and considering the affidavits used in that case, at which we have looked, it will be found that the case does not go as far as this; and there is this difference between that case and the present—that there the various tribunals before which the case came were all agreed that the action ought to be stayed; whereas in this case there has been a difference of opinion.—p. 508.

Russell v. Russell (*supra*, col. 59), approved. **Joplin v. Postlethwaite** (1889) 61 L. T. 629.

—KAY, J.; affirmed, C.A. COTTON, BOWEN and FRY, LJJ., applied.

Turnell v. Sanderson (1891) 60 L. J. Ch. 703. —KEKEWICH, J.

Joplin v. Postlethwaite, explained.

Walsmsley v. White (1892) 40 R. 675; 67 L. T. 433.—C.A.; affirming KAY, J.

LINDLEY, L.J.—I do not read the decision of the C. A. in *Joplin v. Postlethwaite* as being inconsistent with *Russell v. Russell*, for in *Joplin v. Postlethwaite* KAY, J., in the exercise of his discretion, declined to stay the proceedings, and that the C. A. in that case held that he was right, and that he was not bound to stay the proceedings.—p. 675. A. L. SMITH, L.J. concurred.

Walsmsley v. White, followed.**Joplin v. Postlethwaite, explained.**

Vawdrey v. Simpson (1895) 65 L. J. Ch. 369; [1896] 1 Ch. 166; 44 W. R. 128.—CHITTY, J.

Vawdrey v. Simpson, followed.

Workman v. Belfast Harbour Commissioners [1899] 2 Ir. H. 234.—BOYD and KENNY, LJJ. See judgment of latter, where the cases are discussed.

2. THE ARBITRATOR.

Jenkins v. Law (1738) 8 Term Rep. 87, overruled.

Evans v. Thomson (1804) 5 East 189; 1 Smith 380.

ELLENBOROUGH, C.J. (for the Court).—It was objected on the part of the defendant that the award of the umpire was not capable in this case of being enforced as a rule of Court, on the authority of *Jenkins v. Law*; the agreement to enlarge the time of making the award containing no express consent that such agreement should be made a rule of Court. But, upon considering that case, in which the objection appears to have been given way to without any argument on the part of the counsel who had obtained the rule for an attachment, and on which account the matter was probably not brought under the immediate view and attention of the Court; and upon conferring, with a view to an uniformity of practice on this subject, with most of the judges of the other Courts of Westminster Hall, we are of opinion that the case referred to cannot be supported.—p. 193.

See Arbitration Act, 1889 (53 & 54 Vict. c. 49).

Perring and Keymer. In re (1835) 4 L. J.K.B. 199; 3 A. & E. 245; 1 H. & W. 285; S. C. *nom. Allen*. In re, 5 N. & M. 374.—K.B.

Mills v. Bayley (1863) 32 L. J. Ex. 179; 2 H. & C. 36. 9 Jur. (N.S.) 499; 8 L. T. 393. 11 W. R. 598.—EX.; and Drury and Lyne, In re (1869) 38 L. J. Ch. 278; 19 L. T. 763.—STUART, V.-C., approved and applied.

Rouse and Meier, In re (1871) 40 L. J. C. P. 145; L. R. 6 C. P. 312; 23 L. T. 865; 19 W. R. 438; —C.P., BOVILL, C.J. dissenting.

Rouse and Meier, In re, approved.**Piercy v. Young** (*supra*, col. 58), explained.

Fraser v. Ehrensperger (or Fraser, In re) (1883) 53 L. J. Q. B. 73; 12 Q. B. D. 810; 49 L. T. 646; 32 W. R. 240.—C.A.

BRETT, M.R.—The meaning of what the late M.R. there (*Piercy v. Young*) said was that one of the parties could not revoke the agreement to refer, but that he could revoke the submission to a particular arbitrator.—p. 318. BOWEN, L.J. concurred.

Rouse and Meier, In re, discussed. See per BOWEN, L.J.

Smith and Service and Nelson. In re (1890) 59 L. J. Q. B. 533; 25 Q. B. D. 545; 63 L. T. 475; 39 W. R. 117; 6 Asp. M. C. 555.—C.A., ESHER, M.R., LINDLEY and BOWEN, LJJ.

Smith and Service and Nelson, In re, explained.

Manchester Ship Canal Co. v. Pearson (1900) 69 L. J. Q. B. 852; [1900] 2 Q. B. 606; 83 L. T. 45; 48 W. R. 689.—C.A.

v. WILLIAMS, L.J.—If the judgments of the M.R. (Lord Esher) and Lindley, L.J., in *Smith and Nelson, In re*, be read by the light of the argument for the appellants, it is quite clear that they did not intend to say that sect. 4 of the Arbitration Act, 1889, did not apply to the case because the reference was to three arbitrators. The argument for the appellants was that sect. 4 did not apply to the case because no legal proceedings had been commenced, and it was for that reason that the Court said that sect. 4 did

not apply. No application could be made to stay the proceedings until the action had been commenced. But in the circumstances of the present case it is quite plain that sect. 4 applies, and the applicants for a stay, having given their undertaking to name an arbitrator, are entitled to have the stay for which they ask.—p. 874.

A. L. SMITH, L.J., to the same effect.

Baker v. Stephens (1867) 36 L. J. Q. B. 236; 8 B. & S. 438; L. R. 2 Q. B. 523; 15 W. R. 902.—Q.B. applied.

Baring-Gould v. Sharplington Pick and Shovel Syndicate (1898) 67 L. J. Ch. 622; [1898] 2 Ch. 633; 79 L. T. 185; 47 W. R. 23.

STIRLING, J.—The meaning of "entering on the reference" was considered in *Baker v. Stephens*, where it was held that it meant not merely the making an appointment to hear the parties, but actually beginning to hear them, and that an award was made in time if within the limit reckoned, not from when the arbitrator accepted the office, or took upon himself the functions of arbitrator by giving notice of his intention to proceed, but from when he entered into the matter of the reference, either with both parties before him, or under a peremptory appointment enabling him to proceed *ex parte*.—p. 624.

This latter case reversed on this point, *non*. *Baring-Gould and Sharplington Combined Pick and Shovel Syndicate*, *In re* (1899) 68 L. J. Ch. 429. [1899] 2 Ch. 80; 80 L. T. 739; 47 W. R. 564.

—C.A. LINDLEY, M.R., RIGBY and COLLINS, L.JJ.

Hart v. Duke (1862) 32 L. J. Q. B. 55; 9 Jur. (N.S.) 119; 11 W. R. 75.—BLACKBURN, J., applied.

Robinson v. Davies (1879) 49 L. J. Q. B. 218; 5 Q. B. D. 26; 28 W. R. 255.—LUSH and MANISTY, JJ.

Hart v. Duke, commented on.

Kirk v. East and West India Dock Co. (1886) 55 L. T. 245; 50 J. P. 196.—GROVE and STEPHEN, JJ.; affirmed, C.A. COLERIDGE, C.J., LINDLEY and LOPES, L.JJ.; but reversed, *non*. *East and West India Dock Co. v. Kirk* (1887) 57 L. J. Q. B. 295; 12 App. Cas. 738; 58 L. T. 158.—H.L. (E.); HALSBURY, J.C. LORDS WATSON, FITZGERALD and MACNAGHTEN.

East and West India Dock Co. v. Kirk, considered.

James v. James (1889) 58 L. J. Q. B. 300, 424; 23 Q. B. D. 12; 61 L. T. 310; 37 W. R. 600.—C.A. LINDLEY and LOPES, L.JJ.

Tabernacle Permanent Building Society v. Knight (1892) 62 L. J. Q. B. 50; [1892] A. C. 298; 67 L. T. 483; 66 J. P. 709.—H.L. (E.) HALSBURY, J.C., LORDS WATSON, HESCHELL, MORRIS and WYLD; affirming *S. C. non*. **Knight v. Tabernacle Permanent Building Society** (1891) 60 L. J. Q. B. 633; 65 L. T. 550; 39 W. R. 507; 55 J. P. 534.—C.A. ESHER, M.R., FRY and BOWEN, L.JJ.; which reversed, [1891] 2 Q. B. 63; 64 L. T. 204.—WILLS and V. WILLIAMS, JJ.; followed on this point; **East and West India Dock Co. v. Kirk**, explained.

Palmer and Hosken, In re (1897) 67 L. J. Q. B. 1; [1897] 2 Q. B. 131; 77 L. T. 350; 46 W. R. 49.—C.A.

CHITTY, L.J.—Our decision is quite consistent in principle with that of Lord Escher and

the other members of the Court in *Keighley, Marsden & Co. and Durrant & Co., In re* (post, col. 72). There, in dealing with sect. 10 of the Arbitration Act, 1889, the Court referred to the corresponding sect. 8 of the Common Law Procedure Act, 1854, and the previous decisions on that section. But they had not to take into their consideration the new enactment of sect. 19 of the Arbitration Act, 1889, and the general effect of that enactment on arbitrations, and on the application of sect. 10 to circumstances such as those before us. . . . In *East and West India Dock Co. v. Kirk*, decided before the Arbitration Act, 1889, was passed, it was held by the House of Lords that the Court had jurisdiction to give leave to revoke the submission if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction. The leave would have been given in the circumstances of that case if the parties had not come to terms that the arbitrator should state a special case for the decision of the Court. This jurisdiction, as was held in *James v. James* (supra), is discretionary, and to be exercised according to the circumstances of the case. In *East and West India Dock Co. v. Kirk* the discretion was exercised while the arbitration was still pending, and consequently the decision does not directly bear on the present case.—p. 4.

LINDLEY, M.R. to the same effect.

Tabernacle Permanent Building Society v. Knight and Palmer and Hosken, In re, followed.

Montgomery, Jones & Co. and Liebenal & Co., In re (1898) 78 L. T. 406.—C.A. A. L. SMITH, CHITTY and COLLINS, L.JJ.

Knight and Tabernacle Permanent Building Society, In re (1892) 62 L. J. Q. B. 33; [1892] 2 Q. B. 613; 4 R. 67; 67 L. T. 403; 41 W. R. 85; 57 J. P. 229.—C.A. ESHER, M.R., BOWEN and KAY, L.JJ., distinguished.

Kirkleatham Local Board's and Stockton and Middlesbrough Water Board's Arbitration, In re (1892) 62 L. J. Q. B. 180; [1893] 1 Q. B. 375; 4 R. 194; 67 L. T. 311; 57 J. P. 421.—C.A.

The Court (LINDLEY, BOWEN and A. L. SMITH, L.JJ.) held that as the arbitrator had stated his award in the form of a special case, an appeal lay to the C. A. from the judgment of the Div. Court (Pollock, B. and Williams, J.). *Knight and Tabernacle Permanent Building Society, In re*, was not in point, because there the special case was not a statement of the arbitrator's award, but merely the submission for the opinion of the Court of a question of law arising in the course of the reference, and consequently the opinion of the Court upon it was merely consultative, and not a judicial decision, and therefore not appealable.

And see Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 20.

Jackson v. Barry Railway (1892) [1893] 1 Ch. 238; 2 R. 207; 68 L. T. 472; 9 Times L. R. 90.—C.A. LINDLEY and BOWEN, L.JJ.; A. L. SMITH, L.J. dissenting, approved.

Nuttall v. Manchester (Mayor) (1892) 8 Times L. R. 518.—MATHEW and A. L. SMITH, JJ., approved and distinguished. *Eckersley v. Mersey Docks and Harbour Board*

(1894) 9 R. 827; [1894] 2 Q. B. 667; 71 L. T. 308.—C.A.

ESHER, M.R.—It is necessary to show at least a probability that he would be biased—that was decided in *Jackon v. Barry Railway* . . . In that case [*Vittall v. Manchester (Mayor)*] there had been an unseemly personal dispute between the contractor and the engineer, and the engineer had expressed himself in a way indicating that he had prejudged the matter. The decision there was quite right, but is not in point.—p. 829. **LOPES and DAVEY, L.J.J.** concurred.

Jackson v. Barry Railway and Eekersley v. Mersey, &c. Board, principle applied.

Bright v. Haver Plate Construction Co. (1900) 70 L. J. Ch. 59; [1900] 2 Ch. 885; 82 L. T. 793; 49 W. R. 132; 64 J. P. 695.—**COZENS-HARDY, J.**

Coombs, In re (1850) 4 Ex. 839.—**EX.**, applied.

Roberts v. Eberhardt (1858) 28 L. J. C. P. 74; 3 C. L. (S.S.) 482, 506; 4 Jur. (S.S.) 113, 598; 7 W. R. 793.—**EX. CH.** **WIGHTMAN and CROMPTON, JJ. dissenting; reversing** [1857] 27 L. J. C. P. 79.—C.P.

Threlfall v. Fanshawe (1850) 19 L. J. Q. B. 334; 1 L. M. & P. 140.—**COLERIDGE, J., questioned.**

Parkinson v. Smith (1861) 30 L. J. Q. B. 178; 9 W. R. 340.

BLACKBURN, J.—I have just spoken to my brother Wightman about this case, and he has expressed considerable doubts whether *Threlfall v. Fanshawe* is good law. Other of the judges whom I have consulted have also expressed some doubt.—p. 186.

Virany v. Warne (1801) 4 Esp. 47; 6 R. R. 839.—**KENYON, C.J.; Burroughes v. Clarke** (1831) 1 D. P. C. 48.—**TAUNTON, J.:** **Swinford v. Burn** (1818) Gow 25.—**DALLAN, C.J.; Hoggins v. Gordon** (1842) 11 L. J. Q. B. 286; 3 Q. B. 467; 2 G. & D. 656; 6 Jur. 895.—**Q.B.**, and **Coombs, In re, discussed and distinguished.**

Crampton and Holt v. Ridley & Co. (1887) 20 Q. B. D. 48; 57 L. T. 809; 36 W. R. 554.

A. L. SMITH, J., after referring to the above-mentioned cases, continued:—In my opinion if the point now in hand ever comes to be decided by a Court of review, if that be necessary, it will be held, and I believe the law to be, that upon an arbitration such as we are now dealing with, there is an implied promise by the parties appointing the arbitrators and umpire jointly to pay them for their services. In my judgment, in the cases above referred to Courts were not dealing with the class of arbitrators and umpire to which the case in hand refers.—p. 53.

Steward v. East India Co. (1700) 2 Vern. 880; 1 Bp. Cas. Abr. 40, 73.—**HARDWICK, L.C., concurred.**

Dummer v. Clippenham Corporation (1807) 14 Ves. 245.—**ELDON, L.C.**

Steward v. East India Co., explained.

McIntosh v. G. W. Ry. (1849) 2 Do G. & Sm. 748; 18 L. J. Ch. 94; 13 Jur. 92; affirmed (1850) 19 L. J. Ch. 374; 2 Mac. & G. 74; 2 Hall & Tw 250; 14 Jur. 819.—**COTTENHAM, L.C.** **KNIGHT BRUCE, V.C.**—It is not to be found in the Registrar's book, but there is a note of the argument and of the judgment in the Court book of the day, July 10th, 1700. The note is, O.C.

"Allow the demurrer." Lord Eldon appears to have thought that there was an error in the report, and that the demurrer must have been overruled, but the Court book says, "Allow the demurrer; and as to the plea, let it stand for an answer, with liberty to except, and save the benefit of the plea until the hearing." I mention this, not because I think it bears importantly on this case, but because the information may be acceptable to the bar.—p. 770 and n.

Steward v. East India Co., disapproved.

Padley v. Lincoln Waterworks Co. (1850) 2 Mac. & G. 68; 19 L. J. Ch. 436; 2 Hall & Tw. 295; 14 Jur. 299.—**COTTENHAM, L.C.**

Buccleugh (Duke) v. Metropolitan Board of Works (1872) 41 L. J. Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.—**H. L. (E.) LORDS CHELMSFORD, WESBURY, COLONSAY and CAIRNS**, with the JUDGES: *reversing* (1870) 39 L. J. Ex. 189; L. R. 5 Ex. 221; 23 L. T. 255.—**EX. CH.**, which *reversed* 37 L. J. Ex. 177; L. R. 3 Ex. 306.—**EX.**, *discussed*. **Caledonian Ry. v. Walker's Trustees** (1882) 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676.—**H. L. (SC.) SELBORNE, L.C., LORDS O'HAGAN, BLACKBURN and WATSON; referred to**, **Green v. Belfast Tramways Co.** (1887) 20 L. R. Ir. 42.—**Q.B.D.**; *followed*, **Essex v. Acton Local Board** (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153; 61 L. T. 1; 38 W. R. 209; 55 J. P. 756.—**H. L. (E.) HALSBURY, L.C., LORDS WATSON, BRAMWELL, FITZGERALD and MACNAGHTEN**: **London, Tilbury & Southend Ry. and Gower's Walk School Trustees, In re** (1889) 59 L. J. Q. B. 162; 24 Q. B. D. 326; 62 L. T. 306; 38 W. R. 343.—**C.A.** **ESHER, M.R., LINDLEY and LOPES, L.J.J. v. O'Rourke v. Ry. Commissioners** (1890) 59 L. J. P. C. 72; 15 App. Cas. 371; 63 L. T. 66.—**P.C.** **LORDS SELBORNE, WATSON and FIELD and SIR B. PEACOCK; considered**. **Whiteley and Roberts, In re** (1890) 60 L. J. Ch. 149; [1891] 1 Ch. 558 (*post*, col. 72); *referred to*, **Reg. (Moore) v. Abbott** (1896) [1897] 2 Ir. R. 362.—**Q.B.D.**; **Co Mayo Presentment, In re Kelly v. Reg.** [1898] 2 Ir. R. 731.—**Q.B.D.**; *discussed*, **Falkingham v. Victorian Ry. Commissioners** (1900) 69 L. J. P. C. 89; [1900] A. C. 452; 82 L. T. 506.—**P.C.** **HALSBURY, L.C., LORDS MACNAGHTEN, DAVEY and ROBERTSON; referred to**, **Clippens Oil Co. v. Edinburgh and District Water Trustees** (1901) 3 Fraser 1113.—**CT. OF SESSION.** *And see "LANDS CLAUSES ACT."*

3. THE UMPIRE.

Neale v. Ledger (1812) 16 East 51; 14 R. R. 283.—**K.B.** *disapproved*: **Cassell, In re** (1829) 9 B. & C. 624; 7 L. J. (O.S.) K. B. 329; 4 M. & R. 555.—**K.B.**; **Ford v. Jones** (1832) 1 L. J. K. B. 104; 3 B. & Ad. 248.—**K.B.**

Ford v. Jones, considered.

Tunno and Bird, In re (1833) 5 B. & Ad. 488; 3 L. J. K. B. 5; 2 N. & M. 328; 39 R. R. 537.

DENMAN, C.J.—The decision there probably went upon some difference in the affidavits of the respective parties, for Littleale, J., says "such assent must always be a matter of doubt," which shows that a difficulty was felt there in getting at the real facts.—p. 493.

PARKER and TAUNTON, JJ., to the same effect. **PATTON, J.**—I have no distinct recollection of the manner in which *Ford v. Jones* was put to the Court; but I think the circumstance of the parties having been present at the choice of an

unipire by lot, and consenting to it was not strongly brought to their attention. It does not appear to have been insisted upon in showing cause I can hardly think, if it had directly appeared that the parties agreed to the mode of choice, the Court would have decided as it did.—p. 498

Cassell, In re, commented on but adopted.

Hodson v. Drewry (1839) 1 W. W. & H. 549; 2 Jur. 1088; S. C. *nom.* Hodson, In re. 7 D. P. C. 569.—LITTLEDALE, J.

Neale v. Ledger (*supra*), approved.

Cassell, In re, followed.

European and American Steam Shipping Co. v. Croakey (1890) 29 L. J. C. P. 153; 8 C. B. (N.S.) 307; 6 Jur. (N.S.) 896; 8 W. R. 236.—C.P.

Neale v. Ledger and European, &c. Co. v. Croakey, applied.

Morgan v. Bolt (*or* Boulth) (1863) 1 N. R. 271; 7 L. T. 671, 11 W. R. 265.—Q.B.

Neale v. Ledger, approved.

Cassell, In re, distinguished.

Hopper, In re (1867) L. R. 2 Q. B. 367; 36 L. J. Q. B. 97; 8 B. & S. 100. 15 L. T. 566; 15 W. R. 443.

COCKBURN, C.J.—Then comes the question as to whether there has been such an appointment as to give jurisdiction to the umpire; and what appears to be the case is, that the two arbitrators, not being able to agree in the appointment of an umpire, did cast lots as to which of two persons should be appointed, but then, before they did that, they each agreed that the man proposed by the other was a fit and proper person to be umpire, and to discharge the duties which would be thrown upon him. We have it, therefore, that there was undoubtedly a concurrent judgment as to the fitness of the person who was finally appointed; and when the arbitrators have come to such a concurrence as to the fitness of either of two persons for the office of umpire, and the only difference between them is as to which of the two they shall appoint, and the appointment is settled by lot, such a case falls directly within the decision of *Neale v. Ledger*, a case upheld by the Court of C. P. in *European and American Steam Shipping Co. v. Croakey*, where Erie, C.J., in pronouncing the judgment of the Court, distinguishes it from *Cassell, Ex parte*, and says that *Neale v. Ledger* ought to be upheld in any case in which the facts are the same. A similar point came before the Court in *Morgan v. Boulth*, where all the cases now cited were mentioned, and this Court, acting on *Neale v. Ledger* and *European and American Steam Shipping Co. v. Croakey*, came to the same conclusion.—p. 375.

BLACKBURN, J. to the same effect. LUSH, J. concurred.

Leeds v. Burrows (1810) 12 East 1.—K.B., distinguished.

Jebb v. McKiernan (1829) M. & M. 340; 31 R. R. 737.—PARKER, J.

Leeds v. Burrows, discussed.

Lord, In re (1854) 24 L. J. Ch. 145; 1 K. & J. 90; 3 Eq. R. 197. 3 W. R. 186.—WOOD, V.-C., approved but not applied.

Collins v. Collins (1858) 28 L. J. Ch. 184; 26 Beav. 306; 5 Jur. (N.S.) 30; 7 W. R. 115.—ROTHLEY, M.B.

Collins v. Collins, followed.

Bos v. Helsham (1866) 36 L. J. Ex. 20; L. R. 2 Ex. 72; 4 H. & C. 642; 15 L. T. 481; 15 W. R. 259.—EX.

[At a sale by auction one of the conditions was that, if any mistake was made in the description of any of the properties offered for sale, or if any error whatever appeared in the particulars of sale, such mistake or error should not annul the sale, but a compensation in such case should be given, to be settled by two referees, one to be appointed by either party to the sale, or an umpire. It was held, following *Collins v. Collins*, that, the reference indicated in the condition being one of the *quantum* of compensation only, was not a reference to arbitration of an existing or future difference within the meaning of the C. L. P. Act, 1854, s. 11; and that the plaintiffs had, therefore, no power under sect. 13 of that Act to appoint their referee as sole arbitrator.]

Lord, In re, and Anglo-Italian Bank and

De Rosaz, In re (1867) L. R. 2 Q. B. 462;

16 L. T. 412.—Q.B., followed.

De Rosaz v. Anglo-Italian Bank (1869) L. R. 4 Q. B. 462; 38 L. J. Q. B. 161; 17 W. R. 724.

LUSH, J.—There are various sections in the Companies' Clauses Consolidation Act, 1845, referring to arbitration. There are sections which also contemplate the appointment of an umpire in the event of the arbitrators disagreeing, but there is no section which gives power to any person to appoint an umpire for the settling of a dispute in cases where the arbitrators differ or neglect to appoint an umpire. The only clause providing the means of appointing an umpire where the arbitrators disagree, is confined to disputes between claimants and railway companies, and then the umpire is to be appointed by the Board of Trade. But nothing in those sections warrants the appointment of an umpire by a judge. However, *Lord, In re*, before the present V.-C., then Wood, V.-C., sanctioned as it is by the decision of this Court in *Anglo-Italian Bank and De Rosaz, In re*, is an authority that the Common Law Procedure Act, 1854, s. 12, would enable a judge to make that appointment.—p. 471. HANNES and HAYES, JJ. concurred.

Collins v. Collins and Bos v. Helsham, affirmed.

Hopper, In re (*supra*), explained.

Dawdy, In re (1885) 15 Q. B. D. 426; 54 L. J. Q. B. 474; 53 L. T. 800.—C.A.

ESHER, M.R.—The case comes within the authority of *Collins v. Collins* and *Bos v. Helsham*, which decide that persons so appointed are valuers, not arbitrators. *Hopper, In re*, is not inconsistent; there the judges of the Court of Q. B. only said that if those cases bore the construction which counsel had attempted to put upon them, they could not agree with them; they did not say that they thought the cases had been wrongly decided. Blackburn, J. said: "*Collins v. Collins* and *Bos v. Helsham* go to this extent, that, where compensation is to be settled by a particular person, that is not necessarily an award. In that I quite agree. An appraisement is not necessarily an award. If those cases are to be supposed to go as far as to decide that an agreement to assess compensation and ascertain value could not be a matter of arbitration, and there is to be no award, I should

certainly pause before I concurred in them." *Hooper, In re*, therefore, in no way takes away from the authority of *Collins v. Collins* and *Bos v. Hesham*.—p. 430. BAGGALLAY, L.J. concurred.

4. THE AWARD.

Thomas v. Harrop (1823) 1 Sim. & S. 524; 24 R. R. 221.—LEACH, V.-C. *not followed*. White v. Sharp (1844) 13 L. J. Ex. 215; 12 M. & W. 712; 1 D. & L. 1039; 1 Car. & K. 348; 8 Jur. 344.

PARKE, B.—*Thomas v. Harrop* is very loosely and shortly reported, being merely *ex relatione*. The case there may, perhaps, have been that no notice was given to the fourth arbitrator that the others had made an award; however, the decision is very unsatisfactory, and cannot guide our judgment.—p. 215.

ALDERSON, B. to the same effect. ROFFE, B. concurred.

Galloway v. Keyworth (1854) 23 L. J. C. P. 218; 15 U. B. 228; 2 C. L. R. 850.—C.P., *conferred*.

Behren v. Bremer (1854) 3 C. L. R. 40.—C.P.

Samuel v. Cooper (1835) 2 A. & E. 752; 1 H. & W. 86; S. C. *nom.* **Samuel v. Levey**, 4 N. & M. 520.—K.B.

Gray v. Gwennap (1817) 1 D. & All. 106; 18 R. R. 442.—K.B.; and **Dunn v. Warlters** (1842) 11 L. J. Ex. 188; 9 M. & W. 293; 1 D. (N.S.) 626.—EX., *followed*.

Gyde v. Boucher (1836) 2 H. & W. 127; 5 D. P. C. 127.—COLERIDGE J., *overruled*. Creswick v. Harrison (1850) 20 L. J. C. P. 56; 10 C. B. 441; 15 Jur. 108; 1 L. M. & P. 721; *affirmed, nom.* Harrison v. Creswick (1852) 21 L. J. C. P. 113; 13 C. B. 399; 16 Jur. 315.—EX. CH.

MAULE, J.—I think that the words "of and concerning the said several premises so referred as aforesaid," make the award sufficient without a special finding on each particular point, and that the award is conclusive. This opinion... is in accordance with the decided cases. In *Dunn v. Warlters* Lord Abinger does not say that he would have decided otherwise, but he merely says he would have required time to consider the subject, and if he had done so I am inclined to think he would have come to the same conclusion. *Gyde v. Boucher* is opposed to the other cases; but when the alternative is, either to overrule the decision of one judge, or to overrule a long current of authorities, I do not think that the Court can entertain much doubt.—p. 58.

JERVIS, C.J. to the same effect.

Gumm v. Fowler (1860) 29 L. J. Q. B. 189; 2 El. & Bl. 890; 6 Jur. (N.S.) 1093; 2 L. T. 282; 8 W. R. 436.—Q.B., *followed*. Courtauld v. Leigh (1869) 38 L. J. Ex. 124; 1 L. R. 4 Ex. 187; 20 L. T. 496.—EX.

Gumm v. Fowler, observed upon.

Jones v. Victoria Graving Dock Co. (1877) 2 Q. B. D. 311; 46 L. J. Q. B. 219; 36 L. T. 317; 25 W. R. 501.—C.A.

COLERIDGE, C.J.—I am, myself, not at all disposed to differ from the judgment which was pronounced in *Gumm v. Fowler*.—p. 328.

BRAMWELL, L.J.—Notwithstanding my very

great respect for the judges who expressed the opinion they did in *Gumm v. Fowler*, I have much misgiving with respect to it.—p. 329.

BRETT, L.J.—But I think that the words of this reference do, according to the decision in *Gumm v. Fowler*, amount to an agreement that there shall be no appeal against the opinion of the Court or the decision of the arbitrator. Whether I should have thought so or not at the time when that case was decided, I do not know. But that case was decided in 1860, and the interpretation then given to those words has been adopted in the recognised books of the profession ever since.—p. 330.

Cartwright v. Blackworth (1832) 1 D. P. C. 489.—LITTLEDALE, J., *overruled*.

Donlan v. Brett (1834) 2 A. & E. 344; 4 N. & M. 854; 4 L. J. K. B. 55.

DENMAN, C.J. (for the Court).—In this case it was contended, in support of the rule, that an award, that a verdict for a sum named should be entered for the plaintiff, is tantamount to an order that the defendant shall pay so much to the plaintiff. My brother Littledale's decision in *Cartwright v. Blackworth* is in favour of this view: on the other side a case in the Ex. (*Jackson v. Clark* (1825) M. & W. 299; 13 Price 208) was cited as being opposed to it. We have conferred with my brother Littledale, and he agrees with us that the rule cannot be made absolute; and he informs us that he should not have decided as he did in *Cartwright v. Blackworth*, if he had been aware of the case in the Ex.—p. 347.

Donlan v. Brett, followed.

Hayward v. Phillips (1837) 6 L. J. K. B. 110; 6 A. & E. 119; 1 N. & P. 288; 1 Jur. 987.—K.B.

Cartwright v. Blackworth, followed.

Alcock, Ex. parte (1875) 1 C. P. D. 48; 45 L. J. C. P. 86; 33 L. T. 532; 24 W. R. 320.

GROVE, J.—There seems to me to be no distinction between *Cartwright v. Blackworth* and this case. There there was an enlargement of the rule: here there was a postponement after counsel had been instructed to oppose the rule, and with his consent. I must confess I can see no substantial distinction between the two cases.—p. 70. ARCHIBALD, J. concurred.

Lonsdale (Lord) v. Littledale (1794) 2 Ves.

451.—LOUGHBOROUGH, L.C.; **Nichols v. Charlie** (1807) 14 Ves. 265.—ELDON, L.C.; and **Quinnet v. Bannister** (1808) 14 Ves.

530.—ELDON, L.C., *discussed*. **Nichols v. Roe** (1834) 3 Myl. & K. 431.—BROUGHAM, L.C.; *reversing* 3 L. J. Ch. 90; 5 Sim. 156.—SHADWELL, V.-C.

Ashton v. Pointer (1834) 2 D. P. C. 651; S. C. 3 D. P. C. 201; 4 L. J. Ex. 71, *overruled*.

Jupp v. Grayson (1834) 4 L. J. Ex. 8; 3 D. P. C. 199; 5 Tyr. 150; 1 C. M. & R. 523.—EX.

Kent v. Elstob (1802) 3 East 18; 6 R. R.

520.—K.B., *distinguished*. **Doe v. Oxenham v. Cropper** (1839) 8 L. J. Q. B. 241; 10 A. & E. 197; 2 P. & D. 490; 3 Jur. 578.—Q.B., *discussed*.

Leggo v. Young (1855) 24 L. J. C. P. 200; 16 C. B. 626.—C.P. *And see post.*

Leggo v. Young (col. 70), *followed*.
Winthurst v. Barrow Shipbuilding Co. (1877)
 46 L. J. Q. B. 477; 2 Q. B. D. 335 (*post*, col. 75).

Hall and Hinds, In re (1841) 10 L. J. C. P.
 210; 2 M. & G. 817; 3 Scott (N.R.) 250.
 —TINDAL, C.J. (for the Court), *commented on*.

Phillips v. Evans (or **Edwards**) (1843) 13 L. J.
 Ex. 80; 12 M. & W. 309; 1 D. & L. 123.—EX.

Hall and Hinds, In re, discussed.
Hagger v. Baker (1845) 14 L. J. Ex. 227; 14
 M. & W. 9; 2 D. & L. 856.—PARKE, B. (for the
 Court).

Phillips v. Evans, commented on.
Hutchinson v. Shepperton (1849) 13 Q. B.
 955; 13 Jur. 1608.

DELMAN, C.J. (for the Court).—The learned
 counsel for the defendants relied upon some
 strong expressions used by my brother Parke in
Phillips v. Evans, which seem to indicate that
 no mistake of an arbitrator can ever be a
 sufficient ground for setting aside an award.
 Though fully sensible of the propriety of observ-
 ing the greatest caution with regard to this
 subject, to avoid inquiries which would unravel
 bygone transactions and keep alive the litigation
 which the parties had hoped to terminate
 by reference, we cannot think the rule universal,
 and subject to no exception. It is at most one
 for guiding our discretion, which cannot be so
 absolutely fettered and rendered powerless. If
 awards are allowed to be questioned under any
 circumstances, it may be difficult to draw a line;
 but a line must be drawn somewhere, and this
 case will certainly not be found to fall within it,
 whenever drawn. If the Court might with prop-
 riety have refused that application in the first
 instance, yet the rule having been granted on
 affidavits clearly setting forth without con-
 tradiction a case of gross injustice, which the
 Court has power to remedy, we ought not to
 sanction that injustice. It may be observed
 that *Hall and Hinds, In re*, is a clear precedent
 for our taking this course, and is not overruled
 by the Court of Ex. in *Phillips v. Evans*, in which
 the facts were held by Alderson, B., not to be
 brought satisfactorily before the Court, as they
 are in this case. *Hall and Hinds, In re*, is
 expressly recognised in *Hagger v. Baker*, where
 the Court refused to interfere in the judicious
 observations of the present L.C.B.—p. 958.
And see post, col. 72.

Robson and Bailston, In re (1831) 1 B. & Ad.
 723.—K.B.; and **Hutchinson v. Shepperton**,
applied.

Mills v. Bowyers' Society (1856) 3 K. & J. 66.
 —WOOD, V.-C. *And see post*.

Phillips v. Evans and Hall and Hinds, In re,
(supra), *observed on*.

Hogge v. Burgess (1858) 3 H. & N. 293;
 27 L. J. Ex. 318; 4 Jur. (N.S.) 698; 6 W. R.
 504.—EX.

CHANNELL, B.—*Hall and Hinds, In re*, went
 to the utmost extent. That case, however,
 was under the consideration of the Court in
Phillips v. Evans, but they did not act upon it.
 —p. 360.

Phillips v. Evans, referred to.
Hodgkinson v. Fernie (1857) 27 L. J. C. P. 66;
 3 C. B. (N.S.) 204.—C.P.

Hogge v. Burgess, explained.
Holgate v. Sulick (1861) 7 T. & N. 418; 31
 L. J. Ex. 7; 3 L. T. 358; 10 W. R. 10.

BRAMWELL, B.—I am not dissenting from
 anything that was said by the Court in *Hogge v.*
Burgess, or by the Court of K. B. in *Kent v. Elstob*
(supra), col. 70], where it was held that a paper
 delivered contemporaneously with the award
 formed part of it. Those decisions were right
 upon the facts. . . . In *Hogge v. Burgess*,
 Watson, B., whose opinions are entitled to the
 greatest respect, uses the general word "con-
 temporaneous," by which he means a writing
 forming part of the award. Neither he nor my
 brother Martin ever intended to depart from
 the *ratio decidendi*, or the opinion expressed by
 the Court of C. P. in *Leggo v. Young* [*supra*,
 col. 70]—p. 421.

WILDE, B. to the same effect.

Hutchinson v. Shepperton (*supra*, col. 71),
applied.

Flynn v. Robertson (1869) 38 L. J. C. P. 240;
 L. R. 4 C. P. 324; 17 W. R. 767.—C.P.

Flynn v. Robertson, distinguished.
Allen v. Greenslade (1875) 33 L. T. 567.—Q.B.
 QUAIN, J.—That was a case of a mistake of
 figures admitted by all parties.—p. 568.

Allen v. Greenslade, followed.
Greenwood v. Brownhill (1881) 44 L. T. 47.—
 C.A. JAMES, BRAMWELL and BRETT, L.JJ.

Earl v. Stoker (1691) 2 Vern. 251.—
 LORD NOTTINGHAM: **Morgan v. Mather**
 (1793) 2 Ves. 15; 2 R. R. 163.—LOUGH-
 BOROUGH, L.C.; and **Mills v. Bowyers'**
Society (*supra*), *considered*.

Whiteley and Roberts, In re (1890) 60 L. J. Ch.
 149; [1891] 1 Ch. 558; 64 L. T. 81; 39 W. R.
 248.—KEKEWICH, J. *See judgment*.

Burnard v. Wainwright (1850) 19 L. J. Q. B.
 423; 1 L. M. & P. 455.—WIGHTMAN, J.,
approved.

Keighley, Maxsted & Co. and Durant & Co.,
In re (1892) 62 L. J. Q. B. 105; [1893] 1 Q. B.
 405; 4 R. 136; 68 L. T. 61; 41 W. R. 437;
 Asp. M. C. 268.—C.A. ESHER, M.R. and LOPES
 and KAY, L.JJ.

Keighley, Maxsted & Co. and Durant & Co.,
In re, referred to.

Palmer and Hosken, In re (1897) 67 L. J. Q. B.
 1; [1898] 1 Q. B. 131.—C.A. (*supra*, col. 63).

Ward v. Dean (1832) 3 B. & Ad. 234; 37
 R. R. 419.—K.B., *followed*.

Mordue v. Palmer (1870) 40 L. J. Ch. 8; L. R.
 6 Ch. 22; 23 L. T. 752; 19 W. R. 86.—JAMES
 and MELLISH, L.JJ.; *reversing* 39 L. J. Ch. 746;
 22 L. T. 359; 18 W. R. 1068.—BACON, V.-C.

Mordue v. Palmer, approved. **Andrews v.**
Barcus (1888) 57 L. J. Ch. 694; 39 Ch. 1. 133;
 58 L. T. 748; 36 W. R. 705; 53 J. P. 4.—C.A.
 COTTON, PRY and LOPES, L.JJ. (*see* "COSTS")
followed. **Stranger and Riley Bros' Arbitration**,
In re (1900) 70 L. J. Q. B. 19; [1901] 1 Q. B.
 105; 49 W. R. 111.—ALVERSTONE, C.J. and
 KENNEDY, J.

Smith v. Sainsbury (1832) 1 L. J. C. P.
 150; 9 Bing. 31.—TINDAL, C.J., *followed*.
Glasgow & S. W. Ry. and L. & N. W. Ry.,

In re (1888) 52 J. P. 215.—HUPPLESTON, B. and MANISTY, J.

Evans and Howell, In re (1842) 4 Mab. & G. 767; 5 Scott (N.S.) 240.—MAULE and COLTJAN, JJ., *followed*.

Harvey v. Shelton (1841) 13 L. J. (Ch. 466; 7 Beav. 455.—DANGDALE, M.R., *not followed*.

Huddersfield Corporation and Jacomb, In re (1874) 13 L. J. Ch. 748; L. R. 17 Eq. 476; 29 L. T. 824; 22 W. R. 255.—MALINS, V.-C.; *affirmed*, 44 L. J. Ch. 96; L. R. 10 Ch. 92; 31 L. T. 466; 23 W. R. 100.—JAMES and MELLISH, L.JJ.

Huddersfield Corporation and Jacomb, In re, followed.

Smith v. Parkside Mining Co. (1880) 50 L. J. Q. B. 144; 6 Q. B. D. 67; 29 W. R. 154.—HAWKINS and STEPHEN, L.JJ.

Smith v. Parkside Mining Co. and Huddersfield Corporation and Jacomb, In re, applied.

Gallop and Central Queensland Meat Export Co., In re (1890) 59 L. J. Q. B. 460; 25 Q. B. D. 230; 62 L. T. 834; 38 W. R. 621.—DENMAN and CHARLES, JJ.

Kellett and Tranmere Local Board, In re (1864) 34 L. J. Q. B. 87; 11 L. T. 457; 13 W. R. 207.—SHER, J., *dissented from*

Warburton v. Haslingden Local Board (1879) 48 L. J. C. P. 451.—DENMAN and LINDLEY, JJ. *And see* "LANDS CLAUSES ACT."

Warburton v. Haslingden Local Board, followed.

Mackenzie, In re (1886) 55 L. J. Q. B. 309; 17 Q. B. D. 114; 34 W. R. 487.—GROVE and STEPHEN, JJ., *dissented from*.

Knowles v. Bolton Corporation (1900) 69 L. J. Q. B. 481; [1900] 2 Q. B. 253; 82 L. T. 229; 48 W. R. 433.—C.A. A. L. SMITH and RIGBY, L.JJ.

Read v. Garnett (1745) Barnes 58, *held overruled*.

Borrowdale v. Hitchener (1802) 3 B. & P. 244. HEATH, J.—With respect to the case cited from Barnes, that has been overruled by subsequent authorities and practice: indeed, many of the cases reported in that book are not law.—p. 245.

Brooks v. Parsons (1843) 13 L. J. Q. B. 50; 8 Jur. 81; 1 D. & L. 691.—PATTESON, J., *held overruled*.

Humphrey v. Pearce (1852) 22 L. J. Ex. 120; 7 Ex. 696.

MARTIN, J.—*Brooks v. Parsons* . . . may now be considered as overruled by no less than three decisions. There is *Wilcox v. Wilcox* [(1849) 19 L. J. Ex. 27; 4 Ex. 500.—EX.] in this Court, which recognises and adopts the principle of the decision of Erle, J. in *Hobson v. Stewart* [(1847) 16 L. J. Q. B. 145; 1 B. C. Rep. 288; 4 D. & L. 589], and there is *Phillips v. Higgins* [(1851) 20 L. J. Q. B. 357; 2 L. M. & P. 355], in which my brother Wightman expressed his opinion that where there is a reference of a cause only, the award is good notwithstanding there is no specific finding on each issue, if it appear by reasonable intendment that all the issues have

been determined in favour of the plaintiffs.—p. 121.

POLLOCK, C.B. and PARKE, B. to the same effect.

5. COSTS.

Wigens v. Cook (1859) 28 L. J. C. P. 312; 6 C. B. (N.S.) 784; 6 Jur. (N.S.) 72.—C.P., *followed*.

Jones v. Jones (1860) 29 L. J. C. P. 151; 7 C. B. (N.S.) 832; 6 Jur. (N.S.) 826; 1 L. T. 373; 8 W. R. 243.—ERLE, C.J. (for the Court).

Wigens v. Cook and Jones v. Jones, distinguished.

Robertson v. Sterne (1862) 31 L. J. C. P. 362; 13 C. B. (N.S.) 248; 9 Jur. (N.S.) 332; 7 L. T. 462; 11 W. R. 94 n.—WILLES, J. (for the Court).

Robertson v. Sterne, followed.

Part v. Lillicrap (1862) 32 L. J. Ex. 150; 1 H. & C. 615; 9 Jur. (N.S.) 80; 7 L. T. 425; 11 W. R. 94.—EX.

Robertson v. Sterne and Fearn v. Sargent (1863) 32 L. J. Ex. 281; 2 H. & C. 293; 8 L. T. 467; 11 W. R. 808.—EX. *distinguished*.

Smith v. Edge (1863) 33 L. J. Ex. 9; 2 H. & C. 659; 9 Jur. (N.S.) 1300; 9 L. T. 445; 12 W. R. 133.—EX.

Smith v. Edge, approved.

Cowell v. Amman Aberdare Colliery Co. (1865) 34 L. J. Q. B. 161; 6 B. & S. 333; 11 Jur. (N.S.) 687; 12 L. T. 418; 13 W. R. 715.—MELLOR, J. (for the Court).

Jones v. Jones, held overruled.

Ferguson v. Davison (1882) 51 L. J. Q. B. 266; 8 Q. B. D. 470; 46 L. T. 101; 30 W. R. 462.—The C.A. (BRETT and HOLKER, L.JJ.) held that *Jones v. Jones* had been overruled in *Cowell v. Amman Aberdare Colliery Co.*

Cowell v. Amman Aberdare Colliery Co., Ferguson v. Davison and Smith v. Edge, approved.

Hyde v. Beavisley (post, col. 75).

Cowell v. Amman Aberdare Colliery Co. and Moore v. Watson (1867) 36 L. J. C. P. 122; L. R. 2 C. P. 314; 15 L. T. 662; 15 W. R. 429.—C.P., *distinguished*.

Forshaw v. De Wette (1871) 40 L. J. Ex. 153; L. R. 6 Ex. 200; 24 L. T. 397; 19 W. R. 777.—EX. *And see post*.

Moore v. Watson, questioned.

Galatti v. Wakefield (1878) 4 Ex. D. 249; 48 L. J. Ex. 70; 40 L. T. 30.—C.A.

BRAMWELL, L.J.—It has been argued that there is no difference between a compulsory reference and a reference by consent, and that notwithstanding the discretion of the arbitrator as to the costs of the award, they follow the event of the cause. In order to establish this proposition, reliance has been placed upon *Moore v. Watson*: it seems to me that that case is quite distinguishable from that before us; but I desire to add that, as at present advised, I do not agree with the decision. I, however, reserve my judgment until the proper moment has come for

determining whether it ought to be overruled.—p. 251.

BRETT and COTTON, L.J.J. to the same effect.

Moore v. Watson, overruled.

Galatti v. Wakefield, followed.

Holland v. Vincent (1853) 23 L. J. Ex. 78; 9 Ex. 274; 2 C. L. R. 407; 17 Jur. 1059; 2 W. R. 96.—PARKE, B. (for the Court); and *Waller v. Smith* (1837) 7 L. J. Ex. 15; 3 M. & W. 138. 6 D. P. C. 103; M. & H. 326.—EX., referred to.

Street v. Street (1900) 69 L. J. Q. B. 574; [1900] 2 Q. B. 57; 82 L. T. 618; 48 W. R. 450.—C.A. COLLINS and ROMER, L.J.J.

COLLINS, L.J.—*Moore v. Watson* was criticised in *Galatti v. Wakefield*. . . . *Moore v. Watson* was again referred to by Brett, L.J., in *Ferguson v. Dawson* (supra). In terms which showed that he did not approve of it. . . . *Moore v. Watson* having been so treated, and differed from by so great an authority as Bramwell, L.J., I think that *Holland v. Vincent*, to which we were referred by counsel for the plaintiff, is very material, inasmuch as it is a valuable authority as to the law upon the point we are considering, before the decision of *Moore v. Watson*, and does not appear to have been cited in that case. . . . In the argument in that case, *Waller v. Smith* was cited, and Parke, B. disposed of it upon the ground that the question in it was not as to the costs of the reference, but as to costs of the cause. . . . The only other authority to which it is necessary to refer is *Forshaw v. De Witte*, which is a distinct authority in cases of reference by consent. . . . In that case, again, *Moore v. Watson* was cited and distinguished as applying only to compulsory references. These are the authorities with which we have to deal in deciding the case before the Court, and it seems to me that the last two cases I have mentioned—the one before and the other subsequent to *Moore v. Watson*—are, when analysed, inconsistent with the principle of that case, since they are both authorities that the costs of a reference are not a part of the costs of the cause. It is very difficult to see any valid reason why these cases are not as applicable to a reference by compulsion as to a reference by consent. . . . But whether the order was consensual or not, I think that I am right in saying that the opinion expressed by Bramwell, L.J., in *Galatti v. Wakefield*, clearly not dissented from, and, as far as I can judge, assented to by the other members of the Court, coupled with the way in which *Moore v. Watson* has been treated, justifies us in saying that even as to a compulsory reference the decision in *Moore v. Watson* was wrong, and can no longer be looked upon as an authority.—pp. 576–578.

Bell v. Postlethwaite (1855) 25 L. J. Q. B. 63; 5 El. & Bl. 695; 1 Jur. (N.S.) 1167; 4 W. R. 80.—CAMPBELL, C.J. (for the Court), followed.

Winthurst v. Barrow Shipbuilding Co. (1877) 46 L. J. Q. B. 477; 2 Q. B. D. 335; 25 W. R. 557.—MELLOR and FIELD, J.J.

Winthurst v. Barrow Shipbuilding Co., distinguished.

Hyde v. Beardsley (1886) 18 Q. B. D. 244; 56 L. J. Q. B. 81; 57 L. T. 802; 35 W. R. 140. MANISTY, J.—The case is not exactly similar to *Winthurst v. Barrow Shipbuilding Co.* It

is an action of contract referred to arbitration under an order by consent, the costs to abide the event. . . . In that case the parties had agreed that there should be no costs. The Court did indeed point out that the parties had put themselves under the terms of the Criminal Law Procedure Act, and not under the Judicature Act, but there the order of reference was silent as to costs, and the case is on that ground essentially distinguishable.—p. 245.

A. L. SMITH, J. to the same effect.

Ellis v. Desilva (1881) 50 L. J. Q. B. 328; 6 Q. B. D. 521; 44 L. T. 209; 29 W. R. 493.—C.A. BRAMWELL, BAGGALLAY and

BRETT, L.J.J., followed.

Gribble v. Buchanan (1856) 26 L. J. C. P. 24; 18 C. B. 691.—JERVIS, C.J. (for the Court), not followed.

Hawke v. Brear (1885) 14 Q. B. D. 841; 54 L. J. Q. B. 315; 52 L. T. 432; 83 W. R. 613.

MATHEW, J.—The defendant's counsel relied on *Gribble v. Buchanan*. In that case Jervis, C.J. thought it reasonable that the term "event" should be construed as we propose to construe it, but he thought that the practice was against that construction. He therefore adopted a construction which he thought unreasonable, because he conceived himself to be bound by authority. I am not surprised to find that a more reasonable course has been since adopted by the C. A. in *Ellis v. Desilva*, and that the Court there held that in a case like this now before us the word "event" must be construed distributively.—p. 844.

A. L. SMITH, J. to the same effect.

Holliday and Wakefield Corporation, In re (1885) 57 L. J. Q. B. 620; 20 Q. B. D. 699; 59 L. T. 248; 52 J. P. 644.—C.A.

FRY and LOPES, L.J.J., not applied.

Gonty and Manchester, Sheffield and Lincolnshire Ry. In re (1896) 65 L. J. Q. B. 625; [1896] 2 Q. B. 439; 75 L. T. 239; 45 W. R. 83.—C.A. ESHER, M.R., A. L. SMITH and RIGBY, L.J.J.

ESHER, M.R.—We think that that case is no longer binding upon us, and that we have jurisdiction over these costs. We accordingly allow the appeal with costs.—p. 631.

G. COMPULSORY REFERENCES.

Baguley v. Markwick (1861) 30 L. J. C. P. 342; 4 L. T. 245; 9 W. R. 587; S. C. non. *Baggalay v. Borthwick*, 10 C. B. (N.S.) 61.—ERLE, C.J. (for the Court).

Sullivan v. Rivington (1850) 28 W. R. 372.—KELLY, C.B. and LUSH, J., observed on and distinguished.

Dyke v. Cannell (1883) 11 Q. B. D. 180; 49 L. T. 174; 81 W. R. 747.

WATKIN WILLIAMS, J.—When we come to look closely at that case, we see that it is not an authority in the present. The application there was for a rule nisi, and unless the plaintiff was entitled to move for an order or rule nisi he was wrong, for he had given no notice, while if he could move for a rule nisi the Court decided that he was out of time to do so, and so the case is not an authority that the mode of moving there was right, as the matter was concluded by showing that if right it was out of time.—p. 181.

CAVE and A. L. SMITH, J. to the same effect.

Dyke v. Cannell, followed.

Bedborough v. Army and Navy Hotel Co.
(1884) 53 L. J. Ch. 658; 50 L. T. 473.—KAY, J.

Lascelles v. Butt (1876) 2 Ch. D. 588; 35 L. T. 122.—BACON, V.-C., *affirmed*, 24 W. R. 659.—C.A., *held to be obsolete*.

Longman v. East, Pentifex v. Severn and Mellin v. Monico (1877) 47 L. J. C. P. 211; 3 C. P. D. 142; 38 L. T. 1; 26 W. R. 183.—C.A. BRAMWELL, BRETT and COTTON, L.J.J., *explained*.

Ward v. Pilley (1880) 5 Q. B. D. 427; 49 L. J. Q. B. 705; 43 L. T. 301; 28 W. R. 937.—C.A. BRAMWELL, BAGGALLAY and BRETT, L.J.J., BRETT, L.J.—An action cannot be tried before an official referee, only issues can be referred to him. On this point the respondent acted on *Lascelles v. Butt*. But that case was decided before *Longman v. East*, in which it was held that an action could not be referred to an official referee at all. The former case must therefore now be regarded as obsolete.—p. 430.

Clow v. Harper (1878) 47 L. J. Ex. 393; 3 Ex. D. 198; 38 L. T. 269; 26 W. R. 364.—C.A. COCKBURN, C.J., BRAMWELL, BRETT and COTTON, L.J.J., *explained*.

Martin v. Efyfe (1883) 49 L. T. 107; 31 W. R. 840.—DENMAN and LOPES, J.J.

Clow v. Harper, discussed.

Knight v. Coales (1887) 19 Q. B. D. 296; 56 L. J. Q. B. 486; 35 W. R. 675.—C.A.

LOPES, L.J. (for self and FRY, L.J.).—That case has, owing to the language used by some of the judges who decided it, been misunderstood. It was an action for breach of covenant to repair. The defendant denied liability *in toto*. There was, therefore, a preliminary question of liability to be decided before any question of quantum of damages, or of account, could arise. There was no matter of mere account. If the defendant was found not to be liable, no matter of account ever could arise. Cockburn, C.J., in the course of his judgment, says: "If part of it only is matter of mere account, that part should be directed to be disposed of by arbitration, but that part alone." If he meant there was no power, where part was matter of mere account which could not be conveniently tried in the ordinary way, to refer the whole matter in dispute, we cannot agree with his view, nor is it in accordance with the opinions of the other judges who were parties to the judgment. Brett, L.J. says: "It is not necessary to decide whether an order can be made to refer compulsorily not only what is matter of account but the other part also." Bramwell, L.J., referring to the practice which had long prevailed—viz., when a part was matter of mere account to refer the whole. says that "he does not like to say the practice is wrong;" and both Bramwell, L.J. and Cotton, L.J. confine their judgments to the facts of the case then before them. . . . Bramwell, L.J., in the course of his judgment [*Ward v. Pilley*], says: "I believe that not long since a notion got abroad that under sect. 3 of the C. L. P. Act [1854] we had power to refer questions only of account, and not other matters, but that mistake we set right in a case which we decided in this Court at the last sittings. . . ." From this expression of opinion Brett, L.J., who delivered a judgment in

the same case, and also was a party to the judgment in *Clow v. Harper*, does not dissent. It is doubtful where the case referred to by Bramwell, L.J. is reported, but it is clear that he considered that matters other than matters of mere account could be referred compulsorily, and that *Clow v. Harper* was not opposed to that law. . . . We considered in that case [*Martin v. Efyfe*] that notwithstanding *Clow v. Harper* it was competent for us to hold that an action may be referred under sect. 3 of the C. L. P. Act, 1854, although the question in dispute does not consist entirely of matters of account. I adhere to the opinion I then expressed.—p. 298.

ESHER, M.R.—For my part, I decline to enter at all upon the discussion as to what *Clow v. Harper* actually decided. I do not intend to say that anything said or intimated by the late L.C.J. or myself in that case was wrong. I decline to enter upon the discussion, because it is clear to me that if any part of a case can be brought within sect. 3 of the C. L. P. Act, 1854, it follows that it comes within sect. 57 of the Judicature Act, 1873; so that, if any part is a matter of mere account, which can be referred under sect. 3 of the earlier Act, the judge now has power, under sect. 57 of the later Act, to refer all the issues in the cause.—p. 302.

Knight v. Coales, applied.

Hurlbutt v. Barnett & Co. (1892) 62 L. J. Q. B. 1; [1893] 1 Q. B. 77; 4 R. 103; 67 L. T. 818; 41 W. R. 32.—C.A. ESHER, M.R., LOPES and KAY, L.J.J.

ARMY AND NAVY.

Hearson, In re (1891) 64 L. T. 535; 55 J. P. 596.—GAYE and LAWRENCE, JJ., *overruled*.

Reg. v. Cumming, Hall, Ex parte (1887) 56 L. J. Q. B. 287; 19 Q. B. D. 13; 57 L. T. 477; 36 W. R. 9; 6 Asp. M. C. 189; 16 Cox C. C. 315; 51 J. P. 326.—COLERIDGE, C.J., MATTHEW, GAYE and A. L. SMITH, JJ., *referred to*.

Hearson v. Churchill (1892) 61 L. J. Q. B. 569; [1892] 2 Q. B. 144; 66 L. T. 843; 40 W. R. 615; 56 J. P. 820.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

Kinloch v. Secretary of State for India (1880) 49 L. J. Ch. 571; 15 Ch. D. 1; 42 L. T. 667; 28 W. R. 619.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.J.J., *reversing* HALL, V.-C.: *affirmed* (1882) 51 L. J. Ch. 885; 7 App. Cas. 619; 47 L. T. 133; 30 W. R. 845.—H.L. (E.) LORDS SELBORNE, L.C., O'HAGAN, BLACKBURN and WATSON, *applied*.

Reg. v. Secretary of State for War (1891) 60 L. J. Q. B. 457; [1891] 2 Q. B. 326; 64 L. T. 764; 40 W. R. 5; 56 J. P. 105.—C.A. ESHER, M.R. and KAY, L.J.

Palmer v. Flower (1871) L. R. 13 Eq. 250; 41 L. J. Ch. 193; 25 L. T. 816; 24 W. R. 174.—V.-C., *distinguished*.

Ward's Trusts, In re (1872) 42 L. Ch. 4; L. R. 7 Ch. 727; 27 L. T. 668; 20 W. R. 1024.—L.J.J.

Birch v. Birch (1888) 52 L. J. P. 88 : 8 P. D. 163; 32 W. R. 96.—**HANNEN, P.**, *approved*.
Dent v. Dent (1867) 36 L. J. Mat. 61; L. R. 1 P. 866; 15 L. T. 635, 15 W. R. 591.—**JUDGE ORDINARY**, *distinguished*.
Wells v. Forster (1841) 10 L. J. Ex. 216. 8 M. & W. 149; 5 Jur. 464. *adopted*.
Lucas v. Harris (1886) 56 L. J. Q. B. 15; 18 Q. B. D. 127; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261.—**C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.**

LINDLEY, L.J.—Reliance was placed by counsel for the plaintiff and by the Court below on *Dent v. Dent*, which was thought to be opposed to *Birch v. Birch*. But the pension there in question was an Indian Navy retired pension and was not apparently subject to any Indian or English statute which made it inalienable. At all events, if it was in truth inalienable by statute, that circumstance does not appear from the report, and was not present to the mind of the Court. *Dent v. Dent*, therefore, cannot be regarded as opposed to *Birch v. Birch*, nor to any other decision in the books. It appears to me, therefore, both on principle and on authority, that the pensions of these defendants, being made inalienable by statute, are not liable to be taken in execution either through an order for a receiver or in any other way.—p. 20.

Lucas v. Harris, followed.
Crowe v. Price (1889) 58 L. J. Q. B. 215; 22 Q. B. D. 429; 60 L. T. 915; 37 W. R. 424; 53 J. P. 389.—**C.A. ESHER, M.R., BOWEN and FRY, L.JJ.**

Lucas v. Harris, discussed.
Saunders, In re, Saunders, Ex parte (1895) 64 L. J. Q. B. 789; [1895] 2 Q. B. 424; 14 R. 567; 73 L. T. 172; 44 W. R. 30; 59 J. P. 740; 2 *Mansour* 861.—**C.A. ESHER, M.R., KAY and SMITH, L.JJ.**

Lucas v. Harris, dictum explained.
Tilling, Limited v. Blythe (1899) 68 L. J. Q. B. 350; [1899] 1 Q. B. 557; 80 L. T. 44; 47 W. R. 278.—**C.A. A. L. SMITH and COLLINS, L.JJ.**

Knight v. Bulkeley (1858) 27 L. J. Ch. 592; 4 Jur. (N.S.) 527; 6 W. R. 610.—**V.-C.**, *not followed*.
Lloyd v. Chetham (1861) 30 L. J. Ch. 640; 3 Giff. 171; 7 Jur. (N.S.) 1272; 4 L. T. 576; 9 W. R. 924.

Marks v. Frogley (1898) 67 L. J. Q. B. 284; [1898] 1 Q. B. 396; 78 L. T. 77; 18 Cox C. C. 711.—**KENNEDY, J.**, *reversed*, 67 L. J. Q. B. 605; [1898] 1 Q. B. 888; 78 L. T. 607; 46 W. R. 348.—**C.A. SMITH, CHITTY and COLLINS, L.JJ.**

Reg. v. Lewis (1896) 65 L. J. M. C. 126; [1896] 1 Q. B. 665; 74 L. T. 551; 18 Cox C. C. 328; 60 J. P. 376.—**RUSSELL, C.J. and WRIGHT, J.** See now 60 & 61 Vict. c. 47, s. 1.

ARTIZANS' DWELLINGS.

Badham v. Morris (1882) 52 L. J. Ch. 237. n.; 45 L. T. 579.—**HALL, V.-C.**, *followed*.
Swainston v. Finn (1883) 52 L. J. Ch. 235; 48 L. T. 631; 31 W. R. 498.—**PEARSON, J.**

ASSIGNMENT.

Diplock v. Hammond (1884) 23 L. J. Ch. 550; 5 De G. M. & G. 320; 2 W. R. 500.—**KNIGHT BRUCE and TURNER, L.JJ.**, *affirming* 2 Sm. & G. 111.—**STUART, V.-C.**, *distinguished*.

Shellard, Ex parte, Adams, In re (1873) 43 L. J. Bk. 3; L. R. 17 Eq. 109; 29 L. T. 621; 22 W. R. 152.

BACON, C.J.—The distinction between assignments and bills of exchange and orders for payment, is one which has been known for many years, and has been frequently the subject of decision. *Diplock v. Hammond* was a case in which a document was held to be an assignment of the whole of a fund. The Court declined to force the construction of that document by holding that it was only a bill of exchange. I have no inclination to find fault with the decision in that case, but, in my opinion, it does not govern the present case. The present is a pure case of an order for payment of money out of particular funds, at some future day not then fixed, and, as such, it is liable to be stamped as a bill of exchange, and is an order for payment (even if not strictly a bill of exchange), within the meaning of the Stamp Act.—p. 4.

Shellard, Ex parte, Adams, In re, not followed.

Brice v. Bannister (1878) 47 L. J. Q. B. 729; 3 Q. B. D. 569; 38 L. T. 739; 26 W. R. 670.—**C.A. COTTON and BRAMWELL, L.JJ.; BRETT, L.J.**, *dissenting, discussed and followed*.

Buck v. Robson (1878) 26 W. R. 804; 48 L. J. Q. B. 250; 3 Q. B. D. 686; 39 L. T. 825.

COCKBURN, C.J. (for self and **MELLOR, J.**)—The decision of the C. A. in *Brice v. Bannister*, in favour of the plaintiff on an order similar in its terms to those of the document in the case before us, implies that the Court looked upon the document, not as an order for the payment of money, but as an assignment *pro tanto* of the debt due from the defendant to the builder. Being ourselves decidedly of opinion that an order from a creditor to his debtor under an ordinary contract for the price of goods, or for work and labour, or the like, to pay a third party, can confer a right on the latter only so far as it operates as an assignment of the debt, we feel ourselves warranted, on the authority of *Brice v. Bannister*, in acting on that view, notwithstanding the decision in *Shellard, Ex parte*.—p. 806.

Buck v. Robson, followed.
Fisher v. Calvert (1879) 27 W. R. 301.—**JESSEL, M.R.**

Brice v. Bannister, approved. **Hall, Ex parte, Whitting, In re** (1879) 48 L. J. Bk. 79; 10 Ch. D. 615; 40 L. T. 179; 27 W. R. 64; 385.—**C.A. JESSEL, M.R., JAMES and BRAMWELL, L.JJ.**, *distinguished*. **Jones, In re, Nichols, Ex parte** (1883) 22 Ch. D. 782; 52 L. J. Ch. 635; 48 L. T. 492; 31 W. R. 661.—**C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.** *And see post*.

National Provincial Bank v. Harle (1881) 50 L. J. Q. B. 437; 6 Q. B. D. 626; 44 L. T. 585; 29 W. R. 564.—**POLLOCK, B.**, *distinguished*.
Burlinson v. Hall (1884) 12 Q. B. D. 347; 53

L. J. Q. B. 222; 50 L. T. 723; 32 W. R. 492; 48 J. P. 216.

DAY, J.—The only real difficulty which has been raised is with respect to *National Provincial Bank v. Harle*. It would not be becoming in me to make any other observation on the case than this, viz., that it seems to me distinguishable on the ground mentioned by Pollock, B. in the paragraph of his judgment in which he attaches importance to the introduction of a stipulation or covenant for the reconveyance of the mortgaged premises, and it is possible that that was the turning point of that judgment. I have no doubt of the true construction of the sub-sect. 6 [sect. 25 of the Judicature Act, 1873], and that the plaintiff has a right to sue, as he has done.—p. 350.

A. L. SMITH, J.—After some hesitation in this case I arrive at the conclusion that the plaintiff is entitled to judgment. My main difficulty is to distinguish the case from *National Provincial Bank v. Harle*, although, no doubt, Pollock, B. does say at the end of his judgment that the proviso for reconveyance sufficiently indicates upon the face of the assignment that it purports to be by way of charge only. But I cannot say that makes a satisfactory distinction between that case and the present one.—p. 351.

And see post, col. 82.

Burlinson v. Hall, *followed*.

National Provincial Bank v. Harle, *disapproved*.

Tancred v. Delagoa Bay Ry. (1889) 58 L. J. Q. B. 159; 23 Q. B. D. 239; 61 L. T. 229; 38 W. R. 15; 5 Times L. R. 587.—DENMAN and CHARLES, JJ.

Tancred v. Delagoa Bay Ry., *referred to*.

English and Scottish Mercantile Investment Co. v. Brunton [1892] 2 Q. B. 1; 66 L. T. 767.—CHARLES, J.; *affirmed*. (1892) 62 L. J. Q. B. 136; [1892] 2 Q. B. 700; 4 K. 58; 67 L. T. 406; 44 W. R. 133.—C.A. ESHER, M.R., BOWEN and KAY, L.JJ.

Brice v. Bannister, *distinguished*, Western Waggon Co. v. West (1891) 61 L. J. Ch. 244; [1892] 1 Ch. 271; 66 L. T. 402; 40 W. R. 182.—CHITTY, J.; *not applied*, May and Hassell v. Lane (1894) 64 L. J. Q. B. 236; 14 K. 149; 71 L. T. 869; 43 W. R. 193.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.; *reversing* 43 W. R. 58.—MATHEW and CHARLES, JJ. *And see post*, col. 82.

Tancred v. Delagoa Bay Ry., *approved*.

Brice v. Bannister, *discussed*.

Durham Bros. v. Robertson (1898) 67 L. J. Q. B. 484; [1898] 1 Q. B. 765; 78 L. T. 438.—C.A.

CHITTY, L.JJ.—In that case there was an assignment of 100l. out of money due, or to become due, to the assignor under a contract to build a ship, with an express power to give a good discharge to the debtor. Coleridge, C.J. held that the assignment was within sect. 25 [Judicature Act, 1873]. But the C.A. decided the case quite apart from the Act. Cotton, L.J. decided the case on the ground of equitable jurisdiction. That is shown by the opening sentence of his judgment, where he says that the letter was a good equitable assignment. Bramwell, L.J. reluctantly assented to this view. Brett, L.J. dissented, but on general principle. So soon as it was ascertained that there was a good equitable assignment with power to give a discharge, it became unnecessary to consider whether it fell within the Act or not. In *Nichols*, *Ex parte*

[*supra*, col. 80], the present M.R., referring to this decision, treated the assignment as an equitable assignment. He said that the decision was founded on the principle that the right of an equitable assignee of a debt cannot be defeated by a voluntary payment by the debtor to the assignor. The decision of Coleridge, C.J. in *Brice v. Bannister*, that the case fell within sect. 25, appears to me to be open to question. . . . The section speaks of an absolute assignment of any debt or other chose in action. It does not say "or any part of a debt or chose in action" it appears to me, as at present advised, to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit. However, it is not necessary to decide the point in the present case, and I leave it open for future consideration.—p. 488. A. L. SMITH and COLLINS, L.JJ. concurred.

Durham Bros. v. Robertson, *applied*, Griffin, In re, Griffin v. Griffin (1898) 68 L. J. Ch. 220; [1899] 1 Ch. 408; 79 L. T. 442.—BYRNE, J.; *referred to*, Jones v. Humphreys (1901) 71 L. J. K. B. 23; [1902] 1 K. B. 10; 85 L. T. 488; 50 W. R. 191.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Comfort v. Betts (1891) 60 L. J. Q. B. 656; [1891] 1 Q. B. 737; 64 L. T. 685; 39 W. R. 595; 65 J. P. 630.—C.A. ESHER, M.R., FRY and LOPES, L.JJ., *applied* Wiscener v. Rackow (1897) 76 L. T. 448; 13 Times L. R. 358.—C.A. ESHER, M.R., LOPES and CHITTY, L.JJ.

Tancred v. Delagoa Bay Ry. (*supra*) and **Comfort v. Betts**, *distinguished*.

Mercantile Bank of London v. Evans (1899) 68 L. J. Q. B. 921; [1899] 2 Q. B. 613; 81 L. T. 376.—C.A. HALSBURY, L.C., A. L. SMITH and V. WILLIAMS, L.JJ.

Mercantile Bank of London v. Evans, and Jones v. Humphreys (*supra*), *distinguished*.

Burlinson v. Hall (*supra*, col. 80) *referred to*, Hughes v. Pump House Hotel Co. (1902) 71 L. J. K. B. 630; [1902] 2 K. B. 190; 86 L. T. 794; 60 W. R. 660.—C.A. MATHEW and COZENS-HARDY, L.JJ.

King v. Victoria Insurance Co. (1896) 65 L. J. P. C. 38; [1896] A. C. 250; 74 L. T. 206; 44 W. R. 592.—F.C. LORDES WATSON, HOBHOUSE, DAVEY and SIR R. COUCH, *referred to*.

Manchester Brewery Co. v. Coombs (1900) 70 L. J. Ch. 814; [1901] 2 Ch. 608.—FARWELL, J.

King v. Victoria Insurance Co., *explained*, Manchester Brewery Co. v. Coombs and May v. Lane (*supra*, col. 81), *commented on*.

Marchant v. Morton, Down & Co. (1901) 70 L. J. K. B. 820; [1901] 2 K. B. 829; 85 L. T. 169.—CHANNELL, J., *referred to*.

Torkington v. Magee (1902) 71 L. J. K. B. 712; [1902] 2 K. B. 427; 87 L. T. 304.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Torkington v. Magee, *referred to*, Associated Portland Cement Manufacturers, Ltd. v. Tolhurst (1902) 71 L. J. K. B. 949; [1902] 2 K. B. 660; 87 L. T. 465; 51 W. R. 81.—C.A. COLLINS, M.R., SIR F. JEUNE and COZENS-HARDY, L.JJ.

Bushby, Ex parte, Irving, In re (1877) 47 L. J. Bk. 38; 26 W. R. 376; **S. C. nom. Brett, Ex parte, Irving, In re**, 37 L. T. 507; 7 Ch. D. 419.—**BACON, C.J.**

Dearle v. Hall and Loveridge v. Cooper (1828) 3 Russ. 1, 30; 2 L. J. (O.S.) Ch. 62, 27 R. R. 1.—**LYNDBURST, L.C., discussed and applied, Foster v. Cockerell** (1833) 3 Cl. & F. 436.—**H.L. (E.)** **LYNDBURST, L.C. and LORD BROUGHAM: distinguished, Timson v. Ramsbottom** (1837) 2 Keen 35.—**LANGDALE, M.R., compromised on appeal; explained, Jones v. Jones** (1838) 7 L. J. Ch. 164. 8 Sim. 633.—**SHADWELL, V.-C., not applied, Rochard v. Fulton** (1844) 7 Ir. Eq. R. 131.—**SUGDEN, L.C.: discussed, Dunster v. Glengall (Lord)** (1853) 3 Ir. Ch. R. 47.—**CUSACK SMITH, M.R.**

Dearle v. Hall, Loveridge v. Cooper and Timson v. Ramsbottom (supra); referred to, Meux v. Bell (1841) 11 L. J. Ch. 77; 1 Hare 73.—**WIGRAM, V.-C. (and see post): Warburton v. Hill** (1854) 23 L. J. Ch. 633; Kay 470; 2 Eq. R. 441; 2 W. R. 365.—**WOOD, V.-C.; discussed, Ward v. Duncombe (post).**

Dearle v. Hall, principle applied, Daniel v. Freeman (1876) Ir. R. 11 Eq. 233.—**SULLIVAN, M.R.: varied, Ibb. 638.—BALL, L.C. and CHRISTIAN, L.J.: Freshfield's Trust, In re** (1879) 11 Ch. D. 198; 40 L. T. 57; 27 W. R. 375.—**JESSEL, M.R.: English and Scottish Mercantile Investment Co. v. Brunton** [1892] 2 Q. B. 1 (*supra*, col. 81); **Stephens v. Green** (1895) 64 L. J. Ch. 546; [1895] 2 Ch. 148; 12 R. 252; 72 L. T. 375; 43 W. R. 465.—**C.A. LINDLEY, LOPES and KAY, L.J.J.: Lloyd's Bank v. Pearson** (1901) 70 L. J. Ch. 422; [1901] 1 Ch. 865; 84 L. T. 314.—**COZENS-HARDY, J. And see "COMPANY."**

Dearle v. Hall, principle not applied, Scott v. Hastings (Lord) (1858) 4 K. & J. 633; 5 Jur. (N.S.) 450; 6 W. R. 862.—**WOOD, V.-C.; Richards, In re, Humber v. Richards** (1890) 59 L. J. Ch. 728; 45 Ch. D. 589; 63 L. T. 451; 39 W. R. 186.—**STIRLING, J.; referred to, Butler, In re** (1899) [1900] 2 Ir. R. 159.—**BOYD, J.**

Meux v. Bell (supra), followed.
Hall, In re, Nolan v. O'Brien (1880) 7 L. R. Ir. 180.—**CHATTERTON, V.-C.**

Timson v. Ramsbottom and Hall, In re, Nolan v. O'Brien, discussed and distinguished.
Wyart, In re, White v. Ellis (1891) 61 L. J. Ch. 178; [1892] 1 Ch. 188; 65 L. T. 841; 40 W. R. 177.—**C.A. LINDLEY, BOWEN and FRY, L.J.J., affirming STIRLING, J.; affirmed, nom. Ward v. Duncombe** (1893) 62 L. J. Ch. 881; [1893] A. C. 869; 1 R. 224; 69 L. T. 121; 42 W. R. 59.—**H.L. (E.) HERSHELL, L.C., LORDS MACNAGHTEN and HANNEN. See judgments at length, and see "MORTGAGE"; "TRUST."**

Timson v. Ramsbottom and Hall, In re, distinguished.

Wasdale, In re, Brittin v. Partridge (1899) 68 L. J. Ch. 117; [1899] 1 Ch. 163; 79 L. T. 520; 47 W. R. 169.

STIRLING, J.—I am now asked to hold that an assignee who has given notice to all the trustees in existence at the time of his assignment is not entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all the trustees, and who gives notice of such assignment to the new trustees. That, as I think, goes beyond the decisions in *Timson v. Ramsbottom*, and *Hall*,

In re, for in both those cases the assignee omitted to give notice to a trustee in existence when he took his assignment. The principle on which the doctrine of the Court as to notice is founded was the subject of much discussion in the H. L. in the recent case of *Ward v. Duncombe*.—p. 118. See judgment at length.

Timson v. Ramsbottom, Hall, In re, and Wasdale, In re, Brittin v. Partridge, referred to.

Freeman v. Laing (1899) 68 L. J. Ch. 586; [1899] 2 Ch. 355; 81 L. T. 167; 48 W. R. 9.—**BYRNE, J.**

ATTACHMENT.

OF DEBT.

Price, In re (1869) L. R. 4 C. P. 155.—**C.P., followed.**

Hartley v. Shemwell (1861) 30 L. J. Q. B. 223; 1 B. & S. 1; 7 Jur. (N.S.) 774; 9 W. R. 520.—**Q.B., discussed.**

Sunderland Local Marine Board v. Frankland (or Frankland, In re) (1872) 42 L. J. Q. B. 13; L. R. 8 Q. B. 18; 28 L. T. 18.—**ARCHIBALD, J. (for the Court).**

Frankland, In re, approved.

Hartley v. Shemwell, disapproved.

Best v. Pembroke (1873) L. R. 9 Q. B. 363; 42 L. J. Q. B. 212; 29 L. T. 827; 21 W. R. 919.
BLACKBURN, J.—The real point which was there [Hartley v. Shemwell] discussed and decided was, that the arrest of the garnishee was no extinguishment of the debt, and that it still remained liable to attachment. We cannot support Hartley v. Shemwell without overruling Frankland, In re, and that I think we ought not to do,—p. 367.

QUAIN and ARCHIBALD, JJ. to the same effect.

Holmes v. Tutton (1855) 24 L. J. Q. B. 346; 5 El. & Bl. 65; 1 Jur. (N.S.) 975.—**CAMPBELL, C.J. (for the Court), approved.**
Turner v. Jones (1857) 26 L. J. Ex. 262; 1 H. & N. 578; 5 W. R. 318.—**EX.**

Holmes v. Tutton, applied.

Tilbury v. Brown (1860) 30 L. J. Q. B. 46; 6 Jur. (N.S.) 1151; 3 L. T. 380; 9 W. R. 147.—**CROMPTON, J.**

Holmes v. Tutton and Tilbury v. Brown, distinguished.

Murray v. Arnold (1862) 32 L. J. Q. B. 11; 3 B. & S. 287; 9 Jur. (N.S.) 461; 7 L. T. 385; 11 W. R. 147.—**Q.B.**

Holmes v. Tutton, approved.

Williams, Ex parte, Davies, In re (1872) 41 L. J. Bk. 38; L. R. 7 Ch. 314.—**JAMES and MELLISH, L.J.J., explained.**

Emanuel v. Bridger (1874) 43 L. J. Q. B. 96; L. R. 9 Q. B. 286; 30 L. T. 193; 22 W. R. 404.—**QUAIN, J. (for the Court), approved.**

Stevens v. Phelps (1875) 44 L. J. Ch. 689; L. R. 10 Ch. 417; 23 W. R. 716.—**JAMES and MELLISH, L.J.J.**

Greenway, Ex parte, Adams, In re (1873) 42 L. J. Bk. 110; L. R. 16 Eq. 619; 29 L. T. 15; 21 W. R. 866.—**BACON, C.J., dissented from.**

Low v. Blakemore (1875) 44 L. J. Q. B. 155; L. R. 10 Q. B. 485; 33 L. T. 473; 23 W. R. 851.—**LUSH, J. See judgment at length.**

Holmes v. Tutton, Emanuel v. Bridger, and Lowe v. Blakemore, *followed*.

Greenway, *Ex parte*, *disapproved*.

Joselyne, *Ex parte*, Watt, *In re* (1878) 8 Ch. D. 327; 47 L. J. Bk. 91; 38 L. T. 661; 26 W. R. 645. JAMES, L.J.—I think we must follow the decisions of the Court of Q. B. and not that of the C.J. in *Greenway, Ex parte*. . . There has been a uniform course of decisions for more than twenty years, ever since *Holmes v. Tutton*, in which, though it was not absolutely necessary so to decide, the Court were clearly of opinion that the creditor who had served a garnishee order *nisi* was a secured creditor of his judgment debtor.—p. 330.

COTTON and THESIGER, L.JJ. to the same effect.

Joselyne, *Ex parte*, *commented on*.

Butler v. Wearing (1885) 17 Q. B. D. 182; 3 Morrell 5.—MANISTY, J.; *affirmed*, 39 W. R. 116; 7 Morrell 261.—C.A. See "BANKRUPTCY."

Jones v. Thompson (1858) 27 L. J. Q. B. 284; 21 B. & E. 63; 4 Jur. (N.S.) 398; 6 W. R. 443.—WIGHTMAN and CROMPTON, JJ., *approved*.

Hall v. Pritchett (1877) 47 L. J. Q. B. 15; 3 Q. B. D. 215; 37 L. T. 671; 26 W. R. 95.—COCKBURN, C.J. and MELLOR, J.

Tapp v. Jones (1875) 44 L. J. Q. B. 127; L. R. 10 Q. B. 691; 33 L. T. 201; 23 W. R. 691.—BLACKBURN and FIELD, JJ., *approved*.

Cowan's Estate, *In re*, Rapier v. Wright (1880) 49 L. J. Ch. 402; 14 Ch. D. 638; 42 L. T. 866; 28 W. R. 827.—HALL, V.-C.

Jones v. Thompson and Tapp v. Jones, *followed*.

Cowan's Estate, *In re*, and Chatterton v. Watney (1881) 50 L. J. Ch. 227, 535; 17 Ch. D. 259; 44 L. T. 391; 29 W. R. 573.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ., *commented on*.

Webb v. Stanton (1883) 52 L. J. Q. B. 584; 11 Q. B. D. 518; 49 L. T. 432.

BRETT, M.R.—I am not at all inclined to say that the order which was made by Hall, V.-C., in *Cowan's Estate, In re*, was not a right order, because it seems to me that there was an existing debt in that case; and it does not, in my opinion, signify whether it was a legal or an equitable debt, if there was a debt. An order to attach an existing debt is good. But the order is not void because it attempts to include something which does not exist and which cannot be attached by it. The only effect of such an order would be that the parties would be attempting to put it into effect against something which it does not cover. I cannot help seeing, so far as I understand that decision, that Hall, V.-C. came to the conclusion that something might be an accruing debt within the meaning of the rule which was neither a legal nor an equitable debt, payable *in presenti*, or *debitum in presenti, solvendum in futuro*. If that be so, I do not agree with him, and I differ from anything in that case which attempts to go beyond what I have stated.—p. 587.

LINDLEY, L.J.—With regard to what has been the practice, I cannot read the decision of Hall, V.-C. in *Cowan's Estate, In re*, without seeing that he was disposed to attach money which was coming to a trustee. But the V.-C. there had to deal with a somewhat different point: for there was a question of some standing in the Court of

Ch. as to whether money in the possession of a receiver or official liquidator was an attachable debt, and the V.-C. decided that it was. The difficulty there was, that it was supposed to be a contempt of Court to interfere with the Court of Ch.: but the V.-C. said that he saw no objection to attach money in the hands of a receiver: and that decision is right. The question as to whether, under Ord. XLV. r. 2, moneys to become due can be attached by a *cestui que trust* was discussed: but the V.-C. seemed to assume rather than to consider that they could now be attached. To that extent it seems to me that the decision cannot be supported. . . . The question there [*Chatterton v. Watney*] was, whether a mortgagee who would be entitled to the proceeds of sale of a mortgage security was such a debtor that the money coming to him from the sale could be attached; and it was held that the surplus proceeds of the sale could be attached.—p. 588.

FRY, L.J. to the same effect.

[*Chatterton v. Watney* is not referred to in the report in the Law Reports.]

Jones v. Thompson, *applied*.

Reg. v. Hopkins (1896) 65 L. J. M. C. 125; [1896] 1 Q. B. 652; 44 W. R. 585.—C.C.R.

Chatterton v. Watney (*supra*), *applied*.

Rogers v. Whiteley (1889) 58 L. J. Q. B. 416; 23 Q. B. D. 286; 37 W. R. 611; 5 Times L. R. 575.—C.A. COLERIDGE, C.J., LINDLEY and LOPES, L.JJ.; *affirmed*, [1892] 61 L. J. Q. B. 512; [1892] A. C. 118; 66 L. T. 303.—H. (E.) HALSBURY, L.C., LORDS WATSON, MACNAGHTEN, MORRIS, FIELD and HANSEN.

Rogers v. Whiteley, *applied*.

Yates v. Terry (1900) 70 L. J. Q. B. 24; [1901] 1 Q. B. 102; 83 L. T. 415; 49 W. R. 112.—LAWRANCE and KENNEDY, JJ.; *reversed*. [1902] 71 L. J. K. B. 282; [1902] 1 K. B. 527; 86 L. T. 133; 50 W. R. 293.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

Dolphin v. Layton (1879) 48 L. J. Q. B. 426; 4 C. P. D. 180; 27 W. R. 786.—COLERIDGE, C.J. and DENMAN, J., *applied*. Prout v. Gregory (1889) 59 L. J. Q. B. 118; 24 Q. B. D. 281; 61 L. T. 696; 38 W. R. 204; 7 Morrell 1.—COLERIDGE, C.J. and MATHEW, J.

Dolphin v. Layton and Prout v. Gregory, *referred to*.

Marshall Turner, *Ex parte*, Warwick and Worcester Ry., *In re* (1860) 30 L. J. Ch. 92; 2 De G. F. & J. 354; 6 Jur. (N.S.) 1172; 3 L. T. 380.—KNIGHT BRUCE and TURNER, L.JJ.; and Kianher v. Weill (1901) 17 Times L. R. 344.—C.A. A. L. SMITH, M.R., COLLINS and ROMER, L.JJ., *distinguished*.

Spencer v. Coleman (1901) 70 L. J. K. B. 632; [1901] 2 K. B. 199; 84 L. T. 703; 49 W. R. 516.—C.A.

STIRLING, L.J.—That decision [*Turner, Ex parte*] is no authority on the present case. What happened there was that an application was made in Chambers to Willes, J., for the garnishee order. The company was indebted to the judgment debtor, and notwithstanding that the company was in liquidation, Willes, J., finding a debt due from the company to the judgment debtor, made an order attaching the money so due in the hands of the company. The order was made, as appears from the

report, against the company, and not against the liquidator, and still less against any official of the Board of Trade. The order which has been made here is of a totally different nature. It is in a totally different form from that which was made by Willes, J., and which was the foundation of the application afterwards to the Court of Ch. in *Marshall Turner, Ex parte*. The order having been made there in proper form, effect was given to it in the winding-up. That is all that was decided in that case.—p. 635.

COLLINS, L.J.—I should add that in *Klamber v. Well* the whole of the argument was based on the fact that there was in existence a garnishee order, and upon that fact alone. Therefore it has no application here.—p. 636.

Hayter (or Hayton) v. Beall (1881) 29 W. R. 333.—LUSH, L.J. and GROVE, J.; *reversed*, (1881) 44 L. T. 131.—C.A. BRAMWELL and BAGGALLAY, L.J.J.; BRETT, L.J. *dissenting*.

Coren v. Barne (1889) 58 L. J. Q. B. 384; 22 Q. B. D. 249; 60 L. T. 303; 37 W. R. 415.—DENMAN and STEPHEN, J.J., *approved*.

Randall v. Lithgow (1884) 53 L. J. Q. B. 518; 12 Q. B. D. 625; 50 L. T. 587; 32 W. R. 794.—WILLIAMS, J. (for the Court), *held applicable*.

De Pass v. Capital and Industries Corporation (1890) 66 L. J. Q. B. 253; [1891] 1 Q. B. 216; 64 L. T. 43; 39 W. R. 231.—C.A. ESHER, M.R., LOPES and KAY, L.J.J.; *affirmed, nom. Vinall v. De Pass* (1892) 61 L. J. Q. B. 507; [1892] A. C. 90; 66 L. T. 422.—H.L. (E.) HALSBURY, L.C., LORDS WATSON, MACNAGHTEN, FIELD and HANNEN.

OF PERSON.

See also "PARLIAMENT," "SHERIFF," and "SOLICITOR."

Doe v. Reynolds (1830) 10 B. & C. 481; 5 L. J. (O.S.) K. B. 226.—TENTERDEN, C.J., *held overruled*.

Hampleys v. Franks (1858) 27 L. J. C. P. 114; 3 C. B. (N.S.) 765; 4 Jur. (N.S.) 241.—COCKBURN, C.J.

Jupp v. Cooper (1879) 28 W. R. 324; 5 C. P. D. 25.—LINDLEY, J., *considered*.

Eynde v. Gould (1882) 9 Q. B. D. 335; 51 L. J. Q. B. 425; 31 W. R. 49.

COLERIDGE, C.J.—In *Jupp v. Cooper* all that the attention of the Court was called to was, whether the rule should be absolute in the first instance or only a rule *nisi*.—p. 336. GROVE, J. *concurred*.

Thomas v. Palin (1882) 21 Ch. D. 360; 47 L. T. 207; 30 W. R. 716.—C.A. JESSEL, M.R. and LINDLEY, L.J., *followed*.

Wallace v. Graham (1883) 11 L. R. Ir. 369.—SULLIVAN, M.R.

Browning v. Sabin (1877) 46 L. J. Ch. 728; 5 Ch. D. 511; 25 W. R. 602.—JESSEL, M.R., *explained*.

A Solicitor, in re (*or* Ryan, in re) (1880) 49 L. J. Ch. 295; 14 Ch. D. 152; 43 L. T. 310; 28 W. R. 529.

JESSEL, M.R.—The reason why I decided in *Browning v. Sabin* that service of the notice of motion upon the solicitors on the record was sufficient, was, because in a suit service on the

solicitor was always treated as service on the party, and, therefore, that mode of service would be "notice to the party" within the meaning of Ord. XLIV. r. 2, which provides that "no notice of attachment shall be issued without the leave of the Court, or a judge, to be applied for on notice to the party against whom the attachment is to be issued."—p. 296.

Browning v. Sabin and A Solicitor, in re, distinguished.

Mann v. Perry (1881) 50 L. J. Ch. 251; 41 L. T. 248.

BACON, V.C.—In the cases before the M.L. there must have been special circumstances rendering it impossible to effect personal service. No such special circumstances are proved here.

Browning v. Sabin, *discussed*.

Mann v. Perry, *approved*.

Howarth v. Howarth (1886) 11 P. D. 95; 55 L. J. P. 49; 55 L. T. 303; 34 W. R. 633.—C.A.

COTTON, L.J.—It is true that in *Mann v. Perry* Bacon, V.C., refused to make an order for an attachment without personal service or without some evidence that there was a reason for not making personal service. This last case, however, lays down the true principle, that where there is no difficulty about personal service of a motion to attach, the Court may insist on such service. But where there is a difficulty in effecting personal service of the notice, and the original order has been personally served, then it would be wrong for the Court to refuse to act on proof of service in the ordinary form on the party's solicitor. It is a very different matter when the attachment is asked against some one who is not a party to the action; there the service must be personal, as he has no solicitor upon the record.—p. 99. LINDLEY and LOPES, L.J.J. *concurred*.

Hampden v. Wallis (1884) 54 L. J. Ch. 83;

26 Ch. D. 746; 55 L. T. 515; 32 W. R. 808.—CA. BAGGALLAY and COTTON, L.J.J.; LINDLEY, L.J. *dissenting, followed*.

Wyggeston Hospital and Stephenson, in re (1885) 54 L. J. Q. B. 248; 52 L. T. 101; 33 W. R. 551.—GROVE and MATHEW, J.J.

Hampden v. Wallis and Wyggeston Hospital and Stephenson, in re, *considered*.

Petty v. Daniel (1886) 34 Ch. D. 172; 56 L. J. Ch. 192; 55 L. T. 745; 35 W. R. 151.

KAY, J.—All that was decided in those cases was this—that, although, under Ord. LII. r. 4, an irregularity had been committed, yet under another order, namely, Ord. LXX. r. 1, the Court had power to condone the irregularity. That was all those cases decided; they did not decide that it was no irregularity to serve the affidavits separately from the notice of motion, and in my opinion it is undoubtedly an irregularity not to serve the affidavits with the notice of motion.—p. 177.

Davis v. Galmoye (No. 1) (1888) 58 L. J. Ch. 120; 39 Ch. D. 322; 60 L. T. 130;

37 W. R. 227.—C.A. COTTON and FRAY, L.J.J., *explained*.

Davis v. Galmoye (No. 2) (1889) 40 Ch. D. 355; 58 L. J. Ch. 338; 37 W. R. 399.

NORTH, J.—It is said that the C. A. laid down an absolute rule that applications for attachment must always be made upon notice of motion in

open Court. . . . If the C. A. had considered that there was no jurisdiction in Chambers, my order would have been reversed. All I find in the report is that Cotton, L.J. thought that it was better for the application to be made in open Court; a view to which I am prepared to give full weight in considering whether a summons for an attachment should be returned into Court.—p. 356.

Davis v. Galmoye (No. 1), approved and applied.

Bathe, In re [1892] 1 Ch. 459; 61 L. J. Ch. 446; 66 L. T. 38; 45 W. R. 369.—C.A.

LINDLEY, L.J.—As a matter of convenience and discretion, however, it is desirable that the master [in January] should refer such applications to this Court, in order that a matter involving the liberty of the subject may be dealt with judicially in open Court. That was the practice indicated with regard to applications for attachment in the High Court of Justice in *Davis v. Galmoye*. We do not hold that the master cannot himself direct the writ to issue—he has jurisdiction to do so; but we think that it is better for him to refer the matter to this Court, unless the case should be an exceptional one.—p. 462. LOPES, L.J. concurred.

KAY, L.J., to the same effect.

Selous v. Croydon Local Board (1885) 53

L. T. 209.—CHITTY, J., *followed*.

Hudson v. Walker (1891) 61 L. J. Ch. 204; 13 R. 355.—NORTH, J.

Morris, In re, Morris v. Fowler (1890) 59

L. J. Ch. 407; 44 Ch. D. 151; 62 L. T. 758; 38 W. R. 522.—CHITTY, J., *followed*.

Evans, In re, Evans v. Noton (1892) 62 L. J. Ch. 413; [1893] 3 Ch. 252; 2 R. 216; 68 L. T. 271; 41 W. R. 230.—C.A. LINDLEY, BOWEN and A. L. SMITH, L.J.J.

Morris, In re, and Evans, In re, not followed.

Bassett, In re, Bassett v. Bassett (1894) 63 L. J. Ch. 844; [1894] 3 Ch. 179; 8 R. 474.—NORTH, J.

Halford v. Hardy (1899) 81 L. T. 721.—

KEKEWICH, J.; and **Callow v. Young (1887) 56 L. J. Ch. 690; 56 L. T. 147.—CHITTY, J., *discussed*.**

Evans, In re, *adapted*.

D. v. A. & Co. (1900) 69 L. J. Ch. 382; [1900] 1 Ch. 484; 82 L. T. 47; 48 W. R. 429.

COZENS-HARDY, J.—Having regard to the settled practice of giving an undertaking in the terms of a notice of motion, it would be highly dangerous to hold that a defendant who has given an undertaking could disregard it unless and until the order was served. I do not think that Kekewich, J. intended to intimate a contrary opinion in *Halford v. Hardy*. . . . It is somewhat strange that there is no express authority as to what is the proper mode of enforcing an undertaking as distinct from an order. The question arose in *Callow v. Young*. In that case a motion was made before Chitty, J. on Nov. 19th, 1886, for leave to issue an attachment for breach of a negative undertaking, and leave was granted. It appears, however, that the order was stopped on the ground that commitment was the proper remedy, not attachment—a point which had not been taken in argument. The motion was brought on again on Feb. 11th,

1887. Chitty, J., after argument, gave leave to amend the notice of motion by asking in the alternative for commitment, and directed the motion to be served again. I think this amounted to a decision that where the undertaking is in form negative, attachment is not the proper remedy. Had there been an injunction instead of an undertaking, commitment would under the old law have been the only remedy, and the decision may have proceeded on that ground. It does not seem necessarily to cover the case of an undertaking which is positive in form. On principle, however, I think that, except in a case falling within Ord. XLII. r. 7, attachment can only issue for breach of an order of the Court commanding the respondent to do a certain act, and that in the numerous cases where there is a contempt, not arising from non-compliance with such an order of the Court, the only remedy is by commitment. This is the view expressed in Mr. Registrar Lavie's memorandum printed in a note to the report of *Evans, In re*, which is stated by Bowen, L.J., to represent the practice accurately. I adopt that view, and hold that an undertaking, whether positive or negative, must be enforced by commitment and not by attachment.—p. 384.

Glengal (Earl) v. Barnard (1836) 1 Keen

769; 6 L. J. Ch. 25.

Mews v. Carr (1856) 1 H. & N. 484; 26 L. J.

Ex. 39.

Buckmaster v. Harrop (1807) 13 Ves. 456;

6 R. R. 132.

Day v. Wells (1861) 30 Beav. 220; 7 Jur.

(N.S.) 1004; 9 W. R. 857.

Considered and applied.

Bell v. Balls (1807) 66 L. J. Ch. 397; [1897] 1 Ch. 563; 76 L. T. 254; 45 W. R. 378.—STIRLING, J.

Warlow (or Warton) v. Harrison (1859) 7

W. R. 133; 1 Ell. & Ell. 295; 29 L. J.

Q. B. 14; 6 Jur. (N.S.) 66; 8 W. R. 95.

—EX. CH., *distinguished*.

Harris v. Nickerson (1873) 42 L. J. Q. B. 171;

L. R. 8 Q. B. 286; 28 L. T. 410; 21 W. R. 635.

—Q.B.

Warlow (or Warton) v. Harrison, *followed*.

Johnston v. Boyes (1899) 68 L. J. Ch. 425;

[1899] 2 Ch. 73; 80 L. T. 488; 47 W. R. 517.

—COZENS-HARDY, J.

Williams v. Millington (1788) 1 H. Bl. 81;

2 R. R. 724, *followed*.

Davis v. Artingsall (1880) 49 L. J. Ch. 600;

42 L. T. 507; 29 W. R. 137.—FRY, J.

Turner v. Hookey (1887) 56 L. J. Q. B. 301,

commented on.

Barker v. Furlong (1891) 60 L. J. Ch. 368;

[1891] 2 Ch. 172; 64 L. T. 411; 39 W. R. 621.

FROMER, J.—With regard to *Turner v. Hookey*, it appears to me that, if it is to be supported, it must be on the ground that the learned Judges took the view, on the facts before them, that the auctioneer had done nothing but act as a mere conduit pipe; but if the facts are rightly reported I doubt if, on those facts, I should personally

have come to the conclusion they appear to have arrived at.—p. 371.

Williams v. Millington, *referred to*.

Turner v. Hockey, *commented on*.

Barker v. Furlong, *approved*.

Consolidated Co. v. Curtis (1892) 61 L. J. Q. B. 325; [1892] 1 Q. B. 495; 40 W. R. 426; 56 J. P. 563. COLLINS, J.—In my opinion, if delivery under the contract be assumed, the proposition stated in the headnote (*of Turner v. Hockey*) is not law. It seems to me to be in direct conflict both with principle and authority. It was questioned by Romer, J., in *Barker v. Furlong*, and it is observed upon in Messrs. Clerk and Linsell's valuable Treatise on Torts at p. 171. . . . I think the headnote goes far beyond the decision of the Court, though some of the observations of Day, J., might seem to support it. . . . It does not clearly appear. . . . that the defendant, in fact, did more than submit an offer; the bargain may have been concluded and the sale effected by Phillips and the purchaser without further intervention on the part of the defendant, and in this view the case would be exactly within *The National Mercantile Bank v. Ryndell* (44 L. T. 767), and *Wills, J.*, seems so to have regarded it, as he treats it, as covered by the illustration . . . put by Bramwell, L.J., in *Cockrane v. Ryndell* (27 W. R. 776). The decision of the Court, therefore, does not support the headnote, and the case is no authority for the now defendant. On the other hand, the decision of Romer, J. [*in Barker v. Furlong*], above cited, is directly in point, save that there the sale took place in a public room, which, as pointed out in . . . *Williams v. Millington* (H. Bl. 81) . . . can make no difference.—p. 326.

Biggs v. Bree (1882) 51 L. J. Ch. 263; 46 L. T. 8; 30 W. R. 278.—C.A. JESSEL, M.R., BRETT and HOLKER, L.J.J., *followed*. *Brown v. Farebrother* (1888) 58 L. J. Ch. 3; 59 L. T. 822.—KEKEWICH, J.

Coppin v. Walker (1816) 7 Taunt. 237; 2 Marshall 497; 17 R. R. 505, *commented on*. *Robinson v. Rutter* (1855) 4 E. & B. 954; 24 L. J. Q. B. 250; 1 Jur. (N.S.) 823; 3 W. R. 405.—Q.B. CAMPBELL, C.J. (for the Court).—The first part of the marginal note in *Coppin v. Walker* is not justified by the decision; and in the very next reportable case, of *Coppin v. Craig*, the Court appears to have expressed an opinion that the auctioneer "had a lien as well on the proceeds of the sale as the specific article sold."—p. 957.

Mortimer v. Bell (1865) 34 L. J. Ch. 360; 11 Jur. (N.S.) 422; 12 L. T. 260; 13 W. R. 569.—M.R.; *reversed*, 35 L. J. Ch. 25; L. R. 1 Ch. 10; 11 Jur. (N.S.) 897; 13 L. T. 348; 14 W. R. 68.—L.C.

BAILMENT.

Oggs v. Bernard (1702) 2 Lord Raym. 947, 918; Smith's Lead. Cas. 1, 199 (8th ed.), *explained*.

Ross v. Hill (1846) 15 L. J. P. C. 182; 2 C. B. 877; 3 D. & L. 748.—C.P.

Oggs v. Bernard, *reapproved*.

Scarle v. Laverick (1874) 43 L. J. Q. B. 43;

L. R. 9 Q. B. 122; 30 L. T. 89; 22 W. R. 367.—Q.B.

Biddle v. Bond (1865) 6 B. & S. 225; 34 L. J. Q. B. 137; 11 Jur. (N.S.) 425; 12 L. T. 178; 13 W. R. 561.—BLACKBURN, J., *distinguished*.

Sadler. In re, Davies, Ex parte (1881) 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J.J.

Biddle v. Bond, *approved*.

Rogers v. Lambert (1890) 60 L. J. Q. B. 187; [1891] 1 Q. B. 318; 64 L. T. 406; 39 W. R. 114; 55 J. P. 452.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J.J.

Biddle v. Bond, *considered*.

Henderson v. Williams (1894) 64 L. J. Q. B. 308; [1895] 1 Q. B. 521; 14 R. 375; 72 L. T. 98; 43 W. R. 274.—C.A. LORD HALSBURY, LINDLEY and SMITH, L.J.J.

Biddle v. Bond, *followed*.

Ross v. Edwards (1895) 11 R. 574; 73 L. T. 100.—P.C. LORDS WATSON, HOBHOUSE and MACNAGHTEN, and SIR R. COUCH.

Claridge v. South Staffordshire Tramway Co.

(1892) 61 L. J. Q. B. 503; [1892] 1 Q. B. 422; 66 L. T. 655; 56 J. P. 408.—HAWKINS and WILLS, J.J., *overruled*. *The Winkfield* (1901) 71 L. J. P. 21; [1902] P. 42; 85 L. T. 668; 50 W. R. 246.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.J.J.; *reversing* 49 W. R. 685.—JEUNE, P.

Wilson v. Brett (1843) 11 M. & W. 113; 12 L. J. Ex. 264.—EX., *dictum discussed*.

Giblin v. McMullen (1869) 5 Moore P. C. 434; 38 L. J. P. C. 25; L. R. 2 P. C. 317; 21 L. T. 214; 17 W. R. 445.—P.C.

Giblin v. McMullen, *distinguished*.

United Service Co. In re, Johnston, Ex parte (1871) 40 L. J. Ch. 286; L. R. 6 Ch. 212; 24 L. T. 115; 19 W. R. 457.—L.J.

Blackmore v. Bristol and Exeter Ry. (1858)

27 L. J. Q. B. 167; 8 E. & B. 1035; 4 Jur. (N.S.) 657; 6 W. R. 336; and **McCarthy v. Young** (1861) 30 L. J. Ex. 227; 6 H. & N. 329; 3 L. T. 785; 9 W. R. 439.—EX., *approved*.

Coughlin v. Gillison (1898) 68 L. J. Q. B. 147; [1899] 1 Q. B. 145; 79 L. T. 627; 47 W. R. 113.—C.A. A. L. SMITH, RIGBY and COLLINS, L.J.J.

Finucane v. Small (1795) 1 Esp. 315, and

Foster v. Essex Bank, 17 Mass. Rep. 479, cited in *Giblin v. McMullen* (1869) 38 L. J. P. C. 25; L. R. 2 P. C. 317; 21 L. T. 214; 17 W. R. 445; 5 Moo. P. C. (N.S.) 434.—P.C., *distinguished*.

Coupé Co. v. Maddick (1891) 60 L. J. Q. B. 676; [1891] 2 Q. B. 413; 65 L. T. 489; 56 J. P. 39.—CAVE and CHARLES, J.J.

Stables v. Eley (1825) 1 Car. & P. 614.—

ABBOTT, C.J., *disapproved as reported*. *Smith v. Bailey* (1891) 60 L. J. Q. B. 779; [1891] 2 Q. B. 403; 65 L. T. 331; 40 W. R. 28; 56 J. P. 116.—C.A. ESHER, M.R., BOWEN and KAY, L.J.J.

BOWEN, L.J.—It seems to me that the decision in *Stables v. Elley* can only be justified either on the supposition that it is wrongly reported, or in the way which has been suggested by the M.R. That case had better therefore be withdrawn from the text-books.—p. 780.

Tod v. Merchant Banking Co. (1883) 10 Qd. of Sess. Cas. (4th Ser.) 1009, distinguished.

North Western Bank v. Poynter (1894) 64 L. J. P. C. 27; [1895] A. C. 56; 11 R. 125; 72 L. T. 93.—H.L. (SC.) LORDS HERSHELL, L.C., WATSON and MACNAGHTEN.
HERSHELL, L.C.—In *Tod v. Merchant Banking Co.*, the bank, who were the pledgees, never did deliver at any time to any person to hold for them as their agent. The only deliveries which they ever made in that case were deliveries to a purchaser, who received the goods, not for the bank, but to hold from the moment of receipt as owner under the purchase. I confess I am at a loss to see how a case which deals with facts such as I have described can be held to be an authority for the proposition that the delivery of goods by a pledge, to a pledgor or his agent puts an end to the pledge.—p. 31.

North Western Bank v. Poynter, distinguished.

Inglis v. Robertson (1898) 67 L. J. P. C. 103; [1898] A. C. 616; 79 L. T. 224.—H.L. (SC.) LORDS HALSBURY, L.C., WATSON, HERSHELL, MACNAGHTEN and MORRIS.

Carter v. Wake (1877) 46 L. J. Ch. 841; 4

Ch. D. 605.—JESSE, M.R., followed.

Fraser v. Byrns (1895) 13 R. 452.—NORTH, J.; varied in C.A., 8 Nov. 1895.

Donald v. Suckling (1866) 35 L. J. Q. B. 232; 1 L. R. 1 Q. B. 585; 7 B. & S. 783; 12 Jur. (N.S.) 793; 14 L. T. 772; 15 W. R. 13.—Q.B., approved and followed.

Halliday v. Holgate (1868) 37 L. J. Ex. 174; 1 L. R. 3 Ex. 299; 18 L. T. 656; 17 W. R. 13.—EX. CH.

Fitzroy v. Gwillim (1786) 1 Term Rep. 153, overruled.

Tregoung v. Attenborough (1830) 7 Bing. 97; 4 M. & P. 722; 9 L. J. (O.S.) C. P. 28.

BANKER.

1. BANK OF ENGLAND.

Law Guarantee and Trust Society v. Bank of England (1890) 24 Q. B. D. 406; 62 L. T. 496; 38 W. R. 493; 54 J. P. 582.—MATHEW, J. See now National Debt (Stockholders) Relief Act, 1892 (55 & 56 Vict. c. 39), s. 6, and Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20).

Bank of England v. Anderson (1837) 4 Scott 50; 3 Bing. (N.C.) 589; 2 Hodges 294; 6 L. J. C. P. 168; 1 Jur. 9.—G.P.; S. C. 2 Keen 328; 7 L. J. Ch. 265.—M.R., approved.

Booth v. Bank of England (1838) 2 Keen 466; 7 L. J. Ch. 261; 2 Jur. 510.—M.R.; affirmed.

(1840) 1 Scott (N.R.) 701; 6 Bing. (N.C.) 415; 7 Cl. & F. 509; 4 Jur. 762.—H.L. (E.).

2. OTHER BANKS.

Cefn Cilcen Mining Co., In re, Edgworth, Ex parte (1868) 38 L. J. Ch. 78; 1 L. R. 7 Eq. 88; 19 L. T. 593.—V.-C.; and **Waterlow v. Sharp** (1869) L. R. 8 Eq. 501; 20 L. T. 902.—V.-C., questioned.

Brooks v. Blackburn Benefit Society (1884) 9 App. Cas. 857; 54 L. J. Ch. 876; 52 L. T. 225; 33 W. R. 309.—H.L. (E.) LORDS BLACKBURN, WATSON and MITZGERALD.

LORD BLACKBURN.—It was argued that over-drawing a bank account, or, as it was called, taking advantage of banking facilities, was not like other kinds of borrowing, and two decisions of **Stuart, V.-C., In re Cefn Cilcen Mining Co.** and **Waterlow v. Sharp**, were cited as authorities for that. I am not sure that I quite understand how far the V.-C. meant to go, but if he did mean thus in any sense that would affect the present case I cannot agree with him. If any one is going to give authority to pledge his credit, it might be prudent to limit that authority to borrowing from the bank where he kept his account, as the authority would in that case be less likely to be abused; and when framing the rules, if any power to borrow was to be given by them, it might be prudent to limit it to a power of borrowing from the banker's only, and only by over-drawing the banking account; but I cannot see that borrowing is the less borrowing because it is from the bankers.—p. 865.

Foster v. Bank of London (1862) 3 F. & F.

214, considered.

Hardy v. Vensey (1868) 37 L. J. Ex. 76; 1 L. R. 3 Ex. 107; 17 L. T. 607.—EX.

3. BANK NOTES AND BILLS.

Capital and Counties Bank v. Bank of England (1889) 61 L. T. 516.—BOWEN, L.J., distinguished.

Prescott & Co. v. Bank of England (1893) 68 L. J. Q. B. 332; [1894] 1 Q. B. 351; 9 R. 65; 70 L. T. 7.—C.A. LINDLEY, SMITH and DAVEY, L.JJ.

O'Flaherty v. M'Dowell (1857) 6 H. L. Cas. 142, 185.—H.L. (IR.), opinion in contradicted.

Davies v. Kennedy (1869) 17 W. R. 305; 3 Ir. Eq. R. 31; 2b. 668.

The 33 Geo. 2, c. 14, is not repealed by 6 Geo. 4, c. 42, contrary to the opinion of Lord St. Leonards in the above case.

Foley v. Hill (1848) 2 H. L. Cas. 28.—H.L. (E.); affirmed, 13 L. J. Ch. 182; 1 Ph. 399; 8 Jur. 347.—L.C.; reversing V.-C., considered.

St. Aubyn v. Smart (1867) L. R. 5 Eq. 183, 189.—V.-C.; affirmed, L. R. 3 Ch. 646.—L.JJ.: A.-G. v. Edmunds (1868) 37 L. J. Ch. 706; L. R. 6 Eq. 881, 890; Moxon v. Bright (1869) L. R. 4 Ch. 292, 294.—L.C.; Burdick v. Garrick (1870) L. R. 5 Ch. 133; Summers v. City Bank (1874) 43 L. J. C. P. 261; L. R. 9 C. P. 580, 587; Marten v. Roake (1885) 53 L. T. 946.

Foley v. Hill (1846) 2 H. L. Cas. 28.—H.L. (E.); *affirming*, 13 L. J. Ch. 182; 1 Ph. 309; 8 Jur. 347.—L.C., *reversing* V.C.; and **Pott v. Clegg** (1847) 16 M. & W. 321; 16 L. J. Ex. 210; 11 Jur. 280.—EX. *distinguished*.

Atkinson v. Bradford Third Equitable Benefit Building Society (1890) 59 L. J. Q. B. 360; 25 Q. B. D. 377; 62 L. T. 857; 38 W. R. 630.—C.A. LORD ESHER, M.R., LINDLEY and LOPES, L.JJ.

Foley v. Hill and Pott v. Clegg, *distinguished*.

Tidd, *In re*. Tidd v. Overall (1893) 62 L. J. Ch. 915; [1893] 3 Ch. 154; 3 R. 657; 69 L. T. 255; 42 W. R. 25.—NORTH, J.

4. CUSTOMER'S ACCOUNTS.

Coutts v. Irish Exhibition (1890) 63 L. T. 489.—KEKEWICH, J.; *reversed*, W. N. [1891] p. 41.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Brandao v. Barnett (1846) 3 C. B. 519; 12 Cl. & F. 787; 6 Man. & G. 630.—H.L. (E.); *reversing* EX. CH. and *restoring* C.P., *approved*.

London Chartered Bank of Australia v. White (1879) 48 L. J. C. P. 75; 4 App. Cas. 413.—P.C.

Jones v. Peppercorne (1853) Johns. 430; 28 L. J. Ch. 158; 5 Jur. (N.S.) 140; 7 W. R. 103.—V.C., *distinguished*.

Wylde v. Radford (1863) 33 L. J. Ch. 51; 9 Jur. (N.S.) 1169; 9 L. T. 471; 12 W. R. 38.—V.C., *followed*.

Bowes, *In re*. Strathmore (Earl) v. Vane (1886) 56 L. J. Ch. 143; 33 Ch. D. 586; 53 L. T. 260; 35 W. R. 168.—NORTH, J.

Jones v. Peppercorne, *followed*.

Wylde v. Radford and Bowes, In re, *Strathmore v. Vane*, *distinguished*.

London and Globe Finance Corporation, *In re* (1902) 71 L. J. Ch. 893; [1902] 2 Ch. 416; 87 L. T. 49.—BUCKLEY, J.

Walton, In re, Carlisle Banking Co., *Ex parte*, (1877) 36 L. T. 522.—BACON, C.J.; *affirmed*, *nom.* **Walton, In re**, Reddish, *Ex parte* (1877) 5 Ch. D. 882.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.JJ.

Foxton v. Manchester and Liverpool District Banking Co. (1881) 44 L. T. 406.—FRY, J., *distinguished*.

Coleman v. Bucks and Oxon Union Bank (1897) 66 L. J. Ch. 564; [1897] 2 Ch. 243; 76 L. T. 684; 45 W. R. 616.

BYRNE, J.—I am asked to say that that amounts to a decision to this effect—that wherever there is an account which on the face of it is a trust account, and the customer draws a cheque upon that trust account and pays in the cheque to the credit of his own private account, the bankers are bound to see and enquire . . . whether the customer is in point of fact entitled to the money which he so transfers from one account to another. I do not think that that was the meaning of the learned judge in that case. If the bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think they would not be

entitled to honour the cheque drawn upon the trust account without some further enquiry into the matter. But the present case is not that case at all.—p. 568.

5. ADVANCES BY BANKERS.

Easton v. London Joint Stock Bank (1886) 56 L. J. Ch. 569; 34 Ch. D. 95; 55 L. T. 678; 35 W. R. 220.—C.A. COTTON, BOWEN and FRY, L.JJ.; *reversed*, *nom.* **Sheffield (Earl) v. London Joint Stock Bank** (1888) 57 L. J. Ch. 986; 13 App. Cas. 333; 58 L. T. 735; 37 W. R. 33.—H.L. (E.) LORDS HALSBURY, L.C., WATSON, BRAMWELL and MACNAGHTEN.

Simmons v. London Joint Stock Bank (1890) 60 L. J. Ch. 313; (1891) 1 Ch. 270; 63 L. T. 789; 39 W. R. 449.—C.A. LINDLEY, BOWEN and FRY, L.JJ.; *reversed*, *nom.* **London Joint Stock Bank v. Simmons** (1892) 61 L. J. Ch. 723; [1892] A. C. 201; 66 L. T. 625; 41 W. R. 108; 56 J. P. 644.—H.L. (E.) LORDS HALSBURY, L.C., WATSON, HERSHELL, MACNAGHTEN and FIELD.

Sheffield (Earl) v. London Joint Stock Bank, *considered*.

London Joint Stock Bank v. Simmons (*supra*).

Sheffield (Earl) v. London Joint Stock Bank, *distinguished*.

Hone v. Boyle & Co. (1891) 27 L. R. Ir. 137.—C.A.

London Joint Stock Bank v. Simmons, *applied*.

Bentick v. London Joint Stock Bank (1893) 62 L. J. Ch. 353; [1893] 2 Ch. 120; 3 R. 120; 63 L. T. 315; 42 W. R. 140.—NORTH, J.

London Joint Stock Bank v. Simmons, *applied*.

Thompson v. Clydesdale Bank (1893) 62 L. J. P. C. 91. [1893] A. C. 282; 1 R. 255; 69 L. T. 156.—H.L. (SC.) LORDS HERSHELL, L.C., WATSON, MORRIS and SHAND.

6. LETTERS OF CREDIT.

Orr v. Union Bank of Scotland (1854) 1 Macq. H. L. 513; 2 C. L. R. 1666.—H.L. (SC.), *explained*.

British Lunen Co. v. (Aledonian Insurance Co. (1861) 4 Macq. H. L. 107; 7 Jur. (N.S.) 587; 4 L. T. 162; 9 W. R. 581.—H.L. (SC.).

LORD CRANWORTH.—I should be very sorry that what fell from me in this case should be misunderstood. When I said that there might be circumstances of fraud or negligence that would vary the case, what I meant was, that there might be negligence in the circumstances that were the immediate cause of the payment by the bank, as in the case decided in the Common Pleas (*Young v. Grote*, 4 Bing. 253; 12 Moore 484), where, when a cheque had been drawn payable to bearer, "fifty pounds," and it had been so badly written, or there had been so large a blank left on the left-hand side of the "fifty," that the person who got hold of it was enabled to put in "three hundred and," the Court held, that as that negligence on the part of the drawer had afforded the opportunity for that fraud, which the bank could not have discovered by ordinary diligence, they were absolved from the ordinary liability attaching to the payment of a forged cheque.

BANKRUPTCY.

1. PERSONS LIABLE TO.
2. ACTS OF BANKRUPTCY.
3. PETITIONING CREDITOR.
4. PETITIONING CREDITOR'S DEBT.
5. PETITION.
6. RECEIVING ORDER.
7. COMPOSITION AND SCHEME OF ARRANGEMENT.
8. ADJUDICATION.
9. ANNULMENT.
10. DISCHARGE.
11. EFFECT OF DISCHARGE.
12. PROPERTY PASSING TO THE TRUSTEE.
13. PREFERENTIAL CLAIMS.
14. PROOF OF DEBTS.
15. MUTUAL CREDITS, DEBTS AND DEALINGS.
16. SECURED CREDITORS.
17. SURPLUS.
18. EFFECT OF BANKRUPTCY ON EXECUTIONS.
19. PROTECTED TRANSACTIONS.
20. DISCLAIMER AND VISITING ORDERS.
21. OFFICIAL RECEIVER.
22. THE TRUSTEE.
23. THE BANKRUPT.
24. JURISDICTION AND COURTS.
25. PRACTICE AND PROCEDURE.
26. FOREIGN BANKRUPTCIES.
27. COMPOSITION AND ARRANGEMENT DEEDS.

1. PERSONS LIABLE TO.

Wood, In re and Ex parte (1840) 1 Mont. D. & D. 92, *overruled*.
Daivison v. Farmer (1851) 6 Ex. 242; 20 L. J. Ex. 177.

Lynch, In re and Ex parte (1876) 45 L. J. Bk. 48; 2 Ch. D. 227; 34 L. T. 34; 24 W. R. 375.—**BACON, C.J.**, *not followed*.
Miller v. Blankley (1878) 38 L. T. 527.—**C.P.D.**

Lynch, In re and Ex parte, *overruled*.

King, In re, Unity Banking Association, Ex parte (1858) 3 De (4. & J. 63; 27 L. J. Bk. 33; 4 Jur. (N.S.) 1257; 31 L. T. (O.S.) 242; 6 W. R. 640.—**L.J.**, *distinguished*.

Bates, In re and Ex parte (1842) 2 M. D. & De 3, 337, *disapproved*.

Jones, In re and Ex parte (1881) 18 Ch. D. 109; 50 L. J. Ch. 673; 45 L. T. 193; 29 W. R. 747.—**C.A.**, *reversing* 44 L. T. 588.

JESSEL, M.R.—I think it is not right to part with the case without saying that I respectfully but entirely dissent from the decision of the chief judge in *Ex parte Lynch*, which must now be considered as *overruled*. I cannot agree with any of the propositions there laid down by him.—p. 122.

BAGGALLAY, L.J.—In *Ex parte Unity Banking Association*, the decision was that where there had been an express representation by an infant trader that he was of full age, the person to whom the representation had been made might prove for the loss which he had sustained under an adjudication made against the trader after he had attained full age. The question was not

O.C.

whether an adjudication could be made. Therefore that case is no authority for supporting the adjudication in the present case, if considered as based upon strictly bankruptcy proceedings. (p. 123). The chief judge has really acted upon his previous decision in *Ex parte Lynch*, and I entirely concur with what the Master of the Rolls has said with regard to the case.—p. 124. **LUSH, L.J.** concurred.

King, In re, Unity Banking Association, Ex parte, *referred to*.
Burton v. Levey (1891) 7 Times L. R. 248.—**WRIGHT, J.**

Jones, In re and Ex parte (1881) 50 L. J. Ch. 673; 18 Ch. D. 109; 45 L. T. 193; 29 W. R. 747.—**C.A.**, *commented on*.
Duncan v. Dixon (1890) 59 L. J. Ch. 437; 44 Ch. D. 211; 62 L. T. 319; 38 W. R. 700.—**KEKEWICH, J.**

Stevens, In re, McGeorge, Ex parte (1882) 51 L. J. Ch. 909; 20 Ch. D. 687; 47 L. T. 213; 30 W. R. 817.—**C.A.** **JESSEL, M.R.**, **LINDLEY and HOLKER, L.J.**, *distinguished*.
Dagnall, In re, Sean, Ex parte (1890) 45 L. J. Q. B. 666; [1896] 2 Q. B. 407; 75 L. T. 149; 45 W. R. 79; 3 Manson 218.—**V. WILLIAMS and WRIGHT, JJ.**

VAUGHAN WILLIAMS, J.—Then we have to consider whether there is anything in the decision in *Ex parte McGeorge*, which prevents us from holding that the non-payment of debts incurred by a married woman while trading separately, is evidence that she is still continuing to trade. That was a decision under the Bankruptcy Act, 1869, upon the meaning of the words "being a trader." There had been an earlier decision—*Ex parte Solomonberg* (L. R. 10 Ch. 172)—upon the same words, "being a trader," occurring in another part of the same Act, and **Jessel, M.R.** in following that decision, pointed out that the older cases decided under the earlier Bankruptcy Acts were not binding upon him, the words to be construed in those cases being different—"using the trade of merchandise." In the same way, I think we are entitled to say that the decision in *Ex parte McGeorge* is not binding on us as to the meaning of the words "carrying on a trade" in the Married Women's Property Act, 1882.

Dagnall, In re, Sean, Ex parte, *approved*.
Stevens, In re, McGeorge, Ex parte, and Solomonberg, In re and Ex parte (1874) L. R. 10 Ch. 172; 31 L. T. 665; 23 W. R. 204.—**JAMES and MELLISH, L.J.**, *distinguished*.

Worsley, In re, Lambert, Ex parte (1900) 70 L. J. Q. B. 93; [1901] 1 Q. B. 309; 84 L. T. 100; 49 W. R. 182; 3 Manson 8.—**C.A.** **LORD ALVERSTONE, C.J.**, **RIGBY and WILLIAMS, L.J.**

Morgan v. Knight (1864) 15 C. B. (N.S.) 669; 33 L. J. C. P. 168; 9 L. T. 803; 12 W. R. 428, *followed*.

Sydney, In re and Ex parte (1875) 44 L. J. Bk. 21; L. R. 10 Ch. 308; 31 L. T. 14; 23 W. R. 205.—**JAMES and MELLISH, L.J.**, *distinguished*.

Roberts, In re, Watson, Ex parte (1879) 12 Ch. D. 380; 41 L. T. 516; 28 W. R. 205.—**C.A.** **JAMES, BRETT and COTTON, L.J.**

JAMES, L.J.—*Ex parte Sydney* was a decision that a man who is not *au juris* could not institute fresh proceedings for liquidation or composition: it was not a decision that bankruptcy proceedings could not be taken against him.—p. 382.

2. ACTS OF BANKRUPTCY.

Assignment for Benefit of Creditors.

Spackman, In re. Foley (or May), Ex parte (1890) 62 L. T. 266; 38 W. R. 368.—CAVE and SMITH, JJ.; *reversed*, (1890) 59 L. J. Q. B. 306; 24 Q. B. D. 788; 62 L. T. 849; 38 W. R. 497. 7 M. B. R. 100.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Spackman, In re. Foley (or May), Ex parte, in C.A., *supra*, *considered*.

Hughes, In re and Ex parte (1893) 62 L. J. Q. B. 358; [1893] 1 Q. B. 595; 4 R. 368; 63 L. T. 629; 41 W. R. 466. 10 M. B. R. 91.—C.A. LINDLEY and LOPES, L.JJ.; ESHER, M.R. *dissenting*. See judgments.

Spackman, In re. Foley, Ex parte, followed White & Carter, In re. Official Receiver, Ex parte (1893) 63 L. J. Q. B. 245; 10 R. 110; 70 L. T. 34. 1 Manson 33.—V. WILLIAMS, J.

Fraudulent Conveyance.

Cotton v. James (1829) 1 M. & M. 273: 3 Car. & P. 505, *followed*.

Isitt v. Beeston (1868) 38 L. J. Ex. 89: L. R. 4 Ex. 159; 20 L. T. 371; 17 W. R. 620.—EX.

Hirth, In re, Official Receiver, Ex parte, or Trustee, Ex parte (1898) 79 L. T. 391.—WRIGHT J., *reversed*, (1899) 68 L. J. Q. B. 287; [1899] 1 Q. B. 612; 80 L. T. 63. 47 W. R. 243; 6 Manson 10.—C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.JJ.

Twyne's Case (1602) 3 Rep. 80 b. *considered*. Wilton, In re and Ex parte (1874) 22 W. R. 241; 29 L. T. 860.—JAMES and MELLISH, L.JJ. JAMES, L.J.—I think the principle of *Twyne's Case*, as to non-delivery of possession, is to be applied in much the same way as the rule in bankruptcy with respect to order and disposition—which is, that the goods must remain in the order and disposition of the bankrupt up to the time of the bankruptcy, and when possession is given before the bankruptcy there is no ground for saying that it is fraudulent.—p. 242.

Woodhouse v. Murray (1867) 36 L. J. Q. B. 289; L. R. 2 Q. B. 634; 16 L. T. 559; 15 W. R. 1109; 8 B. & S. 464.—Q.B.: *affirmed*, (1868) 38 L. J. Q. B. 28; L. R. 4 Q. B. 27; 19 L. T. 570; 17 W. R. 206; 9 B. & S. 720.—EX. CH., *followed*. **Philps v. Hornstedt** (1875) 1 Ex. D. 62, *affirming* 42 L. J. Ex. 12; L. R. 8 Ex. 26; 21 W. R. 174. *As approved*.

Huam, In re, Co-partner, Ex parte (1878), 10 Ch. D. 313; 48 L. J. Ch. 54; 27 W. R. 299; 39 L. T. 523.—C.A.

THESIGER, L.J.—It is said that *Philps v. Hornstedt* (which was also a decision of the Exchequer Chamber) is contrary to the view taken in *Woodhouse v. Murray*, and is at all events an authority in favour of the respondents. It is very difficult

to distinguish the two cases, but if they cannot be distinguished. *Philps v. Hornstedt* is clearly contrary to the principle of *Woodhouse v. Murray*, and that being so, and both of them being decisions of a Court of co-ordinate jurisdiction with our own, I prefer to follow that decision, which proceeded upon facts almost identical with those of the present case, to that which proceeded upon very different facts.—p. 326.

Graham v. Chapman (1852) 12 C. B. 85; 21 L. J. C. P. 173, *held overruled*.

Harris v. Rickett (1859) 28 L. J. Ex. 197; 4 H. & N. 1.

BRAMWELL, B.—It was ingeniously argued that a conveyance of a trader's effects to a particular creditor, necessarily defeated and delayed the body of his creditors, and was therefore necessarily an act of bankruptcy. On that point that case must be taken to have been overruled by *Hutton v. Cruttwell* (1 El. & Bl. 15; 22 L. J. Q. B. 78) although the Court said they did not do so.—p. 199.

Graham v. Chapman, questioned.

Hutton v. Cruttwell (1852) 1 El. & Bl. 15; 22 L. J. Q. B. 78; 17 Jur. 392.—Q.B., *held applicable*.

Lomax v. Buxton (1871) L. R. 6 C. P. 107; 40 L. J. C. P. 150; 24 L. T. 137; 19 W. R. 441. —WILLES, M. SMITH and BRETT, JJ.

WILLES, J.—The decision in this case occasioned some surprise in the profession. Taking the judgment literally, it seems to be based on the assumption that the deed passed the advance itself, but it looks very much as if the Court took a different view of the transaction from the jury and thought there never was any *bona fide* intention that the £200 should pass (p. 110).

I think that in dealing with the case of *Graham v. Chapman*, we must take it to have turned on the particular terms of the deed, and the mode in which the advance was there made; and that though there was an advance in point of form, it came into the hands of the debtor under such circumstances that he did not get the real enjoyment of the money so advanced, and that on these grounds it was put out of consideration. Wherever the same special reasons apply, no doubt the Court must act on that decision, until it shall be reconsidered by some higher tribunal, but we ought not to extend the effect of it beyond what was precisely decided.—p. 113.

Graham v. Chapman, overruled.

Barker, In re, Kilner, Ex parte (1879) 13 Ch. D. 245; 41 L. T. 520; 28 W. R. 269.—BAGGALLAY, THESIGER and JAMES, L.JJ.; *reversing* 40 L. T. 592.—BACON, C.J., *dissenting*.

Hemingway, In re, Hauxwell, Ex parte (1883) 23 Ch. D. 626; 52 L. J. Ch. 737; 48 L. T. 742; 31 W. R. 711.—C.A. LINDLEY and FRY, L.JJ.; BAGGALLAY, L.J., *partly dissenting*.

LINDLEY, L.J.—Then it is said that, quite apart from the Bills of Sale Act, this bill of sale was an act of bankruptcy, and that is a much more formidable question. The bill of sale did in substance assign to the sureties for their security the whole of the grantor's property. It enabled them to seize everything which he had. It is contended that that is an act of bankruptcy, first, by reason of the decision in *Graham v. Chapman*,

which, it is said, shows that if a bill of sale is so worded as to enable the grantee to seize, not merely all the property of the grantor, but all his property including that which may be bought by him by means of the advance then made to him, it is necessarily a net of bankruptcy. Well, if *Graham v. Chapman* had decided that, it appears to me that it is distinctly wrong. It has been so considered ever since it was decided. I do not say that the decision was wrong, because I am not sure that it is not open to the explanation which was given of it by Willes, J., in *Louisa v. Buxton* (*supra*). He says (on p. 113), "I think that in dealing with the case of *Graham v. Chapman* we must take it to have turned on the particular terms of the deed, and the mode in which the advance was there made, and that though there was an advance in point of form, it came into the hands of the debtor under such circumstances that he did not get the real enjoyment of the money so advanced." If that is, that which purported to be an advance was not an advance at all, and then one can understand the decision in *Graham v. Chapman*. But, so far as *Graham v. Chapman* is supposed to be an authority to the effect that a bill of sale, in the form there used, is necessarily bad, it appears to me that *Graham v. Chapman* has been dissented from and overruled, and cannot be supported. —p. 637. FRY, L.J. agreed.

Mercer v. Peterson (1868) 37 L. J. Ex. 54; L. R. 3 Ex. 104; 18 L. T. 30; 16 W. R. 486.—EX. CH., *followed*.

Jones v. Harber (1870) 40 L. J. Q. B. 59; L. R. 6 Q. B. 77; 23 L. T. 606; 19 W. R. 248.—BLACKBURN and HANNEN, JJ.

Mercer v. Peterson, *followed*.

Heath v. Cochrane (1877) 46 L. J. Q. B. 727; 37 L. T. 280.—Q.B.

Pennell v. Reynolds (1861) 11 C. B. (N.S.) 709; 5 L. T. 286.—WILLES, J., *reversed*.

Ash, In re, Fisher, Ex parte (1872) 41 L. J. Bk. 62; L. R. 7 Ch. 636; 26 L. T. 931; 20 W. R. 849.—L.JJ.

MELLISH, L.J.—*Pennell v. Reynolds* was the first case in which it was held, contrary to the opinion of Lord Campbell, in *Hittleston v. Cooke* (6 El. & Bl. 296; 25 L. T. 281), that an assignment of all a trader's effects was not necessarily an act of bankruptcy.—p. 65.

Ash, In re, Fisher, Ex parte, distinguished. King, In re and Ex parte (1876) 45 L. J. Bk. 109; 2 Ch. D. 256; 84 L. T. 466; 24 W. R. 559.—C.A. JAMES and MELLISH, L.JJ., BAGGALLAY, J.A. and MELLOR, J.

Ash, In re, Fisher, Ex parte, explained.

Mercer v. Peterson, *observed upon and limited*.

Barker, In re, Kilner, Ex parte (1879) 13 Ch. D. 245; 41 L. T. 520; 28 W. R. 269.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ.; *reversing* S. C. *nov.* Barker, In re and Ex parte, 40 L. T. 592.—BACON, C.J.

THESIGER, L.J.—The principles laid down in *Mercer v. Peterson* are undoubtedly binding upon this Court, but I cannot shut my eyes to the fact that their application in any particular case ought to be most carefully guarded, because it cannot be disputed that they do, unless they

are applied with very great caution and under the most careful limitations, open the door to very considerable frauds. It appears to me, therefore, right that the Court should require from any person setting up a bill of sale executed under such circumstances as those which exist in the present case, very clear evidence that the agreement which is set up for the purpose of rendering the bill of sale valid, was a *bona fide* agreement; or, in other words, using the expression of Mellish, L.J., in *Ex parte Fisher* (at p. 644), that it was not an agreement that the bill of sale was to be delayed until such time as the trader should be in a state of insolvency, in order to prevent the destruction to his credit which would result from the registration. I think that the decision in *Ex parte Fisher* supplied a most wholesome corrective to the dangers, which, as it seems to me may arise from the principles laid down in *Mercer v. Peterson*, and that we ought to apply the doctrines laid down by Mellish, L.J., to their full extent, and to require, in this and similar cases, a very clear explanation of the reason why the giving of the bill of sale was delayed.—p. 256.

Ash, In re, Fisher, Ex parte, followed.

Nurse, In re, Foxley, Ex parte (1868) L. R. 3 Ch. 515; 18 L. T. 862; 16 W. R. 831.—L.JJ., *explained*.

Tunstall, In re, Burton, Ex parte (1879) 13 Ch. D. 102; 41 L. T. 571; 28 W. R. 268.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ.

Ash, In re, Fisher, Ex parte, distinguished.

Cook, In re, Morris v. Morris (1895) 64 L. J. P. C. 136; [1895] A. C. 625; 11 R. 554; 72 L. T. 879; 44 W. R. 65.—P.C. LORDS HERSHELL, L.C., HOBHOUSE, MORRIS and DAVEY, and SIR R. COUCH.

HERSCHELL, L.C.—The learned Chief Justice in the Supreme Court [of New South Wales] relied much on the case of *In re Ash, Ex parte Fisher*. . . In the case relied on the bill of sale was given by an insolvent person without any present advance, and of itself could not avail the grantee. He invoked the aid of a prior promise made at the time of the advance; but, for the reasons there given, the Court held that he could not derive any benefit from this promise.

In the case under appeal, the bill of sale was granted in respect of a present advance by a person not shown to be insolvent. The title of the grantee was then complete, and did not depend upon his taking possession, though, owing to his not doing so, the provisions of the Bills of Sale Act might in certain events have deprived him of his security, beyond this his title was unaffected by it.

Nurse, In re, Foxley, Ex parte (*supra*), *explained*.

Marlow, In re, Field, Ex parte (1879) 13 Ch. D. 106, n. (5); 28 W. R. 267.—C.A. JAMES, BRAMWELL and BRETT, L.JJ.

JAMES, L.J.—His lordship at first thought that *Ex parte Foxley* was an authority, showing that book debts were not to be taken into consideration in estimating the value of the property of a trader. But, when the case was examined, it was clear that it laid down nothing of the kind. The judges, having regard to the amount of the property which was assigned, the amount which was reserved, and all the circum-

stances, considered that the debtor had made the assignment with an actual intent to defeat and delay his creditors, and, in coming to that conclusion, they took into consideration the value of the book debts, and they held that the taking of a new bill of sale upon an agreement not to enforce an old one did not of itself supply any new consideration for the assignment. The decision did not in any way interfere with what had always been considered to be the law applicable to such cases.—p. 107, n.

Winstanley, In re, Winder (or Sheen), Ex parte (1876) 43 L. J. Bk. 89; 1 Ch. D. 560; 34 L. T. 48; 24 W. R. 685.—C.A. JAMES and MELLISH, L.J.J., BAGGALLAY, J.A. and MELLOR, J., *considered*.

Parker, In re, Dann, Ex parte (1881) 51 L. J. Ch. 290; 17 Ch. D. 26; 44 L. T. 760; 29 W. R. 771.—C.A. JAMES, COTTON and LUSH, L.J.J.

Parker, In re, Dann, Ex parte. commented on.

Berry, In re, Wilkinson, Ex parte (1883) 22 Ch. D. 788; 52 L. J. Ch. 657; 48 L. T. 495; 31 W. R. 649.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.J.J.

King, In re and Ex parte (*ante*, col. 101).
Ellis, In re and Ex parte (1876) 45 L. J. Bk. 159; 2 Ch. D. 797; 34 L. T. 705.—C.A., *followed*.

Administrator-General of Jamaica *v.* Lascelles (1893) 63 L. J. P. C. 70; [1894] A. C. 135; 6 Ll. 445; 70 L. T. 179; 42 W. R. 416; 1 Manson 163.—P.C. LORDS WATSON, HOBHOUSE and MACNAGHTEN, and SIR R. COUCH.

Departure and Absenting.

Crispin, In re and Ex parte (1873) 42 L. J. Bk. 65; L. R. 8 Ch. 371; 28 L. T. 483; 21 W. R. 491.—L.C. and L.J.: *followed*. Gutierrez, *In re and Ex parte* (1879) 11 Ch. D. 298; 40 L. T. 355; 26 W. R. 497.—C.A.: *approved*. Cooke *v.* Charles A. Vogeler & Co (1900) 70 L. J. Q. B. 181; [1901] A. C. 102; 84 L. T. 10; 8 Manson 113.—H L (E).

Skellon, In re; Coates, Ex parte (1877) 5 Ch. D. 979; 37 L. T. 43; 25 W. R. 800 C.A., *distinguished*.

Fiddian, In re and Ex parte (1892) 66 L. T. 203; 9 Morrell 95.—WILLIAMS and COLLINS, L.J.J.

Fowler v. Padget (1789) 7 Term Rep. 509, *considered*.

Robertson v. Liddell (1808) 9 East 437; 3 Smith 347; 9 R. R. 596.—L.C.

Fowler v. Padget, considered.

Mersey Docks and Harbour Board v. Henderson (1888) 58 L. J. Q. B. 152; 13 App. Cas. 595; 59 L. T. 697; 37 W. R. 449.—H.L. (E). LORDS HALSBURY, L.C., FITZGERALD and MACNAGHTEN.

Paterson, Ex parte (1813) 1 Rose 402; **Cundy, Ex parte** (1816) 2 Rose 357, *followed*.

Taylor, In re, Salaman, Ex parte (1882) 21 Ch. D. 894; 47 L. T. 495; 31 W. R. 282.—C.A. JESSEL, M.R., BRETT and COTTON, L.J.J.

Non-Compliance with Bankruptcy Notice.

Woodall, In re and Ex parte (1884) 53 L. J. Ch. 966; 13 Q. B. D. 479; 50 L. T. 747; 32 W. R. 774; 1 Morrell 201.—C.A.

BAGGALLAY, COTTON and LINDLEY, L.J.J., *explained*.

Keeling, In re, Blanchett, Ex parte (1886) 55 L. J. Q. B. 327; 17 Q. B. D. 303; 34 W. R. 538; 3 Morrell 157.—C.A. ESHER, M.R., BOWEN and FRY, L.J.J.

Keeling, In re, Blanchett, Ex parte, referred to.

Gardiner, In re, Coulson, Ex parte (1887) 57 L. J. Q. B. 149; 20 Q. B. D. 249; 58 L. T. 119; 36 W. R. 142; 5 Morrell 1.—CAVE and A. L. SMITH, J.J.

Woodall, In re and Ex parte, distinguished.

Keeling, In re, Blanchett, Ex parte. followed.

Golding, In re, Harper, Ex parte (1888) 58 L. J. Q. B. 3; 22 Q. B. D. 87; 63 L. T. 133; 37 W. R. 228; 5 Morrell 265.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

ESHER, M.R.—In the case of *In re Woodall* a bankruptcy notice was allowed to be served by an executrix; but in the case of *In re Keeling* it was refused to an assignee. There appears to be no valid distinction between an assignee by act of parties and a trustee in bankruptcy. The position of a trustee in bankruptcy is not the same as that of an executor. The principle of *In re Woodall* ought not to be extended.—p. 3.

Woodall, In re and Ex parte, referred to.

Golding, In re, Harper, Ex parte, applied. Clements, *In re, Davis (or Clements), Ex parte* (1900) 70 L. J. Q. B. 58; [1901] 1 Q. B. 260; 83 L. T. 461; 49 W. R. 176; 8 Manson 27.—WRIGHT and PHILLIMORE, J.J.

O'Loughlin, Ex parte (1871) 40 L. J. Bk. 28; L. R. 6 Ch. 406; 23 L. T. 878; 19 W. R. 459.—JAMES and MELLISH, L.J.J., *dictum questioned*.

Myer, In re, Pascal, Ex parte (1876) 45 L. J. Bk. 81; 1 Ch. D. 509; 34 L. T. 10; 24 W. R. 263.—C.A. JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.

JAMES, L.J.—Perhaps in that case I said more than I ought.—p. 82. (James, L.J., had suggested that a residence within the jurisdiction of some duration was necessary in order that the debtor might be served.)

Chinery, In re and Ex parte (1884) 53 L. J. Ch. 662; 12 Q. B. D. 342; 50 L. T. 342; 32 W. R. 469; Morrell 81.—C.A. COTTON, BOWEN and FRY, L.J.J., *explained*.

Faithfull, In re, Moore, Ex parte (1885) 14 Q. B. D. 627; 54 L. J. Q. B. 190; 52 L. T. 376; 33 W. R. 438; 2 Morrell 52.—C.A. SELBORNE, L.C., BRETT, M.R., COTTON, L.J.

COTTON, L.J.—*Ex parte Chinery*, which related to a garnishee order, has no bearing on the present case. In that case, if the order was a final order, it certainly was not a judgment. When a new act of bankruptcy is created by the legislature we ought to give to their words their strict meaning. I should say no more but for the fact that the decision of the learned registrar seems to have been founded upon a misapprehension of some expressions used in my judgment in *Ex parte Chinery*. In order to decide whether a garnishee order was a final

judgment we had to consider what was the meaning of the expression "final judgment." It is a judgment in an action between parties brought to establish some right of the plaintiff against the defendant. In giving judgment in that case I made use of these words: "I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously-existing liability of the defendant to the plaintiff is ascertained or established, unless there is something to show an intention to use the words in a more extended sense." If a defendant has committed a tort, there is a previously-existing liability on his part to the plaintiff. So here there was a previously-existing liability of the defendant arising out of his covenant contained in the partnership deed. He undertook not to carry on business as a solicitor within certain limits of space; he had broken that agreement, and his liability in respect of that breach was established by the judgment. Taking the very words of my judgment they apply exactly to this case. Of course, the order for the payment of costs did not enforce a pre-existing liability of the defendant, but that order is part of a final judgment which did. I do not wish in any way to qualify what I said in *Ex parte Chinery*—p. 634.

Chinery, In re and Ex parte, *dortum* applied.

Binstead, In re, Dale, Ex parte (1892) 62 L. J. Q. B. 207; [1893] 1 Q. B. 199; 4 R. 146; 68 L. T. 31; 41 W. R. 452; 9 Morrell 319.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Faithfull, In re, Moore, Ex parte, *distinguihed*.

Hemslung, In re and Ex parte (1888) 20 Q. B. D. 509; 57 L. J. Q. B. 258; 58 L. T. 835; 36 W. R. 567; 5 Morrell 52.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

FRY, L.J.—There is . . . no pretence for saying that the order [against a husband for payment of alimony *pendente lite*] is "final" or that it is a judgment [within sect. 4, sub-sect. 1 (g) of the Bankruptcy Act, 1883]. The argument was rested mainly upon *Ex parte Moore*, but it is founded upon a total misapprehension of what that case decided. In that case there was a final judgment, which determined not merely a subordinate issue, but the matter which was in contest in the action. That judgment directed an inquiry as to damages, and it was contended that the fact that the inquiry was directed prevented the remainder of the judgment from being "final." The answer to the argument was this. It is a judgment which finally determines the rights of the parties with regard to the main contest in the action, and its "final" nature is not altered by its directing an inquiry which would not be followed by any further judgment of the Court.—p. 511.

Faithfull, In re, Moore, Ex parte, *followed*.

Alexander, In re and Ex parte (1891) 61 L. J. Q. B. 377; [1892] 1 Q. B. 216; 66 L. T. 133, 40 W. R. 202; 9 Morrell 13.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Binstead, In re, Dale, Ex parte (*supra*), and Bankruptcy Notice, In re, Official Receiver, Ex parte (1895) 64 L. J. Q. B. 429; [1895] 1 Q. B. 609; 14 R. 362; 72 L. T. 812; 43 W. R. 305; 2 Manson 164.—C.A.

ESHER, M.R., LOPES and RIGBY, L.JJ., *applied*.

Owen, In re, Paters, Ex parte (1900) 70 L. J. Q. B. 92; 83 L. T. 572; 49 W. R. 379; 8 Manson 24.—WRIGHT and PHILLIMORE, JJ.

Sanders, In re, Whinney, Ex parte (1884)

13 Q. B. D. 476; 1 Morrell 185.—MATHEW and CAVE, JJ., *followed*.
Tennent, In re, Grimwade, Ex parte (1886) 55 L. J. Q. B. 495; 17 Q. B. D. 357; 3 Morrell 166.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Child, In re and Ex parte (1892) 61

L. J. Q. B. 250; [1892] 2 Q. B. 77; 66 L. T. 204; 40 W. R. 560; 9 Morrell 103.—WILLIAMS and COLLINS, JJ., *applied*.

Raymond, In re and Ex parte (1892) 66 L. T. 400.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Connan, In re, Hyde, Ex parte (1888)

57 L. J. Q. B. 472; 20 Q. B. D. 690; 59 L. T. 281; 5 Morrell 89.—C.A., *distinguished*.

Dennis, In re and Ex parte (1888) 60 L. T. 348; 37 W. R. 263.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Bates, In re, Lindsey, Ex parte (1887)

57 L. T. 417; 35 W. R. 568; 4 Morrell 192, *considered*.

Miller, In re and Ex parte (1893) 5 R. 498; 69 L. T. 260; 10 Morrell 183.

VAUGHAN WILLIAMS, J.—This case is not at all on all fours with that of *In re Bates*, because this bankruptcy notice is doubly wrong. It was wrong at the time of its issue [in requiring payment of £219 when only £200 was due], in such a way that no amendment could put it right at all, and it was wrong at the time of its service [£45 having previously been paid]. It seems to me, therefore, that *In re Bates* does not govern this case. Then again . . . *In re Bates* goes very far indeed, when it says that a mistake of £20 in a notice is a mere formal defect. . . . What it decided in principle was not that every mistake in a bankruptcy notice rendered that bankruptcy notice so defective that no act of bankruptcy could be committed. I accept that principle. But in my opinion, the £45 in the circumstances of this case was not a mere formal mistake, and the amendment ought not to have been made. The decision of the registrar must therefore be set aside and this appeal allowed.—p. 500.

Winterbottom, In re and Ex parte (1886)

56 L. J. Q. B. 288; 18 Q. B. D. 446; 56 L. T. 168; 4 Morrell 5.—CAVE and WILLS, JJ., *distinguished*.

Murieta, In re, South American and Mexican Co., Ex parte (1896) 3 Manson 35.—C.A.

ESHER, M.R.—The debtor has not paid the judgment debt, nor is he able to pay it, and a judgment debtor in that situation ought to be made a bankrupt. Proceedings for it to have been taken. A bankruptcy notice has been served on the debtor. The form of the bankruptcy notice follows the judgment. [His lordship read the notice, which was in the name of the company, and required the debtor to pay the debt to, or to secure or compound for it to the satisfaction of the liquidator of the creditor company, who acted under a committee of inspection.]

It is said that that bankruptcy notice is bad, but it follows the form of the judgment, and is in the name of the company. If the notice had been by the liquidator alone without naming the company, or as liquidator of the company, that would have been informal. But there was neither of these defects. The person who drew the notice was evidently aware of the decision in *In re Winterbottom, Ex parte Winterbottom*.—p. 40.

Beauchamp, In re. Beauchamp, Ex parte (1893) 63 L. J. Q. B. 101; [1894] 1 Q. B. 1; 9 R. 35; 69 L. T. 646; 42 W. R. 110; 10 Morrell 277.—C.A. ESHER, M.R., LOPES and KAY, J.J.; *reversed. nom. Lovell v. Beauchamp* (1894) 63 L. J. Q. B. 802; [1894] A. C. 607; 71 L. T. 587; 43 W. R. 129; 1 Manson 467.—H.L. (E.). LORDS HERSCHELL, L.C., WATSON, MACNAGHTEN and ASHBORNE.

Lynes, In re. Loster, Ex parte (1893) 62 L. J. Q. B. 372; [1893] 2 Q. B. 113; 4 R. 416; 68 L. T. 739; 41 W. R. 488; 10 Morrell 124; 38 J. P. 5.—C.A. ESHER, M.R., LOPES and SMITH, L.J.J., *followed*.

Hewett, In re. Levene, Ex parte (1894) 64 L. J. Q. B. 185; [1895] 1 Q. B. 328; 72 L. T. 60; 43 W. R. 237; 15 R. 162.—WILLIAMS and KENNEDY, J.J.

Sawers, In re. Blain, Ex parte (1879) 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334.—C.A. JAMES, BRETT and COTTON, L.J.J., *followed*.

Pearson, In re and Ex parte (1892) 61 L. J. Q. B. 585; [1892] 2 Q. B. 263; 87 L. T. 367; 40 W. R. 532; 9 Morrell 185.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

Sawers, In re. Blain, Ex parte, and Pearson, In re and Ex parte, approved.

Cooke v. Charles A. Vogeler & Co. (1900) 70 L. J. Q. B. 181; [1901] A. C. 102; 84 L. T. 10; 8 Manson 113.—H.L. (E.). LORDS HALSBURY, L.C., MACNAGHTEN, DAVEY, JAMES, BRAMPTON and ROBERTSON; *affirming* S. C. *nom.* A. B. & Co., *In re* (1900) 69 L. J. Q. B. 375; [1900] 1 Q. B. 541; 82 L. T. 169; 48 W. R. 424; 7 Manson 134.—C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.J.J.

Sawers, In re. Blain, Ex parte, and Cooke v. Charles A. Vogeler & Co., principle adopted.

Dulaney v. Merry (1901) 70 L. J. K. B. 377; [1901] 1 K. R. 536; 84 L. T. 156; 49 W. R. 331; 8 Manson 152.—CHANNELL, J.

Sewell, In re and Ex parte (1879) 49 L. J. Bk. 15; 13 Ch. D. 266; 42 L. T. 8; 28 W. R. 286.—C.A. JAMES, BAGGALLAY and THESIGER, L.J.J.

Pincoffs, In re. Jacobson, Ex parte (1882) 22 Ch. D. 312; 52 L. J. Ch. 561; 48 L. T. 197; 31 W. R. 554.—C.A. JESSEL, M.R., COTTON and BOWEN, L.J.J.

JESSEL, M.R.—What, then, is the law on the subject? It is laid down in *Ex parte Sewell*. There there was a *bona fide* dispute as to a debt, and the Court was of opinion that there was no reason for doubting the debtor's solvency. And James, L.J. said: "I think the proper order to

make will be to stay the proceedings on the summons, on the terms of the appellant's bringing the sum claimed into Court to abide the result of an action." In that case only a small sum was claimed; when the sum is a large one, the practice is to require security, not payment into Court. Baggallay and Thesiger, L.J.J., concurred in that order. It is true Thesiger, L.J. added: "I assent to that only because it appears to be in accordance with previous decisions of this Court in cases in which the weight of the evidence is in favour of the creditor. But for those decisions I should have thought that the proceedings ought to be stayed unconditionally, though the creditor may be within his strict right in issuing the summons; yet I think the provisions of the Act were not intended to apply where the debtor is solvent and has a *bona fide* defence to the claim." Thesiger, L.J., therefore, agreed in the proposed order, because he thought he was bound by the previous decisions. That is the law on the subject, and I think it applies exactly to the present case.—p. 314.

Holdsworth, In re, North Kent Bank, Ex parte, 47 L. J. Bk. 119; 38 L. T. 536; 26 W. R. 637.—BACON, C.J.; *reversed*, (1878) 9 Ch. D. 333; 39 L. T. 379; 27 W. R. 158.—C.A.

Bowie, In re. Breull (or Brewell), Ex parte (1880) 50 L. J. Ch. 384; 16 Ch. D. 481; 43 L. T. 580; 29 W. R. 299.—C.A. JAMES, COTTON and LUSH, L.J.J., *distinguished*.
Graham v. Lewis (1888) 58 L. J. Q. B. 117; 22 Q. B. D. 1; 37 W. R. 73; 53 J. P. 116.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

Wier, In re and Ex parte (1871) 41 L. J. Bk. 14; L. R. 6 Ch. 875; 25 L. T. 369; 19 W. R. 1042.—L.J.J., *followed*.

Powis, In re. Jay, Ex parte (1873) 43 L. J. Bk. 54; L. R. 9 Ch. 133; 29 L. T. 854; 22 W. R. 175.—SELBORNE, L.C., and MELLISH, L.J., *explained*.

Moogin, In re. Bouchard, Ex parte (1879) 12 Ch. D. 26; 48 L. J. Bk. 105; 28 W. R. 129.—C.A. JAMES, BAGGALLAY and THESIGER, L.J.J.

THESIGER, L.J.—It appears to me that the payment of the money into Court under the order of the Court was equivalent to a conditional payment to the creditor. If the money had been actually paid to him under the order of the Court he would have been entitled to keep it, and I think the payment into Court was, when his debt was established, equivalent to a payment to him as of the date when the payment into Court was made. This conclusion is the legitimate consequence of the considered judgment of this Court in *Ex parte Wier*. *Ex parte Jay* was different from the present case for this reason, that there was no fund for the security of the particular creditor; there were only funds in the hands of the receiver for the benefit of the creditors generally.—p. 30.

Wier, In re and Ex parte, and Wood, Ex parte (1854) 4 D. M. & G. 875, *approved and followed*.

Ward, In re, Ward (or Harris), Ex parte (1882) 51 L. J. Ch. 752; 20 Ch. D. 356; 47 L. T. 106; 30 W. R. 560.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.J.J.

Wier, In re and Ex parte, discussed.

Powell, In re, Powell, Ex parte (1891) [1891] 2 Q. B. 324; 64 L. T. 800, 39 W. R. 656; 8 M. B. R. 178.—CAVE and CHARLES, JJ.

Ward, In re and Ex parte (1882) 51 L. J.

(Ch. 282, 20 Ch. D. 356; 47 L. T. 106, 30 W. R. 560.—C.A. and Ward, In re and Ex parte (1882) 52 L. J. Ch. 73; 22 Ch. D. 132, 18 L. T. 332; 31 W. R. 112.—C.A., *followed*.

Ratcliff and Deatry v. Mendelssohn (1902) 71 L. J. K. B. 981; [1902] 2 K. B. 653; 87 L. T. 422; 51 W. R. 3; 7 Com. Cas. 217.—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.

Wolstenholme, In re and Ex parte (1885)

2 Morrell 213.—CAVE and SMITH, JJ.; and Lamb, In re, Gibson, Ex parte (1887) 4 Morrell 25.—C.A. ESHER, M.R., ROWEN and FRY, L.JJ.; *affirming* 55 L. T. 817, *followed*.

Fleming, In re, Trustee, Ex parte (1888)

60 L. T. 151.—COLERIDGE, C.J. and CAVE, J., *dissevered from*.

Friedlander, In re, Oastler, Ex parte (1884)

54 L. J. Q. B. 23; 13 Q. B. D. 471; 51 L. T. 309; 33 W. R. 126; 1 Morrell 207.—C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ., *commented on*.

Crook v. Morley (1891) 61 L. J. Q. B. 97; [1891] A. C. 316; 65 L. T. 389; 8 Morrell 227.—H. C. J. LORDS SELWYN, WATSON, MACNAGHTEN and MORRIS; *affirming* 8 Q. B. D. Crook, In re and Ex parte (1890) 24 Q. B. D. 320; 7 M. B. R. 11.—C.A. ESHER, M.R. and BOWEN, L.J.; FRY, L.J. *dissenting*.

Crook v. Morley, applied.

Simonsen, In re, Bull, Ex parte (1893) 63 L. J. Q. B. 242, [1894] 1 Q. B. 433; 10 R. 107, 7 L. T. 32; 1 Manson 30.—V. WILLIAMS, J.

Crook v. Morley and Lamb, In re, Gibson,

Ex parte (supra), followed.

Waite, In re, Bentley's Yorkshire Breweries Co. Ex parte (1894) 15 R. 157; 71 L. T. 778; 43 W. R. 208.—WILLIAMS and WRIGHT, JJ.

3 PETITIONING CREDITOR.**Baillie, In re, Cooper, Ex parte (1875) 44**

L. J. Bk. 125; L. R. 20 Eq. 762; 32 L. T. 780; 23 W. R. 950.—BACON, C.J., *distinguished*.

Adams, In re, Cullley, Ex parte (1878) 47 L. J. Bk. 97; 9 Ch. D. 307; 38 L. T. 858; 27 W. R. 28.—C.A. JAMES, BRETT and COTTON, L.JJ.

Adams, In re, Cullley, Ex parte, followed.

Hastings, In re, Dearle, Ex parte (1884) 54 L. J. Q. B. 74; 14 Q. B. D. 184; 33 W. R. 440; 1 Morrell 281.—C.A. COLERIDGE, C.J., BRETT, M.R. and LINDLEY, L.J.

Hastings, In re, Dearle, Ex parte, distinguished

Gangee, In re, Wand, Ex parte (1891) 60 L. J. Q. B. 574; 64 L. T. 730, 39 W. R. 579; 8 Morrell 182.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Hastings, In re, Dearle, Ex parte, followed.

Palmer, In re, Brims, Ex parte (1898) 67 L. J. Q. B. 316; [1898] 1 Q. B. 419; 77 L. T. 709; 46

W. R. 342; 5 Manson 50.—C.A. SMITH, CHITTY and COLLINS, L.JJ.

Lewis, In re, Harris, Ex parte (1876) 45

L. J. Bk. 71; 2 Ch. D. 423; 34 L. T. 261; 24 W. R. 851.—BACON, C.J., *explained and distinguished*.

Sacker, In re and Ex parte (1888) 22 Q. B. D. 179; 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

ESHER, M.R.—It is said that the case is governed by *Ex parte Harris*. The headnote to that case [in 2 Ch. D. 423] is, "A receiver in Chancery can issue a debtor's summons in respect of a sum due to him in that character." Is that general proposition justified by the judgment? Bacon, C.J. said, "It is the receiver's duty to receive and get in the estate. He gives security for the due discharge of his duty. He is bound to get in all that can be recovered." Those propositions are perfectly right, but no conclusion is drawn from them in the judgment. But the learned judge went on: "He claims, too, as the holder of a bill of exchange." That made all the difference. If the receiver was the holder of a bill of exchange, that would give him a right to sue at law in his own name. That judgment, therefore, really was that the receiver in that particular case was a good petitioning creditor, because he was the holder of a bill of exchange, and consequently by the law merchant he might have sued on it and recovered the money in his own name, holding the money, when he had got it, as a trustee. . . . If *Ex parte Harris* did determine what the headnote says it did, I can only say that I do not think it was rightly decided. But I do not think it was decided on that ground.—p. 183.

Stray, In re and Ex parte (1866) 36 L. J.

Bk. 7; L. R. 2 Ch. 374; 16 L. T. 250; 15 W. R. 600.—L.JJ., *followed*.

Hawley, In re, Ridgway, Ex parte (1897) 76 L. T. 501; 4 Manson 41.—V. WILLIAMS and WRIGHT, JJ.

Stray, In re and Ex parte, considered.

Carr, In re, Jacobs, Ex parte (1902) 85 L. T. 532; 50 W. R. 336.—WRIGHT and PHILLIMORE, JJ.

Wilbran, Ex parte (1820) 5 Madd. 1, approved.

King v. Henderson (1898) 67 L. J. P. C. 134; [1898] A. C. 720; 79 L. T. 37.—P. C. LORDS WATSON, HOBHOUSE and DAVEY, and SIR R. COUCH.

4. PETITIONING CREDITOR'S DEBT.**Patterson v. Patterson (1870) 40 L. J. Mat. 5;**

L. R. 2 P. 189; 23 L. T. 568; 19 W. R. 232, *questioned*.

Muirhead, In re and Ex parte (1876) 34 L. T. 303; 45 L. J. Bk. 65; 2 Ch. D. 22; 24 W. R. 351.—C.A.

COCKBURN, C.J.—I was a little impressed at first with the case of *Patterson v. Patterson*, which has been referred to, but I confess I look upon that case not without considerable doubt as to the power of the Court to make such an order as was there made. I say this with the most profound respect, which I always have, for the very sound judgments of Sir James Hannen. As I understand the law, it is impossible to say that a person shall be made the organ or the

instrument for receiving the money to be brought into Court, and that that can constitute him a person capable of proving for the debt. But passing that by, it is sufficient, I think, to say that that case does not in any way meet the present, because that was a case in which all that was done was to enable the party to prove. Whether that ought not to have been done in the Court of Bankruptcy, if done at all, is, I think, a very serious question. I entertain considerable doubt whether the Divorce Court had the power which it assumed to exercise in that case. This is not, however, the present case. There the order was wanted merely for the purpose of proof. That is very different from constituting a person a good petitioning creditor. A person may be appointed to prove who is not in the position of a petitioning creditor.—p. 305.

Muirhead, In re and Ex parte, distinguished.
Lewis, In re. Harris, Ex parte (1876) 45 L. J. Bk. 71; 2 Ch. D. 423; 34 L. T. 261; 24 W. R. 851.—BACON, C.J.

Muirhead, In re and Ex parte, followed.
Fryer, In re and Ex parte (1886) 55 L. J. Q. B. 478; 17 Q. B. D. 718; 55 L. T. 276; 34 W. R. 706; 3 Morrell 231.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Shirley, In re, Mackay, Ex parte (1887)
58 L. T. 237.—CAVE and SMITH, JJ., *disapproved*.

Boyd, In re, McDermott, Ex parte (1895)
64 L. J. Q. B. 439; [1895] 1 Q. B. 611; 72 L. T. 348; 14 R. 364; 2 Manson 166.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

ESHER, M.R.—The objection to the bankruptcy notice is based entirely upon the *dictum* of Cave, J. in *Shirley, In re*, and I am bound to say that I do not agree with him, and his *dictum* must be treated as overruled.

Mostyn, In re, Griffiths, Ex parte (1853)
3 De G. M. & G. 174; 22 L. J. Bk. 50; 17 Jur. 655.—L.JJ., *followed*.

King and Beesley, In re, Horner (or King) and Beesley, Ex parte (1894) 64 L. J. Q. B. 126; [1895] 1 Q. B. 189; 15 R. 22; 71 L. T. 580; 43 W. R. 78; 1 Manson 505.—V. WILLIAMS and KENNEDY, JJ.

Low, In re, Central Argentine Gold Fields, Ex parte (1890) 60 L. J. Q. B. 263; [1891] 1 Q. B. 147; 63 L. T. 694; 39 W. R. 181; 7 Morrell 302.—C.A., *followed*.

Bassett, In re, Lewis, Ex parte (1895) 15 R. 337; 43 W. R. 427; 2 Manson 177.—V. WILLIAMS and KENNEDY, JJ.

Tynte, In re and Ex parte (1880) 15 Ch. D. 125; 42 L. T. 598; 28 W. R. 767.—BACON, C.J., *distinguished*.

Whitley, In re, Mirfield Commercial Co., Ex parte (1891) 65 L. T. 251; 8 Morrell 149.—CAVE and CHARLES, JJ.

Lacey, In re, Taylor, Ex parte (1884)
13 Q. B. D. 123; 1 Morrell 113.—CAVE and SMITH, JJ., *distinguished*.

Vautin, In re, Saffery, Ex parte (1899) 68 L. J. Q. B. 971; [1899] 2 Q. B. 549; 48 W. R. 96; 6 Morrell 391.

WRIGHT, J.—At first I thought that it [the above case] expressly applied to the present case,

but when it is looked at it is only a case turning on the sufficiency of the petitioning creditor's debt. I do not think it is an authority on the question of redemption, because the attention of the Court there was not called to the point raised in the present case. I think, therefore, that it is not an authority for the proposition for which it is cited in the text-books—namely, that where a debtor is adjudicated bankrupt on a petition of a secured creditor, the trustee in bankruptcy is entitled to redeem the security at the amount of the petitioner's estimate.—p. 374.

Dalzell, In re, Rashleigh, Ex parte (1875)
L. R. 20 Eq. 782; 32 L. T. 133; 23 W. R. 951.—C.J.; *reversed*, 45 L. J. Bk. 29; 2 Ch. D. 9; 34 L. T. 193; 24 W. R. 495.—C.A.

Williams v Harding (1866) 35 L. J. Bk. 25; L. R. 1 H. L. 9; 12 Jur. (N.S.) 457; 14 L. T. 139; 14 W. R. 503.—H.L. (E.), *considered*.

Dalzell, In re, Rashleigh, Ex parte (*supra*), in C.A.

JAMES, L.J.—Before I make some observations upon these two sections, I will refer to the case of *Williams v. Harding*, in the House of Lords, in which the noble and learned lords came to the conclusion that a man who had contracted a debt before the change in the law was not to be liable to this new law; that if the contract was a contract before this Act, he was not to be liable. This matter was not before them at the time, but they made use of the term "before the passing of the Act," because they considered it hard that a man should be liable for a debt which he so contracted without having noticed that the change in the law was about to take effect, or that there was about to be a change in the law. But no such reason would apply to a man who, after the passing of the Act, knows that in the month of October he will be liable to be made a bankrupt in respect of any debt that he then owed. There would be no hardship in so construing the Act of 1861.

Taylor v. Kinloch (1816) 1 Stark. 175, *commented on*.

Wright v. Lainson (1837) 2 M. & W. 739; M. & H. 202.

PARKE, B.—In a note in 2 Stark. Evid. 105, it is said that *Taylor v. Kinloch* proceeded on a mistaken report of a case on the Northern Circuit. It is difficult to find any principle on which the mere date is evidence.—p. 743.

5. PETITION.

White, In re, Nicholson, Ex parte, 42 L. T. 192—BACON, C.J.; *reversed, sub nom. White, In re, Mason, Ex parte (1880)* 49 L. J. Bk. 56; 14 Ch. D. 71; 42 L. T. 884; 28 W. R. 749.—C.A. JAMES, BRETT and COTTON, L.JJ.

Brightmore, In re, May, Ex parte (1884) 14 Q. B. D. 87; 51 L. T. 710; 33 W. R. 693; 1 Morrell 253.—STEPHEN and CAVE, JJ., *approved*.

French, In re, Ball (or French), Ex parte (1890) 21 Q. B. D. 63; 62 L. T. 93; 38 W. R. 52; 6 Morrell 258.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Pratt, In re and Ex parte (1884) 53 L. J. (Ch. 613; 12 Q. B. D. 334; 50 L. T. 294; 32 W. R. 420; 1 Morrell 27.—C.A. COTTON, BOWEN and FRY, L.J., *considered*.
Fulborough School Board Election, In re, Bourke v. Nutt (1894) 63 L. J. Q. B. 497; [1894] 1 Q. B. 725; 9 R. 395; 70 L. T. 639; 42 W. R. 388; 1 Manson 172; 58 A. P. 572.—C.A. LOPES and DAVEY, L.J.; ESHER, M.R. *diss.*

Onslow, In re, Kibble, Ex parte (1875) 44 L. J. Bk. 63; L. R. 10 Ch. 373; 32 L. T. 188; 23 W. R. 433.—L.J., *distinguished*.
Lynch, In re and Ex parte (1876) 45 L. J. Bk. 48; 2 Ch. D. 227; 84 L. T. 34; 24 W. R. 375.—BACON, G.J.

Onslow, In re, Kibble, Ex parte, discussed and followed.

Lennox, In re and Ex parte (1885) 55 L. J. Q. B. 45; 16 Q. B. D. 315; 54 L. T. 452; 34 W. R. 51.—C.A. ESHER, M.R., COTTON and LINDLEY, L.J.

ESHER, M.R.—The case of *Ex parte Kibble* is a direct authority of the Court of Appeal, that, under such circumstances, a judgment debt may be incurred into at the instance of the debtor when he is disputing whether an adjudication ought to be made or not. Not only is that case a binding authority upon us, but it was rightly decided upon principle, and the principle is that the Court of Bankruptcy has a right to see that it is not put in motion when there is no petitioning creditor's debt at all.

Lennox, In re and Ex parte, explained.

Saville, In re, Beyfus (or Saville), Ex parte (1887) 4 Morrell 277; 35 W. R. 791.—C.A. *approved and followed.*

Flatou, In re, Scotch Whisky Distillers, Ex parte (1888) 22 Q. B. D. 83; 37 W. R. 42.—C.A. ESHER, M.R., FRY and LOPES, L.J.

FRY, L.J.—I entirely agree with what was said by the Master of the Rolls in *In re Saville*: "It seems to me that the case of *Ex parte Lennox* shows that the mere fact of a judgment having been recovered, does not prevent the Court of Bankruptcy, if sufficient reasons are given for doing so, from going behind the judgment. But it does not decide that, there being a judgment, on the mere suggestion of the debtor that the judgment is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt." In the present case I think no "sufficient cause" was shown calling on the registrar to inquire into the validity of the debt.—p. 86.

Lennox, In re and Ex parte, applied.

Vittoria, In re and Ex parte (1894) 63 L. J. Q. B. 793; [1894] 2 Q. B. 387; 9 R. 536; 71 L. T. 48; 42 W. R. 529; 1 Manson 236.—C.A. ESHER, M.R., KAY and SMITH, L.J.

Lennox, In re and Ex parte, dictum applied.

Rythe, In re, Banner, Ex parte (1881) 17 Ch. D. 480; 44 L. T. 908; 30 W. R. 24.—C.A. JAMES, BRETT and COTTON, L.J., *considered*.

Hawkins, In re, Troup, Ex parte (1894) 64 L. J. Q. B. 373; [1895] 1 Q. B. 404; 14 R. 44; 72 L. T. 41; 43 W. R. 306; 2 Manson 14.—C.A. ESHER, M.R. and LOPES, L.J.; RIGBY, L.J. *dissenting*.

Vittoria, In re and Ex parte (*supra*), *approved*.
King v. Henderson (1898) 67 L. J. P. O. 184; [1898] A. C. 720; 79 L. T. 37; 47 W. R. 157; 5 Manson 308.—P.C. LORDS WATSON, HORHOUSE and DAVEY, and SIR R. COUCH.

Whalley, In re, Boss, Ex parte (1874) 43 L. J. Bk. 110; L. R. 18 Eq. 375; 30 L. T. 474; 22 W. R. 702.—BACON, G.J., *discussed*.

Brigstocke, In re and Ex parte (1877) 46 L. J. Bk. 50; 4 Ch. D. 348; 35 L. T. 831; 25 W. R. 262.—C.A.

Dixon, In re and Ex parte (1884) 53 L. J. Q. B. 769; 13 Q. B. D. 118; 50 L. T. 414; 32 W. R. 837; 1 Morrell 98.—C.A. BAGGALLAY, COTTON and LINDLEY, L.J., *explained and followed*.

Watson, In re, Orum, Ex parte (1885) 15 Q. B. D. 399; 52 L. T. 785; 33 W. R. 890; 2 Morrell 199.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.J.

Otway, In re and Ex parte (1895) 64 L. J. Q. B. 521; [1895] 1 Q. B. 812; 14 R. 389; 72 L. T. 452; 2 Manson 174.—C.A. ESHER, M.R., LOPES and RIGBY, L.J., *explained*.

Murieta, In re, South American and Mexican Co., Ex parte (1896) 3 Manson 35.—C.A.

ESHER, M.R.—Then it is said that the petition is an abuse of the process of the Court, because there are no assets available—they have all been assigned for the benefit of creditors under the deed of arrangement. But that argument is not conclusive, and for this reason. The bankrupt will not get his discharge for two years, and may possibly not get it for five years, and in that time it is impossible to say that a person in the position of the debtor here may not get something to pay his debts. *In re Otway* was a wholly different case.—p. 41.

Otway, In re and Ex parte, distinguished.

Robinson, In re and Ex parte (1888) 22 Ch. D. 816; 48 L. T. 501; 31 W. R. 553.—C.A. JESSEL, M.R., BAGGALLAY and LINDLEY, L.J., *considered*.

Leonard, In re and Ex parte (1896) [1896] 1 Q. B. 473; 65 L. J. Q. B. 393; 74 L. T. 183; 44 W. R. 438; 3 Manson 43.—C.A. ESHER, M.R., LOPES and RIGBY, L.J.

ESHER, M.R.—*In re Otway* is no authority for the proposition that the fact of there possibly or probably being no assets to be administered in bankruptcy, is a reason sufficient of itself for refusing to make an adjudication of bankruptcy. In that case, it being ascertained that a receiving order would deprive the debtor of the only asset available for the payment of a composition which he proposed to pay upon his debts; it was held that that was a sufficient reason why the Court in the exercise of its discretion should not make a receiving order. There was also in that case the additional fact that the petitioning creditor had endeavoured to obtain money from the debtor as a condition of his agreeing to the adjournment of the petition, and the Court came to the conclusion that the petitioning creditor was using the petition for the purpose of extorting money and committing a fraud on the bankruptcy laws; and they therefore held that, on a petition so presented, they ought not to make an order.—p. 473.

Otway, In re and Ex parte, explained.
Birkin, In re (1896) 3 Manson 291.—C.A.

Otway, In re and Ex parte, adopted.
Shaw, In re, Gill, Ex parte (1901) 83 L. T. 754.—C.A. RIGBY, WILLIAMS and STIRLING, L.J.J.: reversing (1900) 83 L. T. 487.—WRIGHT and PHILLIMORE, J.J.

Betts, In re and Ex parte (1896) 66 L. J. Q. B. 14; (1897) 1 Q. B. 50; 75 L. T. 292; 45 W. R. 98; 3 Manson 287.—C.A. ESHER, M.R., LOPES and RIGBY, L.J.J., distinguished.

Jubb, In re, Burman and Greenwood, Ex parte (1897) 66 L. J. Q. B. 452; [1897] 1 Q. B. 641; 76 L. T. 329; 45 W. R. 479; 4 Manson 30.—V. WILLIAMS and WRIGHT, J.J.

V. WILLIAMS, J.—It is contended on behalf of the debtor that a receiving order ought not to be made, on the ground that in all probability the costs of the bankruptcy proceedings will exceed the sum of £20, which is alleged to be about the amount of the available assets, and so nobody will get anything. . . . It is contended on behalf of the respondent that the case of *In re Betts, Ex parte Betts*, is a decision which supports the proposition to which I have referred. But if that case is looked at, it is apparent that this was by no means the ground of the decision. . . . The real ground was that, on the information which they had before them, the Court thought that there were no assets, and that there was no probability of there ever being any assets which would be available, because there was already a previous bankruptcy in existence, under which the debtor was still undischarged, and there was nothing in the circumstances of the case to prevent them from exercising their discretion by refusing to make a receiving order.

Betts, In re and Ex parte, proceedings in referred to.

Painter, In re and Ex parte (1894) 64 L. J. Q. B. 22; [1895] 1 Q. B. 85; 71 L. T. 581; 1 Manson 499.—V. WILLIAMS and KENNEDY, J.J., distinguished.

Betts, In re, Official Receiver, Ex parte (1901) 70 L. J. K. B. 511; [1901] 2 K. B. 39; 84 L. T. 427; 49 W. R. 447; 8 Manson 227.—WRIGHT and DARLING, J.J.

Yelverton v. Yelverton (1859) 1 Sw. & Tr. 374; 29 L. J. Mat. 34; 6 Jur. (N.S.) 24; 1 L. T. 194; 8 W. R. 134; and *Brown v. Smith* (1852) 15 Beav. 414; 21 L. J. Ch. 356.—M.R., approved and followed.

Mitchell, In re, Cunningham, Ex parte (1884) 53 L. J. Ch. 1067; 13 Q. B. D. 418; 51 L. T. 447; 33 W. R. 22; 1 Morrell 137.—C.A. BAGGALLAY, COTTON and LINDLEY, L.J.J.

Mitchell, In re, Cunningham, Ex parte, explained.

Barne, In re and Ex parte (1886) 16 Q. B. D. 522; 54 L. T. 662; 3 Morrell 33.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J.J.

ESHER, M.R.—We are bound by the decision of this Court in *Ex parte Cunningham*, which, if I may say so, I think was a right decision. The burden of proving the jurisdiction of the Court, under both sect. 6 and sect. 95, lies on the petitioning creditor. What amount of evidence

will be sufficient to make out a *prima facie* case under either section it is not necessary now to determine. The language used by Baggallay, L.J. in *Ex parte Cunningham*, must, I think, be interpreted with reference to the particular facts of that case; it was there assumed by every one that the debtor's birth domicile was in Ireland. If the burden of proof be that the debtor's domicile was English lay originally on the petitioning creditor, it certainly lay more heavily on him if the debtor's domicile of origin was in Ireland. The language of Baggallay, L.J., cannot be criticised as applied to that state of facts. The only question is, how much evidence the petitioning creditor is bound in the first instance to adduce in order to shift the burden of proof? It would be contrary to the practice of the Court and to the necessity of the case that the petitioning creditor should be bound to go to the Court with evidence to prove that the debtor is a born Englishman, if it has been assumed by both parties throughout the proceedings that he is.—p. 524.

6. RECEIVING ORDER AND ITS CONSEQUENCES.

Adams, In re, Griffin, Ex parte (1879) 48 L. J. Bk. 107; 12 Ch. D. 480; 41 L. T. 515; 28 W. R. 208.—C.A. JAMES, BRETT and COTTON, L.J.J., approved and followed.

Pooley, In re, Harper, Ex parte (1882) 51 L. J. Ch. 810; 20 Ch. D. 688; 47 L. T. 177; 30 W. R. 650.—C.A. JESSEL, M.R., LINDLEY and HOLKER, L.J.J.

Carr, In re and Ex parte (1887) 35 W. R. 150.—C.A., explained.

Hester, In re and Ex parte (1889) 22 Q. B. D. 632; 60 L. T. 943; 6 M. B. R. 85.—C.A. ESHER, M.R., BOWEN and PRY, L.J.J.

ESHER, M.R.—I cannot myself see anything obscure in the judgments in *Ex parte Carr*, but probably there is, because Cave, J., seems to have thought so. I think that *Ex parte Carr* laid down this, that the rescission of a receiving order is a matter for the discretion of the Court, and when the registrar, or the judge, or the Divisional Court, has exercised the discretion, this Court will pause long before it interferes. I think that *Ex parte Carr* also laid down that, in exercising its discretion, the Court of Appeal must in each case have all the facts before it, and it will then upon a consideration of the facts say whether the discretion has or has not been rightly exercised by the Court below. I think that is right.—p. 637.

Chatterton, In re, Hemming, Ex parte (1879) 49 L. J. Bk. 17; 13 Ch. D. 163; 41 L. T. 513; 28 W. R. 218.—C.A. JAMES, BAGGALLAY and THESIGER, L.J.J., explained.

Ross v. Gutteridge (1882) 52 L. J. Ch. 280; 48 L. T. 117.—PEARSON, J.

Horsley, In re, Orde, Ex parte (1871) 40 L. J. Bk. 60; 1 L. R. 6 Ch. 881; 23 L. T. 400; 19 W. R. 1103.—L.J.J., distinguished.

Baun, In re, Evans, Ex parte (1880) 13 Ch. D. 421; 49 L. J. Bk. 25; 28 W. R. 500.—C.A. JAMES, BAGGALLAY and COTTON, L.J.J.
JAMES, L.J.—The next objection is a more serious one, as to the application of *Ex parte Pooley* (L. R. 3 Ch. 722) and *Ex parte Orde*,

viz.: what is to be done with persons who are present at a meeting, but who do not sign the resolutions as voting in favour of them? We held in *Ex parte Orde* that such persons must be considered as present at the meeting, and be reckoned in the total number of creditors present and voting, unless they withdraw their proofs as provided by rule 273 (Bankruptcy Rules, 1870). Without saying how far that decision would apply to Mr. Scrivener, personally, with regard to such a meeting as this, it appears to me quite clear that the principle cannot apply to the case of a creditor who is represented by another creditor as his proxy. I am of opinion that the principle does not apply to the case of a person who is said to have been present in that way. Such a person is not personally present, and in what way does it appear that the proxy remained in force? The creditor who is present might intend to be present on his own behalf, and not on behalf of his principal.—p. 427.

Lancaster, In re, Lancaster (or Bailey), Ex parte, 46 L. J. Bk. 65; 36 L. T. 72; 25 W. R. 380.—BACON, C.J.; *reversed*, (1877) 46 L. J. Bk. 90; 5 Ch. D. 911; 36 L. T. 674; 25 W. R. 669.—C.A.

Shaw, In re, Gill, Ex parte (1900) 83 L. T. 487; 49 W. R. 141.—WRIGHT and PHILLIMORE, JJ.; *reversed*, (1901) 83 L. T. 754; 49 W. R. 264.—C.A. RIGBY, WILLIAMS and STIFLING, L.JJ.

7. COMPOSITION AND SCHEME OF ARRANGEMENT.

Cockayne, In re and Ex parte (1873) 12 L. J. Bk. 71; L. R. 16 Eq. 218; 28 L. T. 678; 21 W. R. 719.—BACON, C.J., *approved*.

Sedley, In re, Cobb, Ex parte (1873) 42 L. J. Bk. 63; L. R. 8 Ch. 727; 29 L. T. 123; 21 W. R. 777.—L.JJ., *explained*.

Webb, In re, Gibbs, Ex parte (1875) L. R. 10 Ch. 382; 44 L. J. Bk. 73; 32 L. T. 292; 23 W. R. 592.—MELLISH, L.J.

MELLISH, L.J.—It is to be observed that in *Ex parte Cobb* the question had been put to the meeting, and the creditors had deliberately determined that they did not desire to have liquidation or composition; and it was in reference to that state of things that James, L.J., says, "I have great doubt whether such a meeting has any validity. I can conceive that where a first meeting is shown to have been no meeting at all, for instance, from the absence of proper advertisements, it might be the duty of the Court to direct a fresh first meeting to be held; but to say that because the debtor finds that he could not do what he wanted to do at the first meeting, or because one of the creditors had changed his mind, that is a reason for holding a fresh first meeting, seems to me a confusion of terms." The Lord Justice does not consider the question what would be the duty of the Court, if in consequence of the non-compliance of the debtor with something which he ought to do at a meeting, the meeting has gone off. But in *Ex parte Cockayne*, which was a case very similar to the present, the chief judge appears to have thought that under certain circumstances a new meeting might be called; for he says that the dismissal of the appeal is to be without prejudice to a second first meeting.—p. 385.

Webb, In re, Gibbs, Ex parte, continued.

Terrell, In re and *Ex parte*; Sheffield and Rotherham Joint Stock Banking Co., *Ex parte* (1876) 46 L. J. Bk. 47; 4 Ch. D. 293; 35 L. T. 646, 648; 25 W. R. 153.—C.A.

BAGGALLAY, J.A.—It seems to me that the same reason as the Lord Justice gave there for considering that another first meeting should be held where there had been an accident or mistake on the part of the debtor equally applies to this case, where there is a mistake on the part of the creditors.

Batey, In re, Emmanuel, Ex parte (1881)

50 L. J. Ch. 305; 17 Ch. D. 35; 44 L. T. 832; 29 W. R. 526.—C.A. JAMES, BRETT and COTTON, L.JJ., *explained*.

Poole, In re, Cocks, *Ex parte* (1882) 21 Ch. D. 397; 31 W. R. 105.

[In *Ex parte Emmanuel*, Brett, L.J., said (on p. 40), "If what they (the creditors) have done is within their authority, but it is, in the opinion of the Court, an erroneous exercise of their authority, I think the Court cannot interfere. But if they have exceeded their authority, in my opinion the Court can and ought to interfere."]

BRETT, L.J.—I meant that the mere fact that there was a difference of opinion between the Court and the creditors would not be a sufficient ground for setting aside their resolution. I was not referring to the question of jurisdiction.—p. 400.

Terrell, In re and Ex parte; Sheffield and Rotherham Banking Co., Ex parte, distinguished.

Walton, In re, Hudson, *Ex parte* (1883) 52 L. J. Ch. 584; 22 Ch. D. 773; 47 L. T. 674; 31 W. R. 372.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.

Robins, In re, Russell, Ex parte, 47 L. T. 338.—BACON, C.J.; *reversed*, (1883) 22 Ch. D. 778; 47 L. T. 675; 31 W. R. 442.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.

Webb, In re, Walter, Ex parte (1876) 45 L. J. Bk. 103; 2 Ch. D. 326; 34 L. T. 701; 24 W. R. 834.—C.A., *explained*.

Staff, In re and Ex parte (1875) 44 L. J. Bk. 137; L. R. 20 Eq. 775; 33 L. T. 40; 23 W. R. 950.—BACON, C.J., *followed*.

Elworthy, In re and Ex parte (1875) 44 L. J. Bk. 123; L. R. 20 Eq. 742; 32 L. T. 699; 23 W. R. 790.—BACON, C.J., *not followed*.

Aaronson, In re and *Ex parte* (1878) 7 Ch. D. 713; 47 L. J. Bk. 60; 38 L. T. 243; 26 W. R. 470.—C.A.

[N.B.—*Ex parte Staff* and *Ex parte Elworthy* were cited as conflicting on the question of registration, and the Court, though it did not mention them in the judgments, decided in accordance with *Ex parte Staff*.]

BAGGALLAY, L.J. (for the Court).—This Court was of opinion [in *Walter, Ex parte*] that, according to the true construction of rule 301 (Bankruptcy Rules, 1870), the passing of the resolution was intended to be conclusive evidence upon the application to register that the debtor's statement of affairs was sufficient, and that the rule had the effect of excluding, upon an application for registration, the raising of any

such question as was raised before Mr. Registrar Keene. Though, however, the Court arrived at this conclusion in *Walter, Ex parte*, in which the statement of affairs was upon the face of it sufficient, it recognised the distinction between such a case and one in which the statement might be upon the face of it insufficient, and in illustration of this distinction referred to *Cockayne, Ex parte (supra)*, and *Gibbs, Ex parte (supra)*, in which cases it was held that, where the debtor has not in his statement distinguished between his joint and separate debts and assets, a resolution founded on that statement ought not to be registered.—p. 716.

Elworthy, In re and Ex parte, not followed.
Williams, In re and Ex parte (1881) 50 L. J. Ch. 741; 18 Ch. D. 495; 45 L. T. 96.—C.A. SELBORNE, L.C., BRETT and COTTON, L.JJ.
[This case was cited by the appellant's counsel, but not referred to in the judgments.]

Staff, In re and Ex parte (supra); and Russell, In re and Ex parte (1875) 44 L. J. Bk. 42; L. R. 10 Ch. 255; 32 L. T. 4; 23 W. R. 817.—L.JJ., distinguished.

Golding, In re, Early, Ex parte (1879) 13 Ch. D. 300; 42 L. T. 298; 28 W. R. 310.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ., followed.

Sharpe, In re, Mathewes, Ex parte (1881) 16 Ch. D. 655; 50 L. J. Ch. 284; 44 L. T. 117.—C.A. JAMES, COTTON and LUSH, L.JJ.

JAMES, L.J.—It appears to me impossible to find any sound distinction between the present case and *Ex parte Early*. In *Ex parte Staff* and *Ex parte Russell*, the Court came to the conclusion that the resolutions had not been passed in the interest of the creditors, that in fact they had no interest in the matter. In *Ex parte Early*, the creditors had an interest in getting the whole of the assets distributed among themselves, and in preventing them being all taken by one creditor who had levied an execution. Their contest was not in favour of the debtor, but in favour of themselves. It appears to me that we cannot say that the present case is not exactly the same, and I cannot see any ground for a distinction between it and *Ex parte Early*.—p. 659.

Staff, In re and Ex parte, approved.
Parnell, In re, Ball, Ex parte (1882) 51 L. J. Ch. 911; 20 Ch. D. 670; 47 L. T. 213; 30 W. R. 738.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.

Aaronson, In re and Ex parte, distinguished.
Hope, In re and Ex parte (1878) 47 L. J. Bk. 78; 9 Ch. D. 398; 38 L. T. 762; 27 W. R. 7.—C.A. JAMES, BRETT and COTTON, L.JJ.

[This case was cited in the arguments and a distinction was relied upon by the appellant, who succeeded. This case was not specially referred to in the judgments.]

Snodin v. Boyce (1859) 4 H. & N. 391; 28 L. J. Ex. 245; 33 L. T. 164.—EX., affirmed.

Dunlop v. Cruger (1862) 32 L. J. Ex. 42; 7 H. & N. 625; 7 L. T. 132; 10 W. R. 801.—EX. CH.

Durham, In re, Merchant Banking Co. of London (or Murray), Ex parte (1881) 43 L. T. 799; reversed, 50 L. J. Ch. 606; 16 Ch. D. 623; 44 L. T. 358; 29 W. R. 363.—C.A.

More v. Underhill (1863) 1 B. & S. 566, overruled.
Wood v. De Mattos (1865) 35 L. J. Ex. 64; L. R. 1 Ex. 91; 12 Jur. (N.S.) 78; 3 H. & C. 987.—EX. CH.

Wood v. De Mattos, distinguished.
Hoggarth v. Taylor (1867) 36 L. J. Ex. 61; L. R. 2 Ex. 105; 15 W. R. 588.—EX.

Sharland v. Spence (1867) 36 J. J. C. P. 230; L. R. 2 C. P. 456; 16 L. T. 355; 15 W. R. 767, followed.
Robertson v. Goss (1867) 36 L. J. Ex. 251; L. R. 2 Ex. 396; 16 L. T. 666; 15 W. R. 965.—EX.

Shettle, In re, Godden, Ex parte (1862) 7 L. T. 366; reversed, 32 L. J. Bk. 37; 7 L. T. 608.—L.JJ.

Burr, In re, Board of Trade, Ex parte (1892) 61 L. J. Q. B. 591; [1892] 2 Q. B. 467; 66 L. T. 553; 9 Morrell 133.—C.A., referred to.

E. A. B., In re (1901) 71 L. J. K. B. 356; [1902] 1 K. B. 457; 83 L. T. 773, 50 W. R. 229; 9 Manson 105.—C.A. v. WILLIAMS, ROMER and COZENS-HARDY, L.JJ., inapplicable.

Baines, In re, Board of Trade, Ex parte (1902) 86 L. T. 691.—WRIGHT and PHILLIMORE, JJ.

Wilson v. Lloyd (1873) 42 L. J. Ch. 559; L. R. 16 Eq. 60; 28 L. T. 831; 21 W. R. 507.—V.-C., distinguished.

Littler, In re, Manchester and Liverpool District Banking Co., Ex parte (1874) 43 L. J. Bk. 73; L. R. 18 Eq. 249; 30 L. T. 339; 22 W. R. 567.—BACON, C.J.

Wilson v. Lloyd, disapproved.
Megraith v. Gray (1874) 43 L. J. C. P. 63; L. R. 9 C. P. 216; 30 L. T. 16; 22 W. R. 409.—C.P., followed.

Jacobs, In re, Jacobs, Ex parte (1875) L. R. 10 Ch. 211; 44 L. J. Bk. 34; 31 L. T. 745; 23 W. R. 251.—L.JJ.

JAMES, L.J.—In the case of *Wilson v. Lloyd*, the chief judge held that a surety was discharged by the creditor voting in favour of accepting a composition from the principal debtor. There were, however, a great many points in that case; and we think that the difference between a composition by a voluntary deed or agreement and a composition under the Bankruptcy Act was not sufficiently considered. On the other hand, in the case of *Megrath v. Gray*, the Court of Common Pleas appear to have come after great consideration to a directly contrary conclusion. . . . We entirely agree in the decision of the Court of Common Pleas and in the reasons they have given for it.—p. 213.

Verner, In re (1871) 15 Sol. J. 697, overruled.

Jones, In re and Ex parte (1875) 44 L. J. Bk. 124; L. R. 10 Ch. 663; 33 L. T. 116; 23 W. R. 886.—L.JJ., distinguished.

Lewis, In re, Mauthner, Ex parte (1876) 45 L. J. Bk. 125; 3 Ch. D. 113.—BACON, C.J.

Jones, In re and Ex parte, explained.
Balburnie, In re, Jameson, Ex parte (1876) 45 L. J. Bk. 156; 3 Ch. D. 488; 25 W. R. 14.—BACON, C.J.; affirmed, 3 Ch. D. 488; 35 L. T. 533.—C.A.

Flint v. Barnard (1888) 58 L. J. Q. B. 53; 22 Q. B. D. 90; 37 W. R. 185.—C.A., *referred to*.

Greer, In re, **Napper v. Fanshawe** (1895) 64 L. J. Ch. 620; 72 L. T. 865; 43 W. R. 547; 59 J. P. 441; 2 Manson 350; 13 R. 598.—CHITTY, J.

Hawes, In re, **Jeffery, Ex parte** (1874) 43 L. J. Bk. 27; L. R. 9 Ch. 144; 20 L. T. 859; 22 W. R. 287.—*L.J.J., distinguished*.

Elliot, In re, **Hopper, Ex parte** (1878) 8 Ch. D. 53; 47 L. J. Bk. 41; 38 L. T. 366; 26 W. R. 488.—C.A.

BAGGALLAY, L.J.—There could be no question in that case that the liquidation proceedings were still pending when the bankruptcy occurred. The concluding words of the judgment of Mellish, L.J., put that beyond all doubt. He said: "As a receiver had, under the liquidation, been appointed, and had not been discharged, the proceedings in liquidation were still pending. That distinguishes *Ex parte Jeffery* from the present case."—p. 59.

Petrie, In re and **Ex parte** (1868) 37 L. J. Bk. 13; L. R. 8 Ch. 232; 18 L. T. 169; 16 W. R. 467.—*L.J.J., followed*.

Beddall v. King (1869) 38 L. J. C. P. 249; L. R. 4 C. P. 549; 20 L. T. 325; 17 W. R. 614.—C.P.

Carew, In re and **Ex parte** (1875) 44 L. J. Bk. 67; L. R. 10 Ch. 308; 22 L. T. 318; 23 W. R. 459.—*L.J.J., approved*.

Campbell v. Imm Thurn (1876) 45 L. J. C. P. 482; 1 C. P. D. 267; 35 L. T. 265; 24 W. R. 675.—C.P., *discussed and distinguished*.

Breslauner v. Brown (1878) 47 L. J. C. P. 729; 3 App. Cas. 672; 39 L. T. 67; 26 W. R. 536.—H.L. (R.).

Carew, In re and **Ex parte**, *explained and distinguished*.

Breslauner v. Brown, *explained*.
Lacey, In re and **Ex parte** (1880) 16 Ch. D. 131; 50 L. J. Ch. 207; 43 L. T. 579; 29 W. R. 299.—C.A. **JAMES, COTTON and LUSH, L.J.J.**

JAMES, L.J.—I am of opinion that this decision of the chief judge is an extension of the doctrine laid down in *Ex parte Carew* which we ought not to sanction even if that doctrine goes to the full extent which has been suggested. In the present case there is no property to be administered, and no proceedings pending; there is nothing now to be done in the composition except to enforce a personal demand against a debtor. I am of opinion that the Court of Bankruptcy has no jurisdiction to entertain a merely personal demand against a debtor, there being no property for the Court to administer. When the judgment of Lord Justice Mellish, in *Ex parte Carew*, was read to us, a judgment in which I appear to have concurred, it did not strike my mind as something I was prepared to accept. It must, however, be read with reference to the facts of that particular case (p. 187). . . . And it was held by the Court that it had jurisdiction to determine upon the debtor's claim to the surplus, and it refused to hand it over to him while the validity of the claim, to meet which a fund had been placed in the hands of trustees, had not been ascertained. That was the whole of the decision. And what Lord Justice Mellish really said, was that the creditor whose claim had not been admitted, might waive the condition which was imposed by sect. 126 [of the Bankruptcy Act, 1869] for his benefit, and come in and bind himself by the composition while the

thing remained still *in fieri* and incomplete. That was, as I understand it, the view of Lord Rafterley in *Breslauner v. Brown*, and it was assented to by Lord Blackburn, and that is to say, that a creditor whose debt was not admitted, might come in and accept the composition during the pending of the proceedings. . . . In *Breslauner v. Brown*, the creditor had already accepted the composition in respect of one debt, and he then claimed the payment of another debt which had not been inserted in the debtor's statement. His acceptance in respect of the first debt could not entitle the debtor to say that he had bound himself by the composition in respect of the second debt, and therefore it was held that he was still a creditor, and entitled to sue the debtor for the second debt.—p. 138.

Wright, In re, **Willey, Ex parte**, 48 L. T. 79; 31 W. R. 383; *reversed*, (1883) 52 L. J. Ch. 546; 23 Ch. D. 118; 48 L. T. 380; 31 W. R. 553.—C.A. **JESSEL, M.R., COTTON and LINDLEY, L.J.J.**

Robinson, In re, **Burrell, Ex parte** (1876) 45 L. J. Bk. 68; 1 Ch. D. 537; 34 L. T. 198; 24 W. R. 353.—C.A., *distinguished*.

Simons, In re, **Allard, Ex parte** (1881) 16 Ch. D. 505; 44 L. T. 85; 29 W. R. 406.—C.A. **JAMES, BRETT and COTTON, L.J.J.**

Edwards v. Coombe (1872) 41 L. J. C. P. 202; L. R. 7 C. P. 519; 27 L. T. 315; 21 W. R. 107.—C.P., *followed*.

Howard, In re, **Hemmingway, Ex parte** (1872) 26 L. T. 298; 20 W. R. 572. *disented from*.

Hutton, In re, **Hodge, Ex parte** (1872) 42 L. J. Bk. 12; L. R. 7 Ch. 723; 27 L. T. 396; 20 W. R. 978.—*L.J.J.*

JAMES, L.J.—I think we are bound by the decision of the Court of Common Pleas in *Edwards v. Coombe*. To a certain extent there is a conflict between the decision of the Court of Common Pleas and the chief judge in bankruptcy in *Ex parte Hemmingway, Re Howard*.

Edwards v. Coombe and Hutton, In re, **Hodge, Ex parte**, *followed*.
Goulden v. Loring (1873) 42 L. J. Q. B. 103; L. R. 8 Q. B. 182; 21 W. R. 543.—Q.B.

Edwards v. Coombe; Hutton, In re, **Hodge, Ex parte**, and **Ford v. Beech** (1848) 11 Q. B. 852; 17 L. J. Q. B. 114; 12 Jur. 310.—EX. CH., *discussed*.

Slater v. Jones (1878) L. R. 8 Ex. 186; 42 L. J. Ex. 122; 29 L. T. 56; 21 W. R. 815.—EX.

BRAMWELL, B.—Two cases have decided that an action is maintainable for the original debt after the debtor has made default in paying an instalment of the composition. But if so, it is said this action must also be maintainable, because if it can be barred now it is barred for ever, upon the principle of *Ford v. Beech*. Now, I agree with the judgment in that case that a suspension of a right of action cannot be a defence, for if it were the action would be gone for ever, and I feel a difficulty in understanding the observation upon the re-vesting of causes of action by Blackburn, J., in *Jeffs v. Day* (L. R. 1 Q. B. 372, at p. 374). At the same time I do not think that the authorities cited, coupled with *Ford v. Beech*, are conclusive. Certainly in *In re Hutton*, Mellish, L.J., does not say that the resolution would not be a bar to proceedings

commenced before default; and in *Edwards v. Coombe*, Willes, J., indicates that his opinion was the contrary. I think, therefore, we can assent to these two decisions, and yet hold the pleas good thus: Either this resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the event happens whereby it is defeated (*i.e.*, the debtor's default) a cause of action accrues or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor, that in case he fails to pay the composition at the time agreed, he will pay the whole debt.—p. 194.

Edwards v. Coombe and Slater v. Jones, discussed.

Newall v. Van Praagh (1874) 43 L. J. C. P. 94; L. R. 9 C. P. 96; 22 W. R. 377; 29 L. T. 891.—C.P.

BRETT, J.—I think it necessary to add some few remarks on the subject to what my lord has said, because a case has just been brought to my notice which was not discussed in the argument, *viz.*, the case of *Slater v. Jones*, which was decided in the Court of Exchequer, subsequently to both the two cases that have been referred to, and in which they were both commented upon. There the creditor brought his action for the original debt, and there was a plea of a composition under the Bankruptcy Act, 1869, to which the plaintiff replied that the time for the payment of the composition had not arrived. The Court of Exchequer seem to have had the difficulty urged upon them, that if the decision in *Edwards v. Coombe* was, that according to the common law the right of action was suspended, it would follow that the debt was gone for ever. The Court said that they did not think it necessary to dissent from *Edwards v. Coombe*, and Bramwell, B., says; "I think we can assent to both decisions and yet hold the plea good, thus: either this resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the event happens, whereby it is defeated (*i.e.*, the debtor's default), a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor, that in case he fails to pay the composition at the time agreed, he will pay the whole debt." It seems to me that we need not disagree with what was said by the Exchequer in *Slater v. Jones*, any more than they dissented from the decision in *Edwards v. Coombe*. It seems to me that the decision in *Edwards v. Coombe* turned upon the construction of the Bankruptcy Act, and not on the common law doctrine of the suspension of a remedy; that the meaning of the statute was that the creditor should not be entitled to go on with an action until the composition was due, and that if paid when due it should extinguish the debt; but that, if it were not paid, it should be just as if there had been no composition, and the creditor should be entitled to the usual remedies, and be generally in the same position as if the resolution for the composition had never passed.—p. 101.

Bishop, In re, Paper Staining Co., Ex parte (1873) L. R. 8 Ch. 595.—L.J., followed.

Watson, In re and Ex parte (1876) 2 Ch. D. 63; 34 L. T. 778; 24 W. R. 592.—C.A.

Melhado v. Watson, 46 L. J. C. P. 349; 36 L. T. 18; *reversed*, (1877) 46 L. J. C. P. 502; 2 C. P. D. 281; 36 L. T. 724; 25 W. R. 562.—C.A.

Wilson v. Breslau, 36 L. T. 18; *reversed*, (1877) 46 L. J. C. P. 593; 2 C. P. D. 314; 37 L. T. 24; 25 W. R. 818.—C.A.

Lang, In re and Ex parte (1877) 5 Ch. D. 971; 37 L. T. 449; 26 W. R. 68.—C.A., *followed*.

Oppenheim v. Jackson (1879) 49 L. J. C. P. 216.—C.A., *affirming* 41 L. T. 193.

Streckeisen, In re, Grunelius, Ex parte W. N. (1876) 244.—JAMES and MELLISH, L.J., and BAGGALLAY, J.A., *considered*. Best, In re and Ex parte (1881) 18 Ch. D. 488; 45 L. T. 95.—C.A. LORD SELBORNE, BRETT and COTTON, L.JJ.

SELBORNE, L.C.—I am not prepared to say that, under the special circumstances of that case, there may not have been extremely good reasons for that conclusion. But it is to be observed that there the Court was not reversing the registrar's decision, but was declining to disturb his order. All I can say is, I do not think that the absence of the debtor from the meeting should in any case be regarded as an unimportant or immaterial circumstance.—p. 491.

Best, In re and Ex parte, explained.

Tilley, In re, Solomon, Ex parte (1882) 20 Ch. D. 281; 51 L. J. Ch. 677; 47 L. T. 57; 30 W. R. 603.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ.

JESSEL, M.R.—I agree that if the debtor had been guilty of gross misconduct, we ought not to give him a new chance of escaping bankruptcy, and that, I think, is the explanation of the refusal of the Court, in *Ex parte Best*, to allow a fresh meeting of the creditors to be summoned. The lord chancellor thought that the debtor had been guilty of a fraudulent preference; that material facts had been concealed from the creditors; and that the creditor who had examined the debtor at one of the meetings had been intimidated.—p. 287.

Burliner v. Royle (1880) 5 C. P. D. 354; 43 L. T. 254; 44 J. P. 831. *approved*.

Engelhardt, In re and Ex parte (1883) 52 L. J. Ch. 748; 23 Ch. D. 706; 49 L. T. 281; 31 W. R. 802.—C.A. BAGGALLAY, LINDLEY and FRY, L.JJ.

Savin, In re and Ex parte (1866) L. R. 1 Ch. 616.—L.JJ., *distinguished*.

Pullen, In re, Williams, Ex parte (1870) 39 L. J. Bk. 1; L. R. 10 Eq. 57; 18 W. R. 406.

Russ, In re, Davis, Ex parte (1870) 45 L. J. Bk. 61; 2 Ch. D. 231; 34 L. T. 259; 24 W. R. 684. *overruled*.

Stanley, In re, Milward, Ex parte (1880) 50 L. J. Ch. 166; 16 Ch. D. 266; 44 L. T. 73; 29 W. R. 167.—C.A. JAMES, COTTON and LUSH, L.JJ.

Stanley, In re, Milward, Ex parte, followed.

Ward, In re, Bennett, Ex parte (1881) 16 Ch. D. 541; 44 L. T. 38; 29 W. R. 343.—C.A. JAMES, BRETT and COTTON, L.JJ.

8. ADJUDICATION

Christie v. Unwin (1840) 11 A. & E. 373; 3 P. & D. 204; 4 Jur. 863.—Q.B., *unpeached*.

Lee c. Howley (1858) 8 El. & Bl. 857. 27 L. J. Q. B. 193; 4 Jur. (N.S.) 533.—Q.B. **CROMPTON, J.**—I may remark that it seems to have been at one time supposed that *Christie v. Unwin* showed the finding of the facts, on which the adjudication of bankruptcy professes to be founded, not to be disputable; the Court of Exchequer has, however, decided otherwise. (See *Fletcher v. Manning*, 12 M. & W. 571.)—p. 864.

Revell v. Blake (1873) 42 L. J. C. P. 165; 1. R. 8 C. P. 533; 29 L. T. 67; 22 W. R. 96.—EX. CH.; *affirming* (1872) 41 L. J. C. P. 129; 1. R. 7 C. P. 300; 26 L. T. 578.—C.P., *distinguished*.

Foulds, In re, Letroyd, Ex parte (1878) 48 L. J. Bk. 17; 10 Ch. D. 3; 39 L. T. 525; 27 W. R. 277.—C.A.

JAMES, J.—The decision in *Revell v. Blake* was quite consistent with this view. There it was held that the adjudication itself was conclusive evidence that the Court which made it had jurisdiction in the case, but that where the adjudication was founded on an act of bankruptcy which could be committed equally, whether the bankrupt was a trader or not, there was nothing in the Act to prevent the trustee from showing that, though the bankrupt had been described as a non-trader, he was really a trader. [The Court of Appeal held that, by the operation of the 10th and 11th sections of the Bankruptcy Act, 1869, an adjudication of bankruptcy is, so long as it stands conclusive as against third persons, that the act of bankruptcy on which the adjudication was founded was in fact committed, but a third person whose title to property is affected by the adjudication is entitled to appeal from the adjudication, being a "person aggrieved" by it within the meaning of the 71st section of the Act.]

Revell v. Blake, followed.

Trim, In re, French, Ex parte (1882) 52 L. J. Ch. 48; 47 L. T. 339.—BACON, C.J.

Reed, In re, Official Receiver, Ex parte (1887) 56 L. J. Q. B. 447; 19 Q. B. D. 174; 56 L. T. 876; 35 W. R. 660; 4 Morrell 225.—C.A. **ESHER, M.R.** and **LOPES, L.J.**; **FRY, L.J.** *dissenting, followed*.

Thurlow (Lord) In re, Official Receiver, Ex parte (1895) 64 L. J. Q. B. 49; [1895] 1 Q. B. 724; 14 R. 320; 72 L. T. 642; 43 W. R. 403; 2 Manson 158; 59 J. P. 309.—C.A. **ESHER, M.R.**, **LOPES** and **RIGBY, L.J.**

Amherst's Trusts, In re (1872) 41 L. J. Ch. 222; 1. R. 13 Eq. 464; 25 L. T. 870; 20 W. R. 290.—V.-C., *distinguished*.

Moon, In re, Dawes, Ex parte (1886) 17 Q. B. D. 275; 55 L. T. 114.—C.A. **ESHER, M.R.**, **LINDLEY** and **LOPES, L.J.**; *affirming* **CAVE, J.** **CAVE, J.**—I was referred to *In re Amherst's Trusts*, which, however, seems distinguishable. There the words used were, "part with the property"—a very general and loose expression, indeed—and it was held that those words were sufficiently complied with, because there was the presentation of a petition, upon which it was open to the Court to appoint a receiver of all or

any part of the debtor's property, and the learned vice-chancellor said, that that was a parting with his property, because he had done something which enabled the Court to take possession of all which belonged to him. It is obvious that the words used there pointed at something very different from assigning your property, or vesting your property, in some one else, and I do not understand that the vice-chancellor would have held that, if the words had been the same as they are here, the same result would have ensued.—p. 282.

Amherst's Trusts, In re, referred to.

Moon, In re, Dawes, Ex parte, applied.

Riggs, In re, Trustee (w. Lovell), Ex parte (1901) 70 L. J. K. B. 541; [1901] 2 K. B. 16; 84 L. T. 428; 49 W. R. 624; 8 Manson 233.—**WRIGHT, J.**

Walker v. Burrell (1780) 1 Doug. 317.—K.B., *dictum overruled*.

Rankin v. Horner (1812) 16 East 191.

ELLENBOROUGH, C.J. (for the Court).—In *Walker v. Burrell*, Lord Mansfield certainly is reported to have said that "he thought that as the plaintiffs had proved a debt under the commission, they could not question its validity, though they might at the time of the act of bankruptcy;" or, according to 3 T. R. 322, "proving a debt under the second commission estopped them from litigating the regularity of the proceedings under it." But the jury found for the plaintiff against whom this evidence was to have operated, and the Court refused to grant a new trial: so that the point did not ultimately become material. This *dictum*, however, goes beyond what it is now contended for; for, after proving a debt, the plaintiffs could not have questioned the validity of the commission, the proof would have been, not merely *prima facie* but *conclusive* evidence; and as the other judges did not notice the point; as it does not appear to have been discussed, as it was not decided; as no instance appears in which it has since been acted upon; and as, upon the grounds already stated, it would be unreasonable to bind the creditor by such proof, and it is difficult to see how he could resist it, if it were admitted as *prima facie* evidence; we are of opinion that the proof in this case ought to have been received, as proof of the validity of the commission.—p. 193.

9. ANNULMENT.

Jeavons, In re, Brown, Ex parte (1874) 43 L. J. Bk. 105; 1. R. 9 Ch. 304; 30 L. T. 108; 22 W. R. 602.—L.C. and **L.J.**, *explained*.

Johnson, Ex parte (1879) 12 Ch. D. 905; 40 L. T. 529; 27 W. R. 804.—C.J., *distinguished*.

Stanger, In re, Geisel, Ex parte (1882) 22 Ch. D. 436; 53 L. J. Ch. 349; 48 L. T. 405; 31 W. R. 264.—C.A. **JESSEL, M.R.**, **COTTON, L.J.**, and **SIR J. HANKEY**.
JESSEL, M.R. (during the argument).—The Court did not then [in *Ex parte Brown*] lay down any absolute limit of time as to rehearing; they only said that, as a general rule, they would adhere to the limit of twenty-one days fixed for appealing.—p. 437.

[*Ex parte Johnson* was not referred to in the judgments.]

Adams v. Sworder (1863) 4 Giff. 287; 32 L. J. Ch. 567; 9 Jur. (N.S.) 689; 8 L. T. 143; 11 W. R. 560.—V.-C.; *reversed*, (1863) 2 De G. J. & S. 44; 33 L. J. Ch. 318; 10 Jur. (S.S.) 140; 12 W. R. 294; 9 L. T. 621.—L.JJ.

Gyll, In re, Board of Trade, Ex parte (1888) 58 L. J. Q. B. 8; 39 L. T. 775; 37 W. R. 164; 5 Morrell 272.—COLEBROOK, C.J., and CAVE, J., *observations adopted*.
Debtor, In re, Official Receiver, Ex parte (1901) 84 L. T. 666.—C.A. COLLINS and STIRLING, L.JJ.

10. DISCHARGE

McKerrow, Ex parte (1865) 13 W. R. 1002, *followed*.
Petrie, In re and Ex parte (1868) 37 L. J. Bk. 20; L. R. 3 Ch. 610; 16 W. R. 817.—L.JJ.

Lloyd, In re and Ex parte (1889) 62 L. T. 366; 6 Morrell 297.—CAVE and CHARLES, JJ., *considered*.
Tobias, In re and Ex parte (1891) 60 L. J. Q. B. 244; [1891] 1 Q. B. 463; 64 L. T. 115; 39 W. R. 399; 8 Morrell 30.—CAVE and WILLIAMS, JJ.

Hawkins, In re and Ex parte (1892) 66 L. T. 466.—WILLIAMS and COLLINS, JJ.; *reversed*, (1892) 61 L. J. Q. B. 458; [1892] 1 Q. B. 890; 66 L. T. 737; 40 W. R. 484; 9 Morrell 118.—C.A. ESHER, M.R. and LOPES, L.J.; FRY, L.J. *dissenting*.

White, In re (1864) 33 L. J. Bk. 22; 9 L. T. 702; 12 W. R. 390; 10 Jur. (N.S.) 189.—L.C., *commented on and explained*.
Salaman, In re and Ex parte (1885) 54 L. J. Q. B. 239; 11 Q. B. D. 936; 52 L. T. 378; 2 Morrell 61.—C.A. BRETT, M.R., BAGGALLAY, and LINDLEY, L.JJ.

BRETT, M.R.—Entering into rash and hazardous speculations was wrong conduct before the passing of this Act [of 1883]. The Act is not manufacturing a new wrong thing; it is only taking notice in a new way of that which was always known to be wrong. In order to limit the section to conduct which has taken place since the passing of the Act, there ought to be in it the words "since the passing of the Act," and there are no such words. If the matter stood upon the statute alone, I should say that there was no reason why the Court should not take into consideration the facts referred to in sub-sect. 3, even if they happened before the passing of the Act, when the bankrupt is applying for a discharge after the commencement of the Act. I am inclined to think that those things might be taken into consideration, even if the adjudication had been made before the passing of the Act. But it is said that *In re White* is an authority to the contrary. There, however, the question arose upon sect. 159 of the Bankruptcy Act, 1861, which was a peculiar section. By it certain acts were treated as crimes, and the Court was empowered to sentence a bankrupt who had committed them to imprisonment. It was not imprisonment merely for the purpose of enforcing a remedy, but imprisonment as a punishment, and then there was a proviso at the end of the section that no person should be liable by virtue of the Act to any criminal proceeding or penalty in respect of any matter which might

have occurred before the passing of the Act, *i.e.*, liable to the imprisonment to which he might have been sentenced under sect. 159. It appears from the reports of the case that Lord Westbury rested his decision on the fact that sect. 159 gave a criminal character to the acts in question. The reports have unfortunately omitted to state that counsel called the attention of the Court to the proviso, but they must have done so. There is no such proviso in sect. 28 of the present Act, and the things referred to in sub-sect. 3 are not treated as criminal acts. They are not in their nature criminal, though they are very wrong things for a trader to do. But there are some other cases contrary to the decision of Lord Westbury. In one of them, *Ex parte Dornford* (4 De G. & Sm. 29), Knight Bruce, V.-C., held that the conduct of a bankrupt as a trader before the Bankruptcy Act of 1849 came into operation might be taken into account with reference to the provisions of that Act as to the allowance of his certificate. And in *Ex parte Storer* (2 D. M. & G. 263), Knight Bruce and Lord Cranworth, L.JJ., came to the same conclusion. Knight Bruce, L.J., said: "It has been suggested by Mr. Cooke that, even if the case set up by the opposing creditors were made out, it does not fall within sect. 256 of the Bankruptcy Act of 1849, because the particular facts occurred before the statute. For this no decision was cited; and, considering the learning and experience of Mr. Cooke, I think I may take it that none exists; and I state my opinion to be that, if this case comes otherwise within the Act of Parliament, it is not the less so, because the conduct complained of took place before the passing of the statute." Every word of that is applicable to the present case. The judgment of Lord Westbury in *In re White* is not consistent with it, for it related to a section which was not like sect. 28. That section resembles sect. 256 of the Act of 1849. We do not attempt to overrule Lord Westbury's decision, but we act on our own construction of sect. 28, and upon the decision of the Court of Appeal in *Ex parte Storer*.—p. 943.

11. EFFECT OF DISCHARGE.

Walker v. Liscarray (1807) 6 Esp. 98, *disapproved*.
Cowper v. Godmond (1833) 9 Bing. 748; 3 M. & Sc. 219.—C.P.
PARK, J.—I cannot assent to the language of Lord Ellenborough, in *Walker v. Liscarray*. It is opposed to his own more deliberate judgment in the cases cited at the bar.—p. 753.

Lyde v. Mynn (1833) 4 Sim. 505; 1 My. & K. 683; Coop. t. Brough. 123.—L.C., *commented on*.
Cole v. Kernot, Thompson v. Cohen (1872) 41 L. J. Q. B. 221; L. R. 7 Q. B. 527; 26 L. T. 693.—Q.B.
BLACKBURN, J.—In *Lyde v. Mynn*, A. granted an annuity to B., and covenanted that if his wife left him any property he would charge it with the annuity. The annuity became discharged by A.'s bankruptcy, and the wife afterwards died, leaving him property. Shadwell, V.-C., and Lord Brougham, C., thought the covenant was a security which was not discharged by the bankruptcy; and though it was argued (and I think there is a

good deal in the argument) that the debt being discharged the covenant to secure it was also gone, this argument was overruled. It is sufficient to say that the precise point does not arise in the present case, as there is no covenant to transfer, or anything amounting to an equitable mortgage like the case of *Holroyd v. Marshall* (10 H. L. C. 191; 32 L. J. Ch. 109).

Lyde v. Myrn, *followed*.

Thompson v. Cohen, *distinguished*.

Collyer v. Isaacs, 50 L. J. Ch. 707.—HALL, V.-C.; *reversed*, (1881) 51 L. J. Ch. 14; 19 Ch. D. 342; 45 L. T. 567; 30 W. R. 70.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.JJ.

Morgan v. Hardy (1886) 17 Q. B. D. 770.—DENMAN, J.; *reversed*, (1887) 56 L. J. Q. B. 363; 18 Q. B. D. 646; 35 W. R. 588.—C.A. BOWEN and FRY, L.JJ.; *SEWELL, M.R. dissenting*; the latter decision *affirmed*, *nom. Hardy v. Fothergill* (1888) 58 L. J. Q. B. 44; 13 App. Cas. 351; 59 L. T. 273; 37 W. R. 177; 53 J. P. 36.—H.L. (E.). LORDS HALSBURY, L.C., SELBORNE, FITZGERALD, HERSCHELL and MACNAGHTEN.

Hardy v. Fothergill (*supra*), *applied*.

Perkins, In re, *Poyser v. Beyfus* (1898) 67 L. J. Ch. 454; [1898] 2 Ch. 182; 78 L. T. 666; 46 W. R. 595; 6 Manson 193.—C.A. LINDLEY, M.R., HIGBY and COLLINS, L.JJ.

Heather v. Webb (1876) 46 L. J. C. P. 89; 2 C. P. D. 1; 25 W. R. 253.—C.P.D., *distinguished*.

Jakeman v. Cook (1878) 48 L. J. Ex. 165; 4 Ex. D. 26; 27 W. R. 171.—EX. D.

Jakeman v. Cook, *distinguished*.

Andrews, In re, *Barrow, Ex parte* (1881) 18 Ch. D. 464; 50 L. J. Ch. 821; 45 L. T. 197.—C.A. SELBORNE, L.C., BRETT and COTTON, L.JJ.

SELBORNE, L.C.—The case of *Jakeman v. Cook* was referred to as showing that in a case, not of composition, but of liquidation by arrangement, after a debtor has obtained his discharge, he is at liberty to enter into a new contract with one of his creditors to pay him his original debt in full. That case appears to me to have no bearing whatever on the present case. The present case is that of a statutory composition under sect. 126, and the agreement of August, 1879, was made, not only before the statutory composition was exhausted by the fulfilment of its terms, but even before the first instalment of the composition had become due to the creditors who were bound by it. It may well be that after a composition has been fully and finally worked out, and all the instalments of it have been paid, the position of the debtor is the same as that of a debtor who has obtained his discharge in a bankruptcy or a liquidation by arrangement, and that an agreement by him with one of the creditors, such as that which was made in *Jakeman v. Cook*, may be supported. But in the present case everything was done before any of the instalments of the composition had become payable to any of the creditors.—p. 470.

Wyborne v. Ross (1809) 2 Taunt. 68; 1 Rose 112, *disapproved*.

Metouf v. Watling (1884) 2 D. P. C. 552. PATTISON, J.—The case of *Wyborne v. Ross* was very much doubted as law by Lord Tenterden, in the case of *Vanaunder v. Crowie* (1 Chitty

16). There he says of it—"The case cited as an authority does not appear to me to throw any light upon the subject; nor can I see the ground upon which that case was decided."—p. 555.

Willett v. Pringle (1863) 2 N. R. 190; and **Seott v. Ambrose** (1814) 3 M. & S. 326; 15 R. R. 504, *followed*.

Maughan v. Vinesberg (1868) 37 L. J. C. P. 210; L. R. 3 C. P. 318, *dissented from*.

Simpson v. Mirabita (1869) L. R. 4 Q. B. 257; 38 L. J. Q. B. 76; 10 B. & S. 77; 20 L. T. 275; 17 W. R. 589.—Q.B.

COCKBURN, C.J.—The older cases are conclusive authorities that the costs, in such a case as the present, though not provable as a debt under the bankruptcy, are barred by the certificate as incident to the original debt which is barred. These cases were not brought to the notice of the Court in *Maughan v. Vinesberg*, which case appears not to have been much considered nor fully argued. We have, therefore, to choose between that and the older cases; and as they cannot be said to have been overruled we prefer to follow them and decline to be bound by the later case.—p. 261.

Harris v. James (1807) 9 East 82, *rejected*. *Jones v. Hill* (1870) L. R. 5 Q. B. 230; 39 L. J. Q. B. 74; 21 L. T. 784; 18 W. R. 453.—Q.B.

MELLOR, J.—I should feel myself bound by *Harris v. James* did I not think we were relieved from that decision by the effect of subsequent legislation, which all seems to point to a different date, viz., the time when the order or certificate takes effect; that is, to the time when it was granted, and not to any previous date by the artificial doctrine of relation to the commencement of the bankruptcy. Reading sect. 151 with the subsequent sections, it is clear that it is the order of discharge, and that alone, which is a bar to further proceedings; and "thereafter" must mean "after the order of discharge take effect;" there is here no ambiguity, and we are, therefore, relieved from the effect of the decision under 5 Geo. 2, c. 30, in *Harris v. James*, and are at liberty to construe the statute according to the plain meaning of the words.—p. 235.

12. PROPERTY PASSING TO THE TRUSTEE.

M'Carthy, In re (1881) 7 L. R. Ir. 473, *followed*.

Lee v. Lopes (1812) 15 East 230; and **Gethin v. Wilks** (1835) 2 Dowl. P. C. 189, *considered*.

Mackenzie, In re, *Hertfordshire (Sheriff)*, *Ex parte* (1899) 68 L. J. Q. B. 1003; [1899] 2 Q. B. 566; 81 L. T. 214; 6 Manson 413.—C.A. LINDLEY, M.R., JEUNE, F. and ROMER, L.J.

Brooklehurst v. Lowe (1857) 7 El. & Bl. 176; 26 L. J. Q. B. 107; 3 Jur. (N.S.) 438.—Q.B., *followed*.

Railton v. Wood (1890) 59 L. J. P. C. 84; 15 App. Cas. 363; 63 L. T. 13.—P.C. LORDS, SELBORNE, WATSON and FIELD, and SIR B. PEACOCK.

Thomas, In re, Willoughby d'Eresby (Baroness) (or *Shen*), *Ex parte* (1881) 43 L. T. 638; 29 W. R. 248.—BACON, C.J.: *reversed*, (1881) 44 L. T. 781; 29 W. R. 527.—C.A. JAMES, COTTON and LUSH, L.JJ.

Selkrig v. Davies (1814) 2 Dow 230; 2 Rose 97, 291; 14 R. R. 146.—H.L., followed.

Hooper, In re, Banco de Portugal v. Waddell (1880) 49 L. J. Bk. 33; 5 App. Cas. 161; 42 L. T. 698; 28 W. R. 477.—H.L. (E.). LORDS CAIRNS, L.C., SELBORNE and BLACKBURN.

Selkrig v. Davies, applied.

Hooper, In re, Pim, Ex parte (1881) 7 L. R. Ir. 458.

Troughton v. Gitley (1676) Amb. 629, followed.

Tucker v. Hernaman (1853) 4 De G. M. & G. 395; 22 L. J. Ch. 791; 17 Jur. 723.—L.JJ.

Troughton v. Gitley and Bourne, In re and Ex parte (1826) 2 Glyn & J. 137, discussed and followed.

Engelback v. Nixon (1875) L. R. 10 C. P. 645; 44 L. J. C. P. 396; 33 L. T. 831.—C.P.

BRETT, J.—It seems to me that the facts proved bring this case precisely within *Troughton v. Gitley*. It was suggested by the learned counsel for the plaintiff that that case had been overruled or was wrongly decided; and expressions of Lord Eldon in subsequent cases were referred to intimating his disapproval of it—amongst others *Ex parte Martin* (15 Ves. 115). Be that as it may, Mr. Willis has satisfied us that no Court of equity has overruled *Troughton v. Gitley*, but that, on the contrary, it has been repeatedly affirmed. Lord Eldon himself, in *Ex parte Bourne* (2 Glyn & J. 137, at p. 141), seems to have accepted the doctrine of *Troughton v. Gitley* as an equitable doctrine then in force. So, in *Ex parte Butler* (2 M. D. & D. 731, 741) Sir John Cross, sitting in the Court of Bankruptcy, affirmed the doctrine of *Troughton v. Gitley*. And further, there is the exceedingly strong authority of the Lords Justices Turner and Knight Bruce in *Tucker v. Hernaman* (4 De G. M. & G. 395; 22 L. J. Ch. 79) in favour of *Troughton v. Gitley* as an existing equitable doctrine.—p. 653.

Troughton v. Gitley and Bourne, In re and Ex parte, distinguished.

Winn, In re, Russell, Ex parte (1876) 45 L. J. Bk. 85; 2 Ch. D. 424; 34 L. T. 295; 24 W. R. 802.—BACON, C.J.

Troughton v. Gitley, considered.

Rawbone's Trust (or Will), In re (1857) 3 K. & J. 476; 26 L. J. Ch. 588; 3 Jur. (N.S.) 837.—V.-C., dictum commented on.

Caughey, In re, Ford, Ex parte (1876) 1 Ch. D. 521; 45 L. J. Bk. 96; 34 L. T. 634; 24 W. R. 590.—C.A.

JESSEL, M.R.—If the appellant is to succeed at all he must succeed either on the general equitable doctrine, of which *Troughton v. Gitley* is only an example, that a man cannot stand by having a charge or incumbrance upon property and allow another to advance money on it on the supposition that it is unincumbered. That assumes that he has knowledge that the other man is going to advance money, and suppresses the fact of his own interest. So the owner of land may not stand by and allow another person to lay out money in building on it, as if it was his own land. But there again you must show that he knew that the other person was laying out the money under the false belief that the land was his own. In my opinion Lord Hatherley

[then Page-Wood, V.-C.] did not intend to lay down any other doctrine than this in his dictum in *In re Rawbone's Trust*. . . I therefore think that there is no law on this subject extending beyond the two rules I have alluded to [the general equitable doctrine and the bankruptcy doctrine of reputed ownership], and that if the dictum of Lord Hatherley was intended to add anything to them it has no foundation in authority, but is only an inaccurate reference to the decision in *Troughton v. Gitley*.—p. 528.

Troughton v. Gitley, observed upon.

Dysart, In re, Bolland, Ex parte (1878) 9 Ch. D. 512; 47 L. J. Bk. 74; 38 L. T. 693; 26 W. R. 807.—C.A. JAMES, BAGGALLAY and

BRAMWELL, L.JJ.—I cannot agree with him [Lord Justice Bramwell] in thinking that the principle of *Troughton v. Gitley* is not applicable to the present case; for I think it does apply, and that it supports our judgment.—p. 321.

Troughton v. Gitley, inapplicable.

Hardy, In re, Hardy v. Farmer (1896) 65 L. J. Ch. 461; [1896] 1 Ch. 904; 74 L. T. 403; 44 W. R. 503; 3 Manson 150.—CHITTY, J.

Troughton v. Gitley and Tucker v. Hernaman

(1853) 4 De G. M. & G. 395; 22 L. J. Ch. 791; 17 Jur. 723.—L.JJ., followed.

Burr, In re, Pannell, Ex parte (1901) 84 L. T. 327.—WRIGHT, J.

Coles v. Barrow (1813) 3 Taunt. 754; 2

Rose 277; 14 R. R. 658, questioned.
Nias v. Adamson (1819) 3 B. & Ald. 223; 22 R. R. 360.

Crofton v. Poole (1830) 1 B. & Ad. 568; 9

L. J. (O.S.) K. B. 59, followed.
Dowling, In re, Banks, Ex parte (1877) 46 L. J. Bk. 74; 4 Ch. D. 689; 36 L. T. 117; 25 W. R. 515.—BACON, C.J.

Lyon v. Weldon (1824) 2 Bing. 334, followed.

The Ruby (1900) 83 L. T. 438; 9 Asp. M. C. 146.—BARNES, J.

Meux v. Smith (1841) 10 L. J. Ch. 225; 11

Sim. 410.—L.C., applied.
Bird v. Philpott (1906) 69 L. J. Ch. 487; [1906] 1 Ch. 822; 82 L. T. 110; 7 Manson 251.—FARWELL, J.

Bird v. Philpott, referred to.

Adie, In re; Rushford, Ex parte (1901) W. N. 98.—WRIGHT, J.

France, In re, Tinker, Ex parte (1874) 43

L. J. Bk. 147; L. R. 9 Ch. 716; 80 L. T. 806; affirming, 22 W. R. 794, distinguished.
Wainwright, In re, Wainwright (or Greener), Ex parte (1881) 19 Ch. D. 140; 51 L. J. Ch. 67; 45 L. T. 562; 30 W. R. 125.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.JJ.

LUSH, L.J.—In the case of a sale of the estate to the debtor himself for a price, as in *Ex parte Tinker*, where the debtor agreed to pay by yearly instalments a certain sum which must have come out of his yearly earnings, the Court held that it would be a breach of faith to take his after-acquired property, because all parties must have understood that he was to pay the instalments out of his earnings. That is not this case. The sale here is a sale to a third person; it is immaterial that he was the trustee.

It is a sale to a third person, and a sale of that kind is authorised by the Bankruptcy Act.—p. 154.

Bennett's Trusts, In re (1874) 14 L. J. Bk. 244; L. R. 19 Eq. 245.—*V.-C. overruled*.
Ebbs v. Boulons (1875) 44 L. J. Ch. 691; L. R. 10 Ch. 479; 33 L. T. 342; 23 W. R. 820.—*L.J.*

Bennett's Trusts, In re (1871) 41 L. J. Bk. 244; L. R. 19 Eq. 245.—*V.-C.*; *reversed*. (1875) L. R. 10 Ch. 490; 32 L. T. 652; 23 W. R. 822.—*L.J.*

Gibson v. Overbury (1841) 7 M. & W. 555; 10 L. J. Ex. 219.—*EX.*, *distinguished*.
Green v. Ingham (1867) 36 L. J. C. P. 236; L. R. 2 C. P. 525; 16 L. T. 455; 15 W. R. 841.—*C.P.*

Duncan v. Chamberlayne (1841) 11 Sim. 123; 10 L. J. Ch. 307; 4 Jur. 819.—*V.-G.*, *disapproved*.

Thompson v. Speirs (1815) 13 Sim. 469; 14 L. J. Ch. 453.—*V.-C.*

Thompson v. Giles (1824) 2 B. & C. 422; 3 D. & R. 733; 2 L. J. (o.s.) K. B. 48; 26 R. R. 392.—*K.B.*, *distinguished*.

Mills, Bawtree & Co. In re, Stannard, Ex parte (1893) 10 Morrell 193.

Thompson v. Giles and Giles v. Perkins (1807) 9 East 12, *held applicable*.
Gaden v. Newfoundland Savings Bank (1899) 68 L. J. P. C. 57; [1899] A. C. 281; 80 L. T. 329.—*P.C.* LORDS WATSON, HOBHOUSE, DAVEY and SIR HENRY STRONG.

Maberley, In re, Cunningham, Ex parte (1833) 3 Deac. & Ch. 58; Mont. & B. 269; 2 L. J. Bk. 58; *affirmed*, *nom.* Belcher, In re (1833) 3 Deac. & Ch. 87; Mont. & B. 286; 2 L. J. Bk. 62, n.

Maberley, In re, Cunningham, Ex parte, *followed*.

Maberley, In re, Solomons, Ex parte (1833) 3 Deac. & Ch. 77; Mont. & B. 308; 2 L. J. Bk. 62.

Maberley, In re, Cunningham, Ex parte, *followed*.

Maberley, In re, Wyhe, Ex parte (1833) 3 Deac. & Ch. 82.

Coombe's Trusts, In re (1859) 1 Giff. 91; 5 Jur. (N.S.) 784; 7 W. R. 609. *approved*.

Bright's Settlement, In re (1880) 18 Ch. D. 413; 42 L. T. 308; 28 W. R. 551.—*C.A.* JESSELL, M.R., BAGGALLAY and COTTON, L.JJ.

Bright's Settlement, In re, considered.
Palmer v. Locke (1881) 18 Ch. D. 381; 51 L. J. Ch. 124; 45 L. T. 229; 30 W. R. 419.—*C.A.* SELBORNE, L.C., BAGGALLAY and LUSH, L.JJ.
SELBORNE, L.C.—With regard to the case of *In re Bright's Settlement*, far be it from me even to adopt upon this present occasion the language of the Master of the Rolls, who seems to have thrown some doubt upon that decision. It may have been a perfectly good decision, and, if it was, it seems to me to have depended upon the presence of special negative words in the statute of 1849 there construed, which *prima facie* as to the subject to which they are applied exclude the

possibility of the bankrupt giving a title to anybody after his bankruptcy. Those negative words were the ground of the decision. I do not propose to enquire whether they were rightly construed or rightly applied.—p. 399.

Simpson v. Creditors of Duncanson (1786) 1 Mor. Diet. 14, 204; 1 Bell. Com. 7th ed. p. 189; Hailes, 1000; Brown on Sales, p. 576; L. R. 6 App. Cas. 598, n., *observed upon*.

Woods v. Russell (1822) 5 B. & Ald. 942; 1 D. & R. 587; 24 R. R. 621 (except as to the rudder and cordage); **Clarke v. Spence** (1836) 5 L. J. K. B. 161; 4 Ad. & E. 448; 6 N. & M. 399; **Wood v. Bell** (1856) 5 El. & Bl. 772; 25 L. J. Q. B. 148; 2 Jur. (N.S.) 349.—*Q.B.*; *partly reversed*, 6 El. & Bl. 355; 25 L. J. Q. B. 321; 2 Jur. (N.S.) 664; 4 W. R. 553.—*EX. CH.*; and **Tripp v. Armitage** (1839) 4 M. & W. 687; 1 Horn. & H. 442; 3 Jur. 249. *approved*.

Seath v. Moore (1886) 11 App. Cas. 350; 55 L. J. P. C. 54; 54 L. T. 690; 5 Asp. M. C. 586.—*H.L.* (SC.) LORDS BLACKBURN, WATSON, BRAMWELL, FITZGERALD and HAINSBURY.

Tooth v. Hallett (1869) 38 L. J. Ch. 396; L. R. 4 Ch. 242; 20 L. T. 153; 17 W. R. 423.—*L.J.*, *distinguished*.

Brice v. Bannister (1878) 47 L. J. Q. B. 722; 3 Q. B. D. 569; 38 L. T. 739; 26 W. R. 670.—*C.A.* BRAMWELL and COTTON, L.JJ.; BRETT, L.J., *disenting*.

Tooth v. Hallett and Jones, In re, Nichols, Ex parte (1883) 22 Ch. D. 782; 52 L. J. Ch. 635; 48 L. T. 492; 31 W. R. 661.—*C.A.* JESSELL, M.R., LINDLEY and BOWEN, L.JJ., *distinguished*.

Toward, In re, Moss, Ex parte (1884) 54 L. J. Q. B. 126; 14 Q. B. D. 310; 52 L. T. 188.—*MATTHEW and CAVE, JJ.*; *affirmed*, 14 Q. B. D. 310.—*C.A.* BRETT, M.R., COTTON and LINDLEY, L.JJ.

Tooth v. Hallett, distinguished.

Drew v. Joselyne (1887) 56 L. J. Q. B. 490; 18 Q. B. D. 590; 57 L. T. 5; 35 W. R. 570.—*C.A.* ESHER, M.R., BOWEN and FRY, L.JJ.

ESHER, M.R.—The contract work went on and was completed [by the trustee in liquidation of the contractors] and the architect certified accordingly under the old contract, and, thereupon, if there had been no question of any assignment, the building owners would have been bound to pay the retention moneys over to the trustee. But there had been an equitable assignment of a portion of those moneys by the contractors before the liquidation, of which the building owners had notice; and in consequence they are bound to pay such portion of them to the assignees. It is argued that in holding that they are so bound we shall be contravening what was decided in *Tooth v. Hallett*. In that case there was the same power given to the building owner to take the work out of the hands of the contractor, but the vital difference between that case and the present is, as it seems to me, that there the building owner had acted on the power and taken the work out of the contractor's hands. Whether he had done so was a question of fact. It appears to me that the judgment of Selwyn, L.J., proceeds on the view that he had done so.

and Cotton, L.J., in the subsequent case of *Brice v. Bannister* (1878, *supra*) took the same view of the case of *Tooth v. Hallett*, viz., that the building owner there not only had the power to take, but actually had taken the work out of the original contractor's hands. That case therefore is no authority for the present, where we find that the building owners did not put an end to the doing of the work under the original contract and the trustee elected to go on under the contract. For these reasons I . . . think this appeal must be allowed.

Jones, In re, Nichols, Ex parte, distinguished.
Davis, In re, Rawlings, Ex parte (1888) 22 Q. B. D. 193; 37 W. R. 203.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Jones, In re, Nichols, Ex parte, principle applied.
Wilmot v. Alton (1896) 66 L. J. Q. B. 42; [1897] 1 Q. B. 17; 45 W. R. 113; 4 Manson 17.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Sinclair, In re, Payne, Ex parte (1885) 15 Q. B. D. 616; 53 L. T. 767; 2 Morrell 255.—CAVE, J., *discussed*.

Spackman, In re, Foley (or May), Ex parte (1890) 59 L. J. Q. B. 306; 24 Q. B. D. 728; 62 L. T. 849; 38 W. R. 497, 7 Morrell 100.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.; *reversing* 62 L. T. 266; 38 W. R. 368.—CAVE and SMITH, JJ.

Sinclair, In re, Payne, Ex parte, distinguished.

Pollitt, In re, Minor, Ex parte (1893) [1893] 1 Q. B. 455; 62 L. J. Q. B. 236; 4 R. 253; 68 L. T. 966; 41 W. R. 276; 10 Morrell 35.—C.A. ESHER, M.R., LINDLEY and A. L. SMITH, L.JJ. ESHER, M.R.—The present case [in which the solicitor of a bankrupt sought to retain money placed in his hands to meet future costs by the bankrupt before the act of bankruptcy, of which the solicitor had knowledge, as payment for services rendered after the act of bankruptcy] cannot be brought within *In re Sinclair*, and I agree that *In re Sinclair* must not be extended beyond the payment of that which is necessary for the debtor, on the ground, if I may say so, of humanity.—p. 458.

Sinclair, In re, Payne, Ex parte, distinguished.

Whidlock, In re, Official Receiver, Ex parte (1893) 63 L. J. Q. B. 245; 10 R. 110; 70 L. T. 34; 1 Manson 33.

V. WILLIAMS, J., was of opinion that the costs incurred in resisting an action must be distinguished from those incurred in resisting the bankruptcy petition, and were clearly not within *Sinclair, In re, Payne, Ex parte*. He further stated that that case only applied to ready money, which was paid over, and not to moneys which happened to be in the hands of a solicitor.

≈ **Sinclair, In re, Payne, Ex parte, inapplicable.**

Pollitt, In re, Minor, Ex parte, *applied*.
Simmons, In re, Ball, Ex parte (1893) 63 L. J. Q. B. 242; [1894] 1 Q. B. 433; 10 R. 107; 70 L. T. 32; 1 Manson 30.—V. WILLIAMS, J.

Sinclair, In re, Payne, Ex parte, inapplicable.

White, In re, Ward, Ex parte (1898) 78 L. T. 25; 5 Manson 17.

WRIGHT, J. held that where an accountant, who had prepared a statement of accounts and sent to the creditors a notice which amounted to an act of bankruptcy, had received payment for his services, the transaction was not protected within the exception of *Sinclair, In re*, and that the money so paid was recoverable by the trustee in the bankruptcy.

Charlewood, In re, Masters, Ex parte (1894) 63 L. J. Q. B. 344; [1894] 1 Q. B. 643; 10 R. 132; 70 L. T. 383; 1 Manson 42.—V. WILLIAMS and WRIGHT, JJ., *distinguished*.

Beys and Craig, In re, Cooper, Ex parte (1894) 10 R. 143; 70 L. T. 561; 42 W. R. 432; 1 Manson 56.—V. WILLIAMS, J.

Mapleback, In re, Butt (or Caldecott), Ex parte, 35 L. T. 172; *reversed*, (1876) 46 L. J. Bk. 14; 4 Ch. D. 150; 35 L. T. 503; 25 W. R. 103; 13 Cox C. C. 374.—C.A.

Mapleback, In re, Caldecott, Ex parte (*supra*, in C.A.), *distinguished*.
Campbell, In re, Wolverhampton Banking Co., Ex parte (1884) 14 Q. B. D. 32; 33 W. R. 642; 1 Morrell 261.—Q.B.D.

Tomkins v. Saffery (1877) 3 App. Cas. 213; 47 L. J. Bk. 11; 37 L. T. 758; 26 W. R. 62.—H.L. (E), *distinguished*.

Plumbly, In re, Grant, Ex parte (1880) 13 Ch. D. 667; 42 L. T. 337; 28 W. R. 755.—C.A. JAMES, BAGGALLAY and COTTON, L.JJ.

Tomkins v. Saffery, considered.

Richardson v. Stormont, Todd & Co. (1900) 69 L. J. Q. B. 369; [1900] 1 Q. B. 701; 82 L. T. 316; 48 W. R. 451; 5 Com. Cas. 134.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Plumbly, In re, Grant, Ex parte, applied.

Woodl, In re, King, Ex parte (1900) 82 L. T. 504.—WRIGHT, J.

Plumbly, In re, Grant, Ex parte, considered.

Levitt v. Hamblet (1901) 70 L. J. K. B. 520; [1901] 2 K. B. 53; 84 L. T. 638; 6 Com. Cas. 79.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.

Plumbly, In re, Grant, Ex parte, referred to.

Beckhuson v. Hamblet (1900) 69 L. J. Q. B. 41; [1900] 2 Q. B. 18; 82 L. T. 459; 5 Com. Cas. 217.—KENNEDY, J.

Mackay v. Douglas (1872) 41 L. J. Ch. 539; 14 R. 14 Eq. 106; 26 L. T. 721; 20 W. R. 652.—V. C., *approved*.

Butterworth, In re, Russell, Ex parte (1882) 51 L. J. Ch. 521; 19 Ch. D. 538; 46 L. T. 113; 30 W. R. 584.—C.A. JESSEL, M.R., BAGGALLAY and LINDLEY, L.JJ.

Pearson, In re, Stephens, Ex parte (1876) 3 Ch. D. 807; 85 L. T. 68; 25 W. R. 126.—*C.J., followed.*

Montefiore v. Behrens (1865) 35 Beav. 95; L. R. 1 Eq. 171.—*M.R., distinguished.*
Holland, In re, Gregg v. Holland (1901) 70 L. J. Ch. 625; [1901] 2 Ch. 145; 85 L. T. 304; 49 W. R. 47; 8 Manson 266.—*FARWELL, J.*

Molt v. Everall (1875) 45 L. J. Ch. 96.—*V.-C., reversed.* (1876) 45 L. J. Ch. 433; 2 Ch. D. 266, 34 L. T. 599; 24 W. R. 471.—*C.A.*

Harrison, In re, Whitney, Ex parte (1900) W. N. 118.—*WRIGHT, J., reversed.* (1900) 69 L. J. Q. B. 942; [1900] 2 Q. B. 710; 83 L. T. 189; 49 W. R. 2; 7 Manson 378.—*C.A. LORD ALVERSTONE, M.R., RIGBY and COLLINS, L.J.*

Player, In re, Harvey, Ex parte (1885) 54 L. J. Q. B. 553; 15 Q. B. D. 632; 53 L. T. 768; 2 Morrell 261.—*MATHEW, CAVE and WILLS, JJ., approved.*

Ashcroft, In re, Todd, Ex parte (1887) 56 L. J. Q. B. 431; 19 Q. B. D. 186; 35 W. R. 676; 4 Morrell 209.—*C.A. ESHER, M.R. and LOPES, L.J.; dubitante FRY, L.J., on this point.*

Player, In re, Harvey, Ex parte, and Kensington v. Chantler (1813) 2 M. & S. 36, *explained.*

Vansittart, In re, Brown, Ex parte (No. 1) (1892) 62 L. J. Q. B. 277; [1893] 1 Q. B. 181; 5 R. 38; 67 L. T. 592; 41 W. R. 32; 57 J. P. 132; 9 Morrell 280.—*V. WILLIAMS, J.*

Player, In re, Harvey, Ex parte, followed.
Tankard, In re, Official Receiver, Ex parte (1899) 68 L. J. Q. B. 670; [1899] 2 Q. B. 57; 80 L. T. 500; 47 W. R. 624; 6 Manson 188.—*WRIGHT, J.*

Player, In re, Harvey, Ex parte, approved.
Plummer, In re, Trustee, Ex parte (1900) 69 L. J. Q. B. 936; [1900] 2 Q. B. 790; 83 L. T. 387; 48 W. R. 634; 7 Manson 367.—*C.A. ALVERSTONE, M.R., RIGBY and COLLINS, L.J.*

Vansittart, In re, Brown, Ex parte (No. 1). *distinguished.*

Tasker v. Tasker and Lowe (1894) 64 L. J. P. 36; [1895] P. 1; 11 R. 619; 71 L. T. 779; 43 W. R. 255.—*JEUNE, P.*

Cross, In re, Payne, Ex parte (1870) 11 Ch. D. 539; 40 L. T. 296; 27 W. R. 368.—*C.A.; and Toomer, In re, Blaisberg, Ex parte* (1888) 52 L. J. Ch. 461; 23 Ch. D. 254; 49 L. T. 16; 31 W. R. 906.—*C.A. JESSEL, M.R., BAGGALLAY and LINDLEY, L.J., applied.*

Sanguinetti v. Stuckey's Banking Co. (1894) 64 L. J. Ch. 181; [1895] 1 Ch. 176; 71 L. T. 872; 43 W. R. 154; 13 R. 66.

CHITTY, J.—It would be strange that that section [47 of the Bankruptcy Act 1883] should have the effect of vesting the property in the settlement in the trustee as against persons who claim to be mortgagees outside the bankruptcy. In my opinion the principles established by *Ex parte Payne* and *Ex parte Blaisberg* apply.

Sanguinetti v. Stuckey's Banking Co. and Farnham, In re (1895) 64 L. J. Ch. 717; [1896] 2 Ch. 799; 12 R. 554; 73 L. T.

231; 3 Manson 102.—*C.A. LINDLEY, LOPES and RIGBY, L.J., explained.*
Sims, In re, Sheffield, Ex parte (1897) 3 Manson 340; 45 W. R. 189.

VAUGHAN WILLIAMS, J.—I am of opinion that neither of the above cases decided that where a voluntary settlement is declared void as against the trustee in bankruptcy under sect. 47 of the Bankruptcy Act, 1883, the avoidance wipes the settlement out as if it never had been; but that they only decided that it was avoided to the extent of the bankrupt's debts and the costs of the bankruptcy.

Briggs and Spicer, In re (1891) 60 L. J. Ch. 514; [1891] 2 Ch. 127; 64 L. T. 187; 39 W. R. 377; 55 J. P. 278.—*STIRLING, J., considered and distinguished.*

Vansittart, In re, Brown, Ex parte (No. 2) (1893) 62 L. J. Q. B. 273; [1893] 2 Q. B. 377; 5 R. 280; 68 L. T. 233; 41 W. R. 286; 10 Morrell 44.—*VAUGHAN WILLIAMS, J.*

Briggs and Spicer, In re, dissapproved.

Vansittart, In re, Brown, Ex parte (No. 2) (*supra*); **Brall, In re, Norton, Ex parte** (1893) 62 L. J. Q. B. 457; [1893] 2 Q. B. 381; 5 R. 440; 69 L. T. 323; 41 W. R. 623; 10 Morrell 166.—*V. WILLIAMS, J.; and Holden, In re, Official Receiver, Ex parte* (1887) 57 L. J. Q. B. 47; 20 Q. B. D. 43; 58 L. T. 118; 36 W. R. 189.—*CAVE and A. L. SMITH, JJ., approved.*

Carter and Kenderdine's Contract, In re (1897) 66 L. J. Ch. 408; [1897] 1 Ch. 776; 76 L. T. 476; 45 W. R. 484; 4 Manson 34.—*C.A. LINDLEY, SMITH and RIGBY, L.J.*

LINDLEY, L.J.—The objection taken by the purchaser is a very formidable one if there is anything in it; and one cannot say that there is nothing in it, because the question has arisen already, and Stirling, J., in the case of *In re Briggs and Spicer* has held the objection to be so serious that he could not force a similar title on the purchaser. On the other hand, Vaughan Williams, J., who has had to consider the question from a somewhat different point of view, has come to the conclusion that the purchaser would get a good title [in *In re Brall*].

The question turns on the construction of sect. 47 of the Bankruptcy Act, 1883. . . . Looking at the language only, it seems to me that, when an enactment says a settlement "shall be void against the trustee in bankruptcy," it does not mean that it shall be void before there is a trustee in bankruptcy.

Let us consider what the consequences would be if the other conclusion were arrived at. No conveyance or transfer of property which came within the definition of the settlement in this 47th section could ever be safely made by anybody if that conveyance or transfer was what is called "voluntary," that is to say, without consideration. . . . That cannot be the meaning of the section, and yet that would be the result if you construe the words "void against the trustee in bankruptcy" as meaning void from the date of the transaction which is referred to. To my mind, good sense is shocked by such a startling construction as that.

The construction which appears to me to be correct has been adopted not only by Vaughan Williams, J., but by the Court of Queen's Bench in *In re Holden*.

Vansittart, In re, Brown, Ex parte (No. 2)
(*supra*), *followed*.

Tankard, In re, Official Receiver, Ex parte (1899) 68 L. J. Q. B. 670; [1899] 2 Q. B. 37; 50 L. T. 500; 47 W. R. 624; 6 Manson 188.—WRIGHT, J.

Vansittart, In re, Brown, Ex parte (No. 2)
(*supra*), and Tankard, In re, Official Receiver, Ex parte, *principles approved*

Plummer, In re, Trustee, Ex parte (1900) 69 L. J. Q. B. 936; [1900] 2 Q. B. 790; 83 L. T. 387; 48 W. R. 634; 7 Manson 367.—C. A. LORD ALVERSTONE, M.R., RIGBY and COLLINS, L.JJ.

Darby v. Smith (1798) 8 Term Rep. 82, *observed upon*.

Jordan, In re, Symmons, Ex parte (1880) 14 Ch. D. 693; 42 L. T. 106; 28 W. R. 803.—C. A. JAMES, COTTON and THESIGER, L.JJ., *reversing* BACON, C.J.

JAMES, L.J.—I wish to add that the case of *Darby v. Smith*, so far as it is intelligible at all, appears not to have been a case of voluntary preference. It was not like any other case which can well happen.—p. 698.

Higinbotham v. Holme (1812) 19 Ves. 88, *applied*.

Whitmore v. Mason (1861) 2 Johns. & H. 204; 31 L. J. Ch. 433; 8 Jur. (N.S.) 278; 5 L. T. 631; 10 W. R. 168.—V.-C.

Higinbotham v. Holme, referred to.

Detmold, In re, Detmold v. Detmold (1889) 38 L. J. Ch. 495; 40 Ch. D. 585; 61 L. T. 21; 37 W. R. 442.—NORTH, J.

Higinbotham v. Holme, held inapplicable.

Stephenson, In re, Brown, Ex parte (1897) 66 L. J. Q. B. 423; [1897] 1 Q. B. 638; 76 L. T. 328; 45 W. R. 416; 4 Manson 13.—WILLIAMS, J.

Fraser v. Thompson, 1 Giff. 49; 5 Jur. (N.S.) 669; 7 W. R. 607; reversed. (1859) 4 De G. & J. 650.

Collins v. Burton, 5 Jur. (N.S.) 952.—V.-C.; *reversed*, (1859) 28 L. J. Ch. 943; 4 De G. & J. 612; 5 Jur. (N.S.) 1113.—L.JJ.

Wallworth, In re, Shuttleworth v. Hernaman (1857) 26 L. J. Bk. 61; 1 De G. & J. 322; 3 Jur. (N.S.) 1313; 5 W. R. 853, distinguished.

Keen and Keen, In re, Collins, Ex parte (1902) 71 L. J. K. B. 487; [1902] 1 K. B. 555; 86 L. T. 235; 50 W. R. 334.—WRIGHT and BIGHAM, JJ.

Kidder, In re, Watkins, Ex parte (1835) 2 Mont. & A. 348; 4 Deac. & Ch. 87, distinguished.

G. E. Ry. v. Turner (1872) 42 L. J. Ch. 83; L. R. 8 Ch. 149; 27 L. T. 697; 21 W. R. 163.—L.C.; *reversing* 41 L. J. Ch. 634; L. R. 8 Ch. 150, n.; 26 L. T. 819; 20 W. R. 736.—M.R.

SELBORNE, L.C.—I will only add one word upon that class of cases which have been cited, and which appear to have been considered by the Master of the Rolls to be authorities for the decision at which his lordship arrived. They are undoubtedly cases in which an apparent exception is made to the general rule that where there is a *bona fide* trust, the trustee does not hold the property in his priver and disposition

with the consent of the true owner, or with such a reputation of ownership as to cause the property to be treated as his own in case of bankruptcy. But the principle of the exceptions in those cases, which I will assume for the present purpose to have been correctly made upon the facts of those particular cases, is this, that there being no *bona fide* reason for the creation of any trust, the forms of a trust were gone through in order to conceal the true ownership of the property. That has been held to be in truth an abuse of the forms of a trust for the purpose of creating a reputation of ownership, and placing the property within the order and disposition of another with the consent of the true owner of the property. For the reasons which I have already given, that principle cannot apply where a joint-stock company is the true owner, and can have given no consent, and where the investment is an unauthorised investment of the money of the company as against the company by the act of its trustees.

G. E. Ry. v. Turner, referred to.

Percival v. Wright (1902) 71 L. J. Ch. 846; [1902] 2 Ch. 421; 51 W. R. 31; 9 Manson 443.—SWINFEN EADY, J.

Colonial Bank v. Whinney (1885) 55 L. J. Ch. 585; 30 Ch. D. 261; 53 L. T. 273; 33 W. R. 852.—C. A.; reversed. (1886) 56 L. J. Ch. 43; 11 App. Cas. 426; 55 L. T. 362; 34 W. R. 705; 3 Morrell 207.—H. L. (E.).

Barrow v. Bell (1855) 5 E. & B. 540; 25 L. J. Q. B. 2; 2 Jur. (N.S.) 159; 4 W. R. 16.—Q.B.

Baldwin, In re, Baldwin (or Foss), Ex parte (1858) 2 De G. & J. 230; 27 L. J. Bk. 17; 4 Jur. (N.S.) 522; 6 W. R. 417.—L.JJ.

Observed upon and distinguished.
Cuthbertson, In re, Edey, Ex parte (1875) 44 L. J. Bk. 55; L. R. 19 Eq. 264; 31 L. T. 851; 23 W. R. 519.—C.J.

Morris v. Cannan (1862) 6 L. T. 17; 10 W. R. 379.—V.-C.; reversed. (1862) 4 De G. & J. 581; 31 L. J. Ch. 425; 8 Jur. (N.S.) 653; 6 L. T. 521; 10 W. R. 589.—L.C.

Bartlett v. Bartlett (1857) 1 De G. & J. 127; 26 L. J. Ch. 577; 3 Jur. (N.S.) 705; 5 W. R. 541.—L.JJ.; reversing 3 Jur. (N.S.) 284.—V.-C., followed.

Rawbone's Trust (or Will), In re (1857) 3 K. & J. 476; 26 L. J. Ch. 588; 3 Jur. (N.S.) 837.—V.-C.; overruling 3 K. & J. 300; 26 L. J. Ch. 509.—V.-C.

Bartlett v. Bartlett, followed.
Grainge, In re, Grainge v. Warner (1865) 6 N. R. 219; 12 L. T. 564; 13 W. R. 833.—V.-C., disapproved.
Stuart v. Cockerell (1869) 30 L. J. Ch. 127; L. R. 8 Eq. 607.—MALLINS, V.-C.

Lake, In re, Dorman, Ex parte (1872) 42 L. J. Bk. 20; L. R. 8 Ch. 51; 27 L. T. 528; 21 W. R. 94.—L.JJ., followed.

Ryall v. Rowles (1750) 1 Ves. sen. 375, considered.

Bainbridge, In re, Fletcher, Ex parte (1878) 47 L. J. Bk. 70; 8 Ch. D. 218; 38 L. T. 229; 26 W. R. 430.—BACON, C.J.

Schomburg, *In re* and *Ex parte* (1874) L. R. 10 Ch. 172; 31 L. T. 665; 23 W. R. 204.—*L.J.*, *approved* and *followed*.
 Stevens, *In re*. McGeorge, *Ex parte* (1882) 51 L. J. Ch. 909; 20 Ch. D. 697; 47 L. T. 213; 30 W. R. 817.—*C.A.*

Bromley, *In re*, *Smith, Ex parte* (1844) 3 Mont. D. & D. 687, *disapproved*.
 Sketchley, *In re*, Boulton, *Ex parte* (1857) 26 L. J. Bk. 45; 1 De G. & J. 163; 3 Jur. (N.S.) 425; 5 W. R. 443.—*L.J.*

Henderson, *In re*, Lewis, *Ex parte* (1871) L. R. 6 Ch. 626; 24 L. T. 785; 19 W. R. 835.—*L.J.*, *followed*.

Blenkhorn, *In re*, Day, *Ex parte* (1874) 43 L. J. Bk. 122; L. R. 9 Ch. 697; 31 L. T. 260; 22 W. R. 907.—*C.A.*

Ginger, *In re*, London and Universal Bank, *Ex parte* (1897) 66 L. J. Q. B. 777; [1897] 2 Q. B. 461; 76 L. T. 808; 46 W. R. 144; 4 Manson 149.—*V. WILLIAMS* and *WRIGHT, JJ.*, *followed*.
 Hayes, *In re* [1899] 2 Ir. R. 206.—*BOYD, J.*

Ginger, *In re*, London and Universal Bank, *Ex parte*, *followed*.
 Weibking, *In re*, Ward, *Ex parte* (1902) 71 L. J. K. R. 389; [1902] 1 K. B. 713; 86 L. T. 455; 50 W. R. 460.—*WRIGHT, J.*

Smith v. Topping (1833) 5 B. & Ad. 674; 2 N. & M. 421; 3 L. J. K. B. 47; *Conston, In re*, Ward, *Ex parte* (1872) 42 L. J. Bk. 17; L. R. 8 Ch. 144; 27 L. T. 502; 21 W. R. 115.—*L.J.*; and *Belcher v. Bellamy* (1848) 17 L. J. Ex. 219; 2 Ex. 808, *inapplicable*.
 Rutter v. Everett (1895) 64 L. J. Ch. 845; [1895] 2 Ch. 872; 73 L. T. 82; 44 W. R. 104; 2 Manson 371.—*STIRLING, J.*

Rutter v. Everett and Stewart, *In re*, Shelley, *Ex parte* (1864) 34 L. J. Ch. 6; 11 Jur. (N.S.) 25; 11 L. T. 554; 18 W. R. 356.—*L.C.*, *adopted*.
 Crouch, *In re*, Smith, *Ex parte* (1901) 83 L. T. 746.—*WRIGHT, J.*

Knowles v. Horsfall (1821) 5 B. & Ald. 134, *recommended on*.
 Priestley v. Pratt (1867) 36 L. J. Ex. 89, L. R. 2 Ex. 101; 16 L. T. 64; 15 W. R. 639.

Knowles v. Horsfall, *observed upon*.
 Hamilton v. Bell (1854) 10 Ex. 545; 24 L. J. Ex. 45; 18 Jur. 1109; 3 W. R. 62; 3 C. L. R. 808; *Priestley v. Pratt*; and *Prismall v. Lovegrove* (1862) 6 L. T. 329, *approved*.
 Conston, *In re*, Watkins, *Ex parte* (1878) L. R. 8 Ch. 520; 42 L. J. Bk. 50; 28 L. T. 793; 21 W. R. 580.—*L.C.* and *L.J.*

SELBORNE, L.C.—The cases most directly in point, are, first of all, *Knowles v. Horsfall*, which has been evidently regarded with a certain degree of dissatisfaction by judges of later date. The learned judge who reported it expressed regret that he had done so, because it turned on the particular manner in which the facts were stated in the special case. There was a custom

stated in the special case, but—perhaps intentionally and with a view of covering, not only the case of goods in the warehouse of the vendor, but also goods in the warehouse of a third party, which were left in the vendor's name without any notice to the warehouseman—the statement of the custom was left vague and general. It was not stated as a custom applicable to the business of the vendor considered as a person who kept a bonded warehouse himself, and there was no statement to the effect of the evidence in this case, as to the particular course of the business of wine and spirit merchants having bonded warehouses of their own. It may be said that the custom was stated so generally that it might have been inferred that it would extend to those cases, but it was not stated specifically with reference to them, and that has been pointed out in subsequent cases, as in *Watson v. Pearce* (1 Bing. (N.C.) 327), where it was stated that no usage was proved in *Knowles v. Horsfall*, *Thackerait v. Cook* (3 Taunt. 487) is not only not an authority for the respondents here, but just the reverse, as it appears to me. The actual usage proved there was a usage the purpose and intention of which was to continue reputation of ownership in the vendor. It is not wonderful that, under those circumstances, it was held that the reputation of ownership did continue. What was said by Sir James Mansfield shows, as I understand him, that on such evidence of custom, as we have here, he would have held the reputation of ownership to have been displaced. I am unable to distinguish the present case from *Hamilton v. Bell* and *Priestley v. Pratt*, unless there be a difference between the principles to be applied to wine on the one hand and clocks and watches on the other, which nobody can seriously suggest. There are other cases in which the Courts have shown a decided inclination to reduce within limits, more consistent with a sound and reasonable view of the doctrines, some of the *dicta* or views which are to be found in the earlier cases. I should not indeed like to commit myself to the strong language of Sir Frederick Pollock in the case of *Prismall v. Lovegrove*, in which he said that the old doctrine of reputed ownership was completely out of fashion, and had been so for at least forty years. It would be more in accordance with my opinion to say that the doctrine of reputed ownership has been the same from first to last, but that the Courts have of late years looked more narrowly and closely to the real value and weight of the circumstances which tend on the one hand to confirm, and on the other hand to exclude, the reputation of ownership.—*p. 531.*

Conston, *In re*, Watkins, *Ex parte*, *explained and applied*.
 Conston, *In re*, Vaux, *Ex parte* (1874) L. R. 9 Ch. 602; 43 L. J. Bk. 113; 30 L. T. 739; 22 W. R. 811.—*L.J.*

MELLISH, L.J.—The principle laid down in *Ex parte Watkins* was, that in determining whether, when goods sold remain in the possession of the vendor up to the time of his bankruptcy, the vendor is the reputed owner of them, the Court must have regard to the custom of the particular trade, and if there was a well-established custom that goods when sold should remain in the possession of the vendor it prevents the mere fact of their continuing in his possession from giving

the reputation of ownership. The real question in that case was whether it was enough to prove the existence of such a custom in a particular trade; and the Court of Appeal held, on the authority of several recent cases at common law, that it was enough to prove the custom of a particular trade, because the creditors of a trader are mostly persons engaged in the same trade, or bankers or other persons who are acquainted with the custom of that particular trade. That being so, does it make any difference that these goods were in another man's warehouse, and not in the vendor's warehouse, as was the case in *Ex parte Watkins*? As to the purchaser, it could make no difference. The evidence shows that the custom exists for the goods to remain in the name of the vendor at the bonded warehouse, but for them to be transferred in the vendor's own books. The purchaser buys them in bond and by the custom of the trade they may remain there for years, to avoid the payment of duty on them, in the possession of the vendor or of some person who holds them for him. The reputation of ownership is prevented from arising just as much when the goods are in another person's warehouse as in the vendor's. If the vendor's creditors know nothing about the goods, it can make no difference in what warehouse they are. If they know that the goods are in the vendor's name in the warehouse of a third person, they know that they are not necessarily for that reason the vendor's goods. I think, therefore, that the principle of *Ex parte Watkins* applies to this case.—p. 607.

Couston, In re, Watkins, Ex parte, distinguished.

Lingham v. Biggs (1797) 1 Bos. & P. 82; and **Lingard v. Messiter** (1823) 1 B. & C. 308; 2 D. & R. 495, *followed*.

Jones, In re, Lovering, Ex parte (1874) L. R. 9 Ch. 621; 43 L. J. Bk. 116; 30 L. T. 622; 22 W. R. 859.—*L.J.J.*

JAMES, L.J.—This case seems to me to come exactly within the authorities cited. I have referred to the common law cases (*Lingham v. Biggs, Lingard v. Messiter*), where the bankrupt was the owner, and a change of ownership occurred which was not known to the world. The case of *Ex parte Watkins* was not intended in the slightest degree to weaken or overrule these cases, and the constant practice based upon those cases simply shows that the doctrine laid down in them may be countervailed by evidence of any known custom or practice in the particular trade in question, known to the dealers in that trade and known to the bankers and other persons accustomed to have dealings with persons in that trade. In *Ex parte Watkins* it was perfectly well known as the universal practice of the spirit trade that spirits should remain in the warehouse of the vendor, and in these circumstances it was held that no reputation of ownership arose as to the spirits in the warehouse. But that case would be no authority for determining this case unless it could be made out, which was not attempted to be done, that there is a practice known in London, or anywhere else, under which drapers, or persons who are the owners of furniture in the rooms of the house in which they live, ordinarily sell their furniture to a dealer, and then take it back again upon the terms of paying a weekly rent.—p. 625.

Matthews, In re, Powell, Ex parte (1875) 45 L. J. Bk. 100; 1 Ch. D. 501; 34 L. T. 224; 24 W. R. 378.—*C.A., overruled*.

Crawcour v. Salter (1831) 51 L. J. Ch. 495; 18 Ch. D. 30; 45 L. T. 62; 30 W. R. 21.—*C.A.*

JAMES, L.J.—The same question arose in the case of *Ex parte Powell, In re Matthews*, some years ago. The chief judge took official notice that this was the custom of trade among hotel keepers. In the Court of Appeal we were of opinion that the custom was not so well established as that the Court ought to take judicial notice of it. But as the trustee declined to have an issue tried, the decision of the chief judge was affirmed. Since that time the custom has become much more widely known. Everybody knows that it is a very common practice indeed, especially for hotel keepers, to hire furniture; and if it is a common practice, it negatives the foundation of the rule in bankruptcy as to reputed ownership, which is to prevent a man obtaining false credit by the possession of the goods.—p. 496.

BAGGALLAY and LUSH, L.J.J., to the same effect.

Coldwell v. Gregory (1812) 1 Price 119; 2 Rose 149; 15 R. R. 699, *held overruled*.

Smith v. Watson (1824) 2 B. & C. 401; 3 D. & R. 751; 2 L. J. (o.s.) K. B. 63.

BAYLEY, J.—That case was considered by this Court in *Ex parte Enderby, Re Gilpin* (2 B. & C. 389), and we certified that a secret partner was within the statute.

Gilpin, In re, Enderby, Ex parte (1824) 2 B. & C. 389; 3 D. & R. 636; and **Smith v. Watson**, *overruled*.

Reynolds v. Bowly (1867) L. R. 2 Q. B. 474; 36 L. J. Q. B. 247; 16 L. T. 532; 15 W. R. 813; 8 B. & S. 406.—*EX. CH.; reversing* 36 L. J. Q. B. 1; L. R. 2 Q. B. 41; 15 W. R. 124; 7 B. & S. 67.—*Q.B.*

KELLY, C.B. (for the majority).—Still the question is, whether, looking to the decisions on the subject, and with still greater and more minute attention to the words of the section (12 & 13 Vict. c. 106, s. 125), we are called upon on this, the first occasion, so far as I know, in which this important question has been brought under the consideration of a Court of error, to hold that, as a general rule of law, a partnership in which there is a dormant partner is within the provisions of this enactment. Upon this point we have unquestionably what cannot be doubted to be the very high, if not the highest, authority of Lord Eldon in the case of *Ex parte Dyster* (2 Rose 256), in which it would seem that that learned judge was of opinion that a partnership in which there is a dormant partner is, in general, within the provisions similar to this section. The same appears undoubtedly to have been the opinion of some of the judges of the Queen's Bench, whose opinion and authority are entitled to great weight in the case of *Ex parte Enderby*. That, again, was followed by the case of *Smith v. Watson*. And it cannot be denied that judges of great learning, and the very highest eminence, have entertained and pronounced an opinion which is at variance with that which this Court is about to deliver.—p. 476.

Reay, In re, Arbouin, Ex parte (1846) De G. 359; **Reynolds v. Bowly** (*supra*); **Rowland and Crankshaw, In re** (1866) L. R.

1 Ch. 421.—*L.C.*: and **Wright, In re, Sheen, Ex parte** (1877) 6 Ch. D. 235; 37 L. T. 451; 26 W. R. 195.—*C.A.*, discussed and explained.

Palsford, In re, Hayman, Ex parte (1878) 8 Ch. D. 11; 47 L. J. Bk. 54; 38 L. T. 238; 26 W. R. 597.—*C.A.*

JAMES, L.J.—We cannot look at the hardship inflicted upon any particular person, or at the nature of any particular transaction. We can only apply the fixed rule, that that which is joint estate shall go to the joint creditors, and that which is separate estate shall go to the separate creditors. And what is joint estate, and what is separate estate is also affected by the doctrine of reputed ownership. It is said that doctrine does not apply to a case of this kind. I am of opinion, however, that that doctrine was really the foundation of Lord Cranworth's judgment in *In re Rowland and Crankshaw*. I wish to make this further observation upon the case of *Reynolds v. Woolf*, which was decided in the Exchequer Chamber. Beyond all doubt, where property belongs to a partnership of two, and there is only one ostensible partner, you cannot apply the doctrine of reputed ownership. The property is that of the two, and you cannot say that, because there is only one ostensible partner, the Court will, in the event of bankruptcy, treat the property of the firm as in his order and disposition. The possession, in such a case, is quite consistent with the real title, and therefore the reputed ownership clause does not apply. But that has really nothing to do with a case where one man, who is the real owner, forms a partnership consisting of two or three persons and allows them to have the apparent possession and ownership of the property. There, the real owner being one person, some other persons, who are not the real owners, have acquired by his consent the reputed ownership and the apparent possession, and it can make no difference that he himself is one of the firm who have the apparent possession. *Ex parte Arbonin* was determined on reputed ownership, and that principle seems to me to underlie the decision in *In re Rowland and Crankshaw*. The ostensible partner received the goods, and the persons who dealt with the firm had a right to hold them to that which was represented by their common consent to be the fact. The doctrine of reputed ownership is only an application of the common principle that people must make good their representations; they must make good that which they hold out to the world as being the fact. That some of the creditors may be disappointed is beside the question, for a creditor has no equity except through his debtor. He has certainly no right to any particular assets, nor, indeed, has he any right with regard to the assets, except a right to have them dealt with according to the rights of the debtor in them. In *Ex parte Sheen* I was endeavouring to apply the principle of *In re Rowland and Crankshaw*, when I said that it would not do to show that some one creditor, or two or three creditors, might have received information that a man was liable as a partner, but that it must be shown that there had been an ostensible partnership held out to the world.—p. 22.

Whitehead, In re, Routh, Ex parte (1884) 54 L. J. Q. B. 88; 52 L. T. 265; 33 W. R. 230.—*CAVE, J.*; *reversed, sub nom. Whitehead, In re and*

Ex parte (1885) 54 L. J. Q. B. 240; 14 Q. B. D. 419; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405.—*C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.*

Rogers, In re, Holland, Ex parte (1891) 8 Morrell 243.—*C.A. LINDLEY, BOWEN and KAY, L.JJ., followed.*

Drucker, In re, Basden, Ex parte (1902) 71 L. J. K. B. 686; [1902] 2 K. B. 237; 86 L. T. 785; 9 Mansour 237.—*C.A. WILLIAMS, ROMER and STIRLING, L.JJ.*; *affirming* 50 W. R. 543.—*WRIGHT, J.*

Lewis, In re, Helder, Ex parte (1883) 53 L. J. Ch. 106; 24 Ch. D. 339, 49 L. T. 612.—*C.A. BRETT, M.R., COTTON and BOWEN, L.JJ., distinguished.*
Sharp, In re, Gundry v. Johnson (1900) 83 L. T. 416.—*WRIGHT, J.*

13. PREFERENTIAL CLAIMS.

Bush, In re, Prideaux, Ex parte, 3 Mont. & Ayr. 516; *reversed*, (1838) 3 Myl. & C. 327; 7 L. J. Ch. 202; 2 Jur. 366.—*L.C.*

Bush, In re, Prideaux, Ex parte, 3 Myl. & C. 327, *commented on.*
St. Pancras v. Clapham (1860) 2 El. & El. 742; 6 Jur. (N.S.) 700; 29 L. J. M. C. 141; 8 W. R. 493.—*Q.B.*

14. PROOF OF DEBTS.

Wellock v. Constantine (1863) 2 H. & C. 146; 32 L. J. Ex. 285; 9 Jur. (N.S.) 232; 7 L. T. 751.—*EX., questioned.*

Shepherd, In re, Ball, Ex parte (1879) 48 L. J. Bk. 57; 10 Ch. D. 667; 40 L. T. 141; 27 W. R. 563; 14 Cox C. C. 237.—*C.A. BRAMWELL, JAMES and BAGGALLAY, L.JJ.*
BRAMWELL, L.J.—I consider *Wellock v. Constantine* to be a case of very little authority. No reason is given for the judgment in the decision, and the judges differed; and one of them, in the course of the arguments, gives reasons for a different judgment.—p. 59.

Tonnies, In re, Bishop, Ex parte (1873) 42 L. J. Bk. 107; L. R. 8 Ch. 718; 28 L. T. 862; 21 W. R. 716.—*L.J., followed.*
Knight, In re, Cooper, Ex parte (1885) 2 Morrell 223.

Gomersall, In re, Gordon, Ex parte (1875) 44 L. J. Bk. 97; L. R. 20 Eq. 291; 32 L. T. 644; 23 W. R. 728; *varied*, (1875) 45 L. J. Bk. 1; 1 Ch. D. 137; 33 L. T. 483; 24 W. R. 257.—*C.A.*

Gomersall, In re, Gordon, Ex parte (1875) 45 L. J. Bk. 1; 1 Ch. D. 137; 33 L. T. 483; 24 W. R. 257.—*C.A., distinguished.*
Aylmer, In re, Crane, Ex parte (1893) 10 R. 473; 70 L. T. 244; 1 Mansour 301.

v. WILLIAMS, J.—The facts of the case do not bring it within *Gomersall, In re*. The ground of that decision was that the bills were drawn and accepted on the eve of bankruptcy, and were, in fact—to use the words of Lord Justice James—"mere shams and fictitious things," drawn and accepted for the express purpose of enabling a proof, and to which the Court found there was no intention that any efficacy should be given except in the event of bankruptcy, in which case it was intended that there should be a proof. In the present case I do not find any facts which

would justify me in coming to the conclusion that there never was any intention that Captain Aylmer should pay these amounts.—p. 474.

Miller, In re, Wardley, Ex parte (1877) 6 Ch. 1. 790; 37 L. T. 38. 25 W. R. 881, *distinguished*.

Pannell, In re, Bates, Ex parte (1879) 48 L. J. Bk. 113; 11 Ch. D. 914; 41 L. T. 263; 27 W. R. 927.—C.A.

Brooks v. Rogers (1791) 1 H. Bl. 640, *held overruled*.

Howis v. Wiggins (1792) 4 Term Rep. 714, *questioned*.

Cowley v. Dunlop (1798) 7 Term Rep. 565.

GROSE, J.—As to the cases of *Brooks v. Rogers* and *Howis v. Wiggins*, this case has been reserved for the purpose of reconsidering them. The gentlemen in the Court of Chancery conceived that those decisions are directly in opposition to their daily practice. And of the case of *Brooks v. Rogers* it is remarkable that the Lord Chancellor, who in 1791 determined the case as chief justice of C. P., so doubted of it, that upon reconsidering it in the case *Ex parte Seddon*, in November, 1796, he overruled it, and permitted the debt to be proved. The case of *Howis v. Wiggins* came on before this Court upon a motion for a new trial: and possibly under a misapprehension of it, I considered it as a case of indemnity; and the ground on which the rule was refused was on a supposition that *Vanderheyden v. De Pabre* (3 Wilson 13), which was a case of indemnity, was in point. I then considered *Howis*, the plaintiff, and payer of the two promissory notes, as having indorsed them as a surety for the defendant, with a view to give credit to the notes, and without any consideration given to him for so doing. In any other way of considering that case I think it is not to be supported.—p. 577.

Walker, Ex parte (1798) 4 Ves. 373; 4 R. R. 218, *questioned*.

Lawson, Ex parte, Lloyd, Ex parte (1821) Jacob 274.—L.C.

Walker, Ex parte, distinguished and limited. Charles, In re, *Macredie, Ex parte* (1873) L. R. 8 Ch. 535, 42 L. J. Bk. 90; 28 L. T. 827; 21 W. R. 535.—L.C. and L.J.

MELLISH, L.J.—In my opinion the rule in *Ex parte Walker* only applies where there are cross accommodation acceptances, or, at any rate, only applies where the acceptances are given by the one party in consideration of the acceptances given by the other party. In that state of things, in taking the account, the acceptances and bills on both sides are to be rejected, and I do not think that any of the authorities which have been cited establish the principle that, where a debt has been paid by giving an acceptance, and the creditor has discounted the bill, and it remains outstanding, although no action at law could be maintained for it, yet, nevertheless, if the acceptor becomes bankrupt, there could be a proof. In my opinion, to admit that would be, as the chief judge has said, to admit a double proof.—p. 539.

Walker, Ex parte, inapplicable.

Charles, In re, Macredie, Ex parte, dictum questioned. London, Bombay and Mediterranean Bank,

In re, *Cama, Ex parte* (1874) L. R. 9 Ch. 686; 43 L. J. Bk. 638; 31 L. T. 294; 22 W. R. 809.—L.J.

MELLISH, L.J.—I cannot see how the doctrine of *Ex parte Walker* (4 Ves. 373) can possibly apply to a case where there are in fact three firms, and where the firm which seeks to prove is not the same as that which made the arrangement about the exchange of acceptances, if there was an exchange of acceptances. Indeed, I doubt whether I was right in what I said in *Ex parte Macredie*, that possibly the doctrine of *Ex parte Walker* might apply, not only to a case where there was an exchange of accommodation acceptances, but might apply to a case where one bill was in some respects the consideration for another bill. I have great doubt on further consideration whether that was right, and whether the rule was not that which was stated by Lord Selborne in that case, namely, that proof could only be admitted when an action at law would lie, and not in a case of pure accommodation acceptances in respect of which, if there was no bankruptcy, no action at law would lie.—p. 689.

Jones v. Gordon (1877) 47 L. J. Bk. 1; 2 App. Cas. 616; 37 L. T. 477; 26 W. R. 172.—H.L. (C.), *followed*.

Boyes, In re, Crofton v. Crofton (1886) 56 L. J. Ch. 135; 83 Ch. D. 612; 55 L. T. 391; 35 W. R. 247.—NORTH. J.

Holmes v. Symons (1871) 41 L. J. Ch. 59; L. R. 13 Eq. 66; 25 L. T. 628; 20 W. R. 175.—V.-C.; *appeal compromised*, (1872) 20 W. R. 921.—L.J.

Young v. Winter (1855) 16 C. B. 401; 24 L. J. C. P. 214; 37 L. T. 477; 26 W. R. 175.—*disapproved*.

Warburg v. Tucker (1855) 5 El. & Bl. 384; 24 L. J. Q. B. 317; 16 C. B. 418, n.; 1 Jur. (N.S.) 871; 3 W. R. 555, *approved and adopted*.

Mitcalfe v. Hanson (1866) 35 L. J. Q. B. 225; L. R. 1 H. L. 242.—H.L. (C.).

[In *Young v. Winter*, the Court of Common Pleas held that bankruptcy was an answer to a branch of covenant in not repaying to the plaintiff the premiums he had paid, to keep up a policy of insurance. The Court of Queen's Bench held the reverse of this in *Warburg v. Tucker*, and the decision of the Court of Queen's Bench and not that of the Common Pleas, has been adopted by the House of Lords in *Mitcalfe v. Hanson*.]

Warburg v. Tucker and Mitcalfe v. Hanson, considered.

Deering v. Bank of Ireland (1886) 56 L. J. P. C. 47, 12 App. Cas. 20; 56 L. T. 66; 35 W. R. 634.—H.L. (IR.). LORDS HALSBURY, L.C., WATSON and BLACKBURN; *reversing* S. C. *nom.* Killen, In re, 11 L. R. 15 Ch. 388.

Longford v. Ellis (1785) 14 East 202, n.;

H. Bl. 29, n., *held overruled*.

Buss v. Gilbert (1813) 2 M. & S. 70.

ELLENBOROUGH, C.J. said he thought it was governed by the case of *Ex parte Charles* (14 East 197), where this subject was very much discussed, and the Court looked into it with particular anxiety, and overturned the case of *Longford v. Ellis*.—p. 71.

Longford v. Ellis; Hurst v. Mead (1793) 5 Term Rep. 365; **Lewis v. Picrey** (1788) 1 H. Bl. 29; and **Watts v. Hart** (1797) 1 Bos. & P. 134, *held overruled*.
Walker v. Barnes (1814) 5 Taunt. 778; 1 Marsh. 346; 2 Rose 279; 15 R. R. 653.
GIBBS, C.J. (after reading the judgment of the Court of King's Bench in the case *Ex parte Charles* (14 East 197)).—The Court in that case fully considered all the authorities which could be cited in favour of the bankrupt: and they considered that they overturned the above cases, and I cannot but think their decision was a sound one.—p. 779.

Henbest v. Brown (1791) Peake 54, *disapproved*.

Parslow v. Dearlove (1804) 4 East 438; 1 Smith 281; 3 Esp. 78.

ELLENBOROUGH, C.J.—The report of that case only states that such was the inclination of Lord Kenyon's opinion (that the statutes 7 Geo. 1. c. 31, and 5 Geo. 2. c. 30, extended to all *debts* as well as *written securities* payable at a future day). But it does not appear that the words of the statutes were particularly presented to his judgment at the time. And whatever weight is justly due to the intimation of his opinion, I have no idea how the meaning of a statute can be carried by construction so far beyond the express words of it.—p. 439.

Hide, In re, Llynvi Coal and Iron Co., Ex parte (1871) 41 L. J. Bk. 5; L. R. 7 Ch. 28; 25 L. T. 609; 20 W. R. 105.—*L.J.*, *observations approved*.

Hoyle, In re, Waters, Ex parte (1873) L. R. 8 Ch. 562, 568; 28 L. T. 757; 21 W. R. 554.—**MELLISH, L.J.**, *observations questioned*.

Brett v. Jackson (1869) 38 L. J. C. P. 139; L. R. 4 C. P. 259; 19 L. T. 790; 17 W. R. 532.—*C.P.*, *referred to*.

Hardy v. Fothergill (1888) 58 L. J. Q. B. 44; 13 App. Cas. 351; 59 L. T. 273; 37 W. R. 177; 53 J. P. 36.—**H.L. (E.)**. **LORDS HALSBURY, L.C., SELBORNE, FITZGERALD, HERSCHELL and MACNAGHTEN**.

LORD SELBORNE.—If in *Ex parte Waters*, Mellish, L.J. meant to intimate an opinion that the liability of a lessee who had assigned his lease, remaining bound to the lessor under his covenants in the lease, would never, under the Act of 1869, be proveable in bankruptcy, I can only say that such an expression of opinion was extra-judicial; and that I am not able myself to find sufficient ground for it in the words of that statute.

Linton v. Linton (1885) 54 L. J. Q. B. 529; 15 Q. B. D. 239; 52 L. T. 782; 33 W. R. 714; 2 Morrell 179.—*C.A.* **BRETT, M.R., BAGGALLAY and BOWEN, L.J.**, *followed*.

Fryer, In re and Ex parte (1886) 55 L. J. Q. B. 478; 17 Q. B. D. 718; 55 L. T. 276; 34 W. R. 766; 3 Morrell 231.—*C.A.* **ESHER, M.R., BOWEN and FRY, L.J.**; *reversing CAVE, J.*

Linton v. Linton, referred to.

Haddon v. Haddon (1887) 56 L. J. M. C. 69; 18 Q. B. D. 778; 56 L. T. 716; 51 J. P. 486.—**HAWKINS and SMITH, JJ.**

Linton v. Linton, applied.

Hawkins, In re, and Ex parte (1893) [1894] 1 Q. B. 25; 10 R. 29; 69 L. T. 769; 42 W. R. 202; 1 Manson 6.—**WILLIAMS and KENNEDY, JJ.**

Linton v. Linton, discussed.

Watkins v. Watkins (1890) 65 L. J. P. 73; [1896] P. 222; 74 L. T. 636; 44 W. R. 677.—*C.A.* **LINDLEY, LOPES and KAY, L.J.**

Linton v. Linton, held applicable.

Hardy v. Fothergill (supra), discussed.

Kerr v. Kerr (1897) 66 L. J. Q. B. 838; [1897] 2 Q. B. 439; 77 L. T. 29; 46 W. R. 46.—**HAWKINS and WILLIAMS, JJ.; WRIGHT, J.** *dissenting*.

Shutt v. Procter (1816) 2 Marsh. 226, *questioned*.

St. Martin (Overseers) v. Warren (1818) 1 B. & Ald. 491.

BAYLEY, J.—As to the case cited from the Common Pleas (*Shutt v. Procter*). I doubt its authority, as far as it, in any respect, impugns the doctrine laid down by this Court in *Cole v. Gower* (6 East 110).—p. 497.

Duffield, In re, Peacock, Ex parte (1873)

42 L. J. Bk. 78; L. R. 8 Ch. 682; 28 L. T. 830; 21 W. R. 755.—*L.J.*, *distinguished*.

Newman, In re, Brooke, Ex parte (1876) 3 Ch. D. 494; 25 W. R. 261.—*C.A.*

Gibbins, In re, Eagle, Ex parte (1830) Mont. & M.A.R. 422; 8 L. J. (O.S.) Ch. 96; *reversed, nom.* **Gibbins, In re, Tindall, Ex parte** (1832) 1 Moore & Sc. 607; 8 Bing. 402; 1 Mont. 462; 1 Mont. & M.A.R. 415; 1 Deac. & C. 291; 1 L. J. Ch. 193.

Hardy v. Green (1849) 12 Beav. 182; 18

L. J. Ch. 480.—*M.R.*, *considered*.

Clint, In re, Bolland, Ex parte (1873) 43 L. J. Bk. 16; L. R. 17 Eq. 115; 29 L. T. 513; 22 W. R. 152.—**BACON, C.J.**

White, In re, Morley, Ex parte (1873) L. R.

8 Ch. 1026; 29 L. T. 442; 21 W. R. 940.

—*L.J.*, *distinguished*.

Simpson, In re, Furness (or Satterthwaite), Ex parte (1874) 43 L. J. Bk. 43, 147; L. R. 9 Ch. 572; 30 L. T. 448; 22 W. R. 697.—**BACON, C.J.**; *affirmed by L.J.*

White, In re, Morley, Ex parte, followed.

Simpson, In re, Furness (or Satterthwaite), Ex parte, distinguished.

White, In re, Dear, Ex parte (1876) 1 Ch. D. 514; 45 L. J. Bk. 22; 34 L. T. 631; 24 W. R. 525.—*C.A.*

BAGGALLAY, J.A.—I was for some time unable to see how *In re Simpson* could be reconciled with the former authorities, but a more matured consideration of the facts and the authorities leads me to a conclusion that it can, because the facts of *In re Simpson* were very special. The chief judge, in giving his judgment in that case, pointed out the distinction between it and *Ex parte Morley*. It is unnecessary to go through his reasons, which clearly and distinctly show the difference between the two cases, and it appears to me that the principles of *Ex parte*

Morley are perfectly applicable to the present case.—p. 520.

White, In re, Morley, Ex parte, followed.
Simpson, In re, Furness (or Satterthwaite), Ex parte, distinguished.
Mellor, In re, Manchester and County Bank, Ex parte (1879) 48 L. J. Bk. 94; 12 Ch. D. 917; 40 L. T. 723.—BACON, C.J.

White, In re, Morley, Ex parte, and Simpson, In re, Furness (or Satterthwaite), Ex parte, distinguished.
Daniel, In re, Powell, Ex parte (1896) 75 L. T. 143.—WILLIAMS and WRIGHT, JJ.

Dutton v. Morrison (1810) 17 Ves. 193; 1 Rose 213; 11 R. R. 56, *distinguished*.
Kelson, In re, Egyptian Commercial and Trading Co., Ex parte (1868) L. R. 4 Ch. 125.—L.C.

CAIRNS, L.C.—I also think that the circumstance that the payment was not made voluntarily, but was recovered by process of law against the Egyptian firm as drawers, can make no difference, and that the holders of the bills are perfectly entitled to retain any money they have so recovered. This makes the distinction between the present case and the case of *Dutton v. Morrison*, in which there was a bankruptcy, and the assignees of a bankrupt firm sought to restrain the attachment against one of the partners trading in another business.—p. 181.

Rogers, In re, Field, Ex parte (1842) 3 Mont. D. & D. 95; 12 L. J. Bk. 27; 7 Jur. 382, *discussed*.

Hoare v. Oriental Bank Corporation (1877) 2 App. Cas. 589; 37 L. T. 173; 25 W. R. 757.—P.O.

SIR J. COLVILLE (for J. C.).—It seems to their lordships that if that case (*Ex parte Field*) is in conflict with the earlier cases of *Ex parte Crossfield* and *Ex parte Buckingham*, it must be taken to have overruled them. It is cited in a note of Mr. Justice Lindley's work on Partnership, where—having said broadly, "Except in the cases hereinafter mentioned the joint creditors of partners are not entitled to payment out of their separate estates in competition with their separate creditors. This rule is now so well established that it is useless to refer particularly to the cases illustrating it, and it is proposed, therefore, to notice at once the exceptions to the rule"—in a note upon that passage, he says, "As to co-debtors not partners, see *Ex parte Field*, *Ex parte Buckingham*, 1 M. D. & D. 95; *Ex parte Crossfield*, 1 Deac. 405."—p. 759.

Carpenter, In re, Besley, Ex parte (1890) 7 Morrell 270.—CAVE, J., *followed*.
Budgett, In re, Cooper v. Adams (1894) 63 L. J. Ch. 847; [1894] 2 Ch. 537; 8 R. 424; 71 L. T. 72; 42 W. R. 551; 1 Manson 230.—CHITTY, J.

Barrow, In re, Moul, Ex parte (1882) 1 Mont. 321; 1 Deac. & C. 44; Mont. & B. 28; 2 Deac. & C. 419; 1 L. J. Bk. 26, *upheld*.

Goldsmid v. Cazenove (1859) 7 H. L. Cas. 785; 29 L. J. Bk. 17; 5 Jur. (N.S.) 1230; 4 W. R. 802.—H.L. (B.).

Barrow, In re, Moul, Ex parte, followed.
Salter, If re, Soper, Ex parte (1834) 4 Deac. & C. 569; 2 Mont. & Ayr. 53.

Welch, In re, Stone, Ex parte (1873) 42 L. J. Bk. 73; L. R. 8 Ch. 914.—L.J., *commented on*.
Laine, In re, Berner, Ex parte (1886) 56 L. J. Q. B. 153; 56 L. T. 170.

CAVE, J., after referring to the doubt expressed by Mellish, L.J., in *Ex parte Stone*, as to whether, where a joint and several covenant had been entered into by partners for payment of a debt of the firm, sect. 37 of the Bankruptcy Act, 1869, applied, and double proof was allowable, although the covenant was not formally in the name of the "firm," said that the answer to this doubt was supplied by the L.J. himself in *Ex parte Honey* (41 L. J. Bk. 9), where he expressed the opinion that it was the intention of the legislature that such proof should be admissible wherever there was a joint and several contract and joint and several estates being administered in bankruptcy.

Douglas, In re, Wilson, Ex parte (1872) 41 L. J. Bk. 46; L. R. 7 Ch. 490; 26 L. T. 489; 20 W. R. 564.—L.J., *approved*.

Hooper, In re, Banco de Portugal v. Waddell (1880) 49 L. J. Bk. 33; 5 App. Cas. 161; 42 L. T. 698; 28 W. R. 477.—H.L. (B.).

Holland, In re, Alston, Ex parte (1868) L. R. 4 Ch. 168; 19 L. T. 542; 17 W. R. 266.—L.C. and L.J., *followed*.

Stratton, In re, Salting, Ex parte (1883) 53 L. J. Ch. 415; 25 Ch. D. 148; 49 L. T. 694; 32 W. R. 450.—C.A. COTTON, LINDLEY and FRY, L.JJ.

Levey, In re, Topping, Ex parte (1865) 4 De G. J. & S. 551; 34 L. J. Bk. 13; 11 Jur. (N.S.) 210; 12 L. T. 8; 13 W. R. 445.—L.C., *distinguished*.

Lacey v. Hill and Lacey v. Hill (1872) L. R. 8 Ch. 441; 42 L. J. Ch. 86; 28 L. T. 86; 21 W. R. 239.—L.J.

MELLISH, L.J.—If it had been necessary to determine how far *Ex parte Topping* should be held to apply to a case where the separate estate in respect of which the proof is sought to be made is solvent, so that any surplus would go to the joint estate, I should have liked to take further time for consideration.—p. 445.

Levey, In re, Topping, Ex parte, distinguished.
Hind, In re and Ex parte (1890) 62 L. T. 327.—CAVE and SMITH, JJ.

Lacey v. Hill, discussed.
Head, In re, Head's Executors, Ex parte (1893) 63 L. J. Q. B. 206; [1894] 1 Q. B. 638; 10 R. 115; 70 L. T. 35; 1 Manson 38.—WILLIAMS, J.

Dixon, In re, Nanson, Ex parte, 43 L. J. Bk. 133; 31 L. T. 40; 22 W. R. 875; *reversed, nom.*
Dixon, In re, Gordon, Ex parte (1874) 44 L. J. Bk. 17; L. R. 10 Ch. 160; 31 L. T. 528; 23 W. R. 123.—L.J., *affirmed* in H.L. *infra, nom.*
Nanson v. Gordon.

Minchin, In re, Carter, Ex parte (1827) 2 Glyn & J. 233.—L.C., *followed*.

White, In re, Westcott, Ex parte (1874) 49

L. J. Bk. 119; L. R. 9 Ch. 624; 30 L. T. 739; 29 W. R. 813.—*L.J., distinguished.*

Dixon, In re, Gordon, Ex parte (1874) *supra*.

JAMES, L.J.—*Ex parte Carter* is a very high authority, and has never, I believe, been questioned in this Court. That also was a case of executors of a partner who was dead, and "it was put upon exactly the same footing. It was said they cannot claim because there are still debts due from the estate. The executors cannot claim in competition with their own creditors." Attempts have been made to show that there were a number of peculiarities in that case of *Ex parte Carter*, that the estate had not all been wound up, and that trading had been going on, but really that had nothing whatever to do with the *ratio decidendi* of the case. The mere fact that accounts had not been taken to ascertain the amount of the debt, did not alter the character of the relation between the executors and the creditors. That was not a matter with which the creditors had anything to do. It was simply this. The amount of the debt was capable of being ascertained, though it was not ascertained. The sole ground on which they could not prove was this, that they could not prove in competition with persons who had a right to make them pay any debts. They were both going against the same estate. That being the principle adopted in *Ex parte Carter*, and acted upon in a very strong case indeed, in the case of *Ex parte Bess, In re Motion* (38 L. J. Bk. 39), and recognised again in the clearest terms by that case of *Ex parte Collinge* (12 W. R. 30; 4 De G. J. & S. 583), we should be unsettling the law of this Court if we were to affirm the judgment of the chief judge in this case. The chief judge seems to have been of opinion that we had given a decision in the case of *Ex parte Westcott, In re White*, which in some way or other conflicts with the authorities to which I have referred. But in that case we were simply dealing with a plain case of a claim by a *cestui que trust* against a trustee who had committed a breach of trust. There was a case there which did not appear to us to be within the words or the spirit of the rule. The *cestui que trust* said, "You have taken my money and spent it, I call upon you to pay it." We merely said that he was entitled so to call upon the trustee, and that was the simple ground of that case. It did not appear to me at that time that it could by any refined argument be brought within the application of *Ex parte Carter*. That was the simple ground there, and it was never intended to interfere with the rule which has been laid down.—p. 123.

White, In re, Westcott, Ex parte, distinguished.

Goodchild, In re, Sillitoe, Ex parte (1824)

1 Glyn & J. 374, *approved*.

Nanson v. Gordon (1876) 45 L. J. Bk. 89; 1 App. Cas. 195; 34 L. T. 401; 24 W. R. 740.—*H.L. (B.).*

CATRINE, L.C.—The statement of the general principle may be taken from a number of cases; but I may conveniently refer to the enunciation of it by Lord Eldon in the case of *Ex parte Sillitoe*:—"A partner in a firm, against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm who are in fact his own

creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership, but of himself."

White, In re, Westcott, Ex parte, distinguished.

Nanson v. Gordon, followed.

Blythe, In re and Ex parte (1880) 16 Ch. D. 620; 29 W. R. 900.—*BACON, C.J.*

Lee, In re, Good, Ex parte, 41 L. T. 660; 28 W. R. 278; *reversed*, (1880) 49 L. J. Bk. 49; 14 Ch. D. 82; 42 L. T. 450; 28 W. R. 553.—*C.A.*

Hoare, In re, Ashworth, Ex parte (1874) 43 L. J. Bk. 142; L. R. 18 Eq. 705; 30 L. T. 906; 29 W. R. 925; and **Palethorpe, In re, King, Ex parte** (1875) 44 L. J. Bk. 92; L. R. 20 Eq. 273; 32 L. T. 505; 28 W. R. 681, *considered*.

Ker, In re, Bagshaw, Ex parte (1879) 13 Ch. D. 304; 41 L. T. 743; 28 W. R. 405.—*C.A.*

JAMES, L.J.—I do not say that *Ex parte Ashworth* and *Ex parte King* may not require further consideration, if the question should arise whether there is any positive rule that, if a mortgagee has made a mistake in his proof, he is not entitled to have it rectified on making a proper application.—p. 306.

Benfield v. Solomons (1803) 9 Ves. 77, 80, *referred to*.

Smith v. Moffatt (1865) 35 L. J. Ch. 19; L. R. 1 Eq. 397, 401; 12 Jur. (N.S.) 22; 14 W. R. 242.—*V.-C.* See also *Motion v. Moojen* (1872) 41 L. J. Ch. 596; L. R. 14 Eq. 202.—*V.-C.*

Richter v. Laxton (1878) 48 L. J. Q. B. 184; 39 L. T. 499; 27 W. R. 214.—*LUSH, J.*; and **Redhead v. Welton** (1861) 29 Beav. 521; 30 L. J. Ch. 577; 4 L. T. 230; 9 W. R. 473.—*M.R., followed*.

Brander, In re, London Cotton Mills Co., In re (1876) 25 W. R. 109.—*v.-c., not followed*.

Levy v. Lovell (1880) 14 Ch. D. 234; 49 L. J. Ch. 305; 42 L. T. 242; 28 W. R. 602.—*C.A.*

JAMES, BRETT and COTTON, L.J.J.

BRETT, L.J.—Can a process by a plaintiff which has effect on property or a debt only for a particular purpose, namely, to compel appearance, but which can only take effect on that property or debt so as to obtain the realisation of the debt due to the plaintiff out of that property or debt in one particular state of circumstances, be called a charge on that property or debt within the meaning of sects. 12 and 16 of the Bankruptcy Act, 1869? In my opinion it cannot; and a process can only be called a charge or security if it can be enforced against the property under all circumstances, and not if it can be enforced in one particular state of circumstances only. For this reason, I am of opinion that the Court must give judgment in favour of the appellant, and in accordance with the decisions of Mr. Justice Lush in *Richter v. Laxton*, and Lord Romilly in *Redhead v. Welton*, and against the opinion of V.-C. Hall in *Re London Cotton Mills Co.*—p. 241.

Levy v. Lovell (1880) L. R. 14 Ch. D. 234; 49 L. J. Ch. 305; 42 L. T. 242; 28 W. R. 602.—*C.A., followed*.

Price, In re, Sear, Ex parte (1881) 17 Ch. D.

74: 44 L. T. 887.—C.A. JAMES, BRETT and COTTON, L.JJ.

Clarke, In re, Connell, Ex parte (1838) 3 Dea. 201: 3 Mont. & Ayr. 581: 7 L. J. Bk. 44, *followed*, but *doubted*.

Collie, In re, Manchester and County Bank. Ex parte (1876) 45 L. J. Bk. 149: 3 Ch. D. 481: 35 L. T. 23; 24 W. R. 1035.—C.A.

Collie, In re, Manchester and County Bank. Ex parte, *followed*.

Cooksey, In re, Portal, Ex parte (1900) 83 L. T. 495.—WRIGHT, J.

Rees, In re, National Provincial Bank of England, Ex parte, 44 L. T. 159: *reversed*. (1881) 17 Ch. D. 98: 44 L. T. 325: 29 W. R. 796.—C.A. JAMES, BRETT and COTTON, L.JJ.

Toussaint v. Martinant (1787) 2 Term Rep. 100; and Martin v. Court (1788) 2 Term Rep. 640, *held overruled*.

Young v. Taylor (1818) 8 Taunt. 815.

GIBBS, C.J. (for the Court).—In the cases of *Toussaint v. Martinant* and *Martin v. Court*, the Courts began to hold that the penalties might be proved under a commission, although the party had not actually made any payment; but that doctrine has since been corrected in *Re Bowness* (Cooke's Bankruptcy Laws, 7th ed. 174) and *Ex parte Bowness* (*ibid.*).—p. 822.

Whitmore v. Mason (1861) 2 J. & H. 204.—V.C. *dictum approved*.

Tidswell, In re and Ex parte (1887) 56 L. J. Q. B. 548: 57 L. T. 416: 35 W. R. 669: 4 Morrell 219.—CAVE, J., *followed*.
Mackintosh v. Pogose (1895) 64 L. J. Ch. 274. [1895] 1 Ch. 505: 13 R. 254: 72 L. T. 251: 43 W. R. 247: 2 Manson 27.—STIRLING, J.

Tidswell, In re and Ex parte, *approved*.

Clark, In re, Schulze, Ex parte (1898) 67 L. J. Q. B. 759: [1898] 2 Q. B. 330: 78 L. T. 785: 46 W. R. 678: 5 Manson 201.—C.A. A. L. SMITH, RIGBY and WILLIAMS, L.JJ.

Genese, In re, District Bank of London, Ex parte (1885) 55 L. J. Q. B. 118: 16 Q. B. D. 700: 34 W. R. 79.—CAVE, J., *commented on*.

Cronmire, In re and Ex parte (1901) 70 L. J. K. B. 310: [1901] 1 K. B. 480: 84 L. T. 342: 8 Manson 140.—C.A. RIGBY, WILLIAMS and STIRLING, L.JJ.

Sadler, In re, Norris, Ex parte (1886) 56 L. J. Q. B. 93: 17 Q. B. D. 728: 35 W. R. 19: 3 Morrell 260.—C.A. ESHER, M.R., FRY and BOWEN, L.JJ.; *reversing* 34 W. R. 704.—CAVE, J., *distinguished*.

Newton, In re, National Provincial Bank of England, Ex parte (1896) 65 L. J. Q. B. 686: [1896] 2 Q. B. 403: 75 L. T. 144: 45 W. R. 63: 8 Manson 200.—WILLIAMS and WRIGHT, JJ.

—Vanderhaege, In re, Izard, Ex parte (1887)

20 Q. B. D. 146: 58 L. T. 236: 36 W. R. 525: 4 Morrell 27.—CAVE, J., *considered*.
Semenza, In re, Paget, Ex parte (1893) 63 L. J. Q. B. 278: [1894] 1 Q. B. 15: 9 R. 156;

69 L. T. 703: 42 W. R. 241: 1 Manson 18.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

ESHER, M.R.—Where there appears to be a fair and reasonable dispute between the parties, I do not think security for costs ought to be ordered. That is, I think, what Mr. Justice Cave intended to decide in *In re Vanderhaege, Ex parte Izard*, viz., that on an appeal by a creditor from the decision of the trustee's rejecting his proof, the Court has jurisdiction, in the exercise of its discretion, to order security for costs to be given, but that security should only be ordered in extreme cases.

Couldery v. Bartrum (1881) 51 L. J. Ch. 265: 19 Ch. D. 394: 45 L. T. 689: 30 W. R. 141.—C.A. BAGGALLAY, LUSH and LINDLEY, L.JJ.; *affirming* JESSE, M.R., *followed*.

Société Générale de Paris v. Green (1888) 53 L. J. Ch. 153: 8 App. Cas. 604: 32 W. R. 97.—H.L. (E.). LORDS SELBORNE, L.C., BLACKBURN and FITZGERALD.

Harvey, In re, Pigou, Ex parte (1818) 3

Mad. 136; 18 R. B. 203, *not followed*.
Cumberland, In re, Worthington, Ex parte (1876) 45 L. J. Bk. 135: 3 Ch. D. 803: 34 L. T. 951.—BACON, C.J.

Cowell, In re, Barratt, Ex parte (1823) 1

Glyn & J. 327, *approved and followed*.
Morris, In re, James v. London and County Banking Co. (1899) 68 L. J. Ch. 299: [1899] 1 Ch. 485: 80 L. T. 37: 47 W. R. 324: 6 Manson 178.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.

15. MUTUAL CREDITS, DEBTS and DEALINGS.

Ryall v. Larkin (1746) 1 Wils. 155.—K.B., *imputed*.

Ridout v. Brough (1774) 1 Cowp. 133.—K.B.

Olive v. Smith (1813) 5 Taunt. 56; 2 Rose 122, *limited*.

Rose v. Hart (1818) 8 Taunt. 499; 2 Moore 547; 20 R. B. 533, *followed*.

Young v. Bank of Bengal (1836) 1 Moore P. C. 150: 1 Deac. 622.

LORD BROUGHAM (for J. C.).—In *Olive v. Smith*, a broker had been allowed to set off a debt antecedently due from his employer against the losses recovered from the underwriters on policies deposited in his hands. In *Rose v. Hart*, the Court held that such a set-off is only competent to the pawnee in cases where the thing alleged to be a giving of credit either constitutes a present cross-debt or must end in one. This limitation of the case of *Olive v. Smith* has, in subsequent cases, been approved and followed: *Sampson v. Burton* (2 Bro. & B. 89); *Rose v. Sims* (1 B. & Ad. 521).—p. 168.

Rose v. Hart, *corrected*.

Gibson v. Bell (1835) 1 Bing. (N.C.) 743: 1 Scott 712: 1 Hodges 136; 4 L. J. C. P. 242.

Olive v. Smith, *held overruled*.

Young v. Bank of Bengal, *distinguished*.
Alsager v. Currie (1844) 12 M. & W. 751; 13 L. J. Ex. 208.

PARKE, B.—No doubt *Young v. Bank of Bengal* overruled the decision in *Oliver v. Smith*.—p. 755.
[*Young v. Bank of Bengal* distinguished on the ground that no credit was there given to the bank; that in fact there was there no mutual credit.]

Rose v. Hart, followed.

Young v. Bank of Bengal, considered.

Naroji v. Chartered Bank of India, Australia and China (1868) L. R. 3 C. P. 444; 37 L. J. C. P. 221; 18 L. T. 358; 16 W. R. 791.—C. P.

BOVILL, C.J.—*Rose v. Hart* is a binding authority, and has not been overruled. Itself it overruled some previous cases, and was decided after consultation with many of the judges. The language of the judgment was evidently much considered. Mr. Williams has strongly urged that the case of *Young v. Bank of Bengal* is opposed to *Rose v. Hart*, and is a decision in his favour. Lord Brougham, however, in giving judgment in that case, says: "There is nothing inconsistent with what has now been advanced in the decision, in the language used by the Court of Common Pleas in the case of *Rose v. Hart*, where the former case of *Oliver v. Smith* was reconsidered, and a material qualification added to the generality of the doctrine which had been there laid down." His lordship does not propose to distinguish the two cases, but says, in effect, that the law which the Privy Council is there laying down is not distinguishable from the law already laid down in this Court.—p. 449.

Rose v. Hart and *Young v. Bank of Bengal*, considered.

Naroji v. Chartered Bank of India, approved. *Astley v. Gurney* (1869) L. R. 4 C. P. 714; 38 L. J. C. P. 357; 18 W. R. 44.—EX. CH. KELLY, C. B. diss.

Eberle's Hotels Co. v. Jonas (1887) 56 L. J. Q. B. 278; 18 Q. B. D. 459; 35 W. R. 467.—C.A. ESHER, M.R., BOWEN and FRY, L.J.J., distinguished.

Rose v. Hart (supra); *Booth v. Hutchinson* (1872) 42 L. J. Ch. 492; L. R. 15 Eq. 30; 27 L. T. 600; 21 W. R. 116.—v. c.; *Peat v. Jones* (1881) 51 L. J. Q. B. 128; 8 Q. B. D. 147; 30 W. R. 433.—C.A. JESSEL, M.R., BRETT and COTTON, L.J.J., and *Naroji v. Chartered Bank of India*, referred to.

Palmer v. Day (1895) 64 L. J. Q. B. 807; [1895] 2 Q. B. 618; 15 R. 523; 44 W. R. 14; 7 *Manson* 386.—RUSSELL, C.J. and CHARLES, J.

Rose v. Hart; *Young v. Bank of Bengal*;

Naroji v. Chartered Bank of India; *Astley v. Gurney*; *Deveze, In re, Barnett, Ex parte* (1874) 43 L. J. Bk. 87; L. R. 9 Ch. 293; 29 L. T. 858; 22 W. R. 283.—L.O. and L.J.J.; *Elliott v. Turquand* (1881) 51 L. J. P. C. 1; 7 App. Cas. 79; 45 L. T. 771; 30 W. R. 477.—P.O.; *Lanckester, In re, Price, Ex parte* (1875) L. R. 10 Ch. 648; 38 L. T. 113; 23 W. R. 844.—L.J.J.; *Peat v. Jones*; *Booth v. Hutchinson*; and *Palmer v. Day*, considered.

Daintrey, In re, Mant, Ex parte (1896) 69 L. J. Q. B. 207; [1900] 1 Q. B. 546; 82 L. T. 239; 7 *Manson* 107.—WRIGHT and BIGHAM, J.J., reversed by C.A. LINDLEY, M.R., JEUNE, P. and ROMER, L.J.

Stanforth v. Fellows (1814) 1 Marsh. 184;

2 Rose 151, followed.
New Quebrada Co. v. Carr (1869) 38 L. J. C. P. 283; L. R. 4 C. P. 651; 17 W. R. 859.—C. P.

Bailey v. Finch (1871) 41 L. J. Q. B. 83, L. R. 7 Q. B. 34; 25 L. T. 871; 20 W. R. 294; and *Bailey v. Johnson* (1872) 41 L. J. Ex. 211; L. R. 7 Ex. 293; 20 W. R. 1013.—EX. CH.; affirming L. R. 6 Ex. 279; 24 L. T. 711, explained.

Willis, In re, Morier, Ex parte (1879) 12 Ch. D. 491; 40 L. T. 792; 28 W. R. 235.—C.A.

COTTON, L.J.—Only two cases were much pressed upon us by Mr. De Gex. *Bailey v. Johnson* was a case where a bankruptcy had been annulled, and a set-off was allowed as between money which had been paid in by the trustee before the bankruptcy was annulled and money due to the bankers by the person who had been adjudicated a bankrupt. But that case was decided (certainly by the Exchequer Chamber) on the ground that, by virtue of sect. 81 of the Bankruptcy Act, on the annulling of the bankruptcy, the property reverted to the person who had been declared bankrupt, and became his as and from the time when it was paid into the bank, and therefore it was a clear case of set-off.

As to *Bailey v. Finch*, I think it is unnecessary to express any opinion whether the Court, in dealing with the matter then before them, correctly applied equitable principles to the circumstances of the case. What they did decide was this. They had to deal with a legal right of set-off, because both the accounts were the accounts of one person, and at law there was a right of set-off. But it was attempted to preclude that right by the fact that one of the accounts had been opened in the name of the customer as executor. There was a legal right to set-off, and the question was, whether there was a sufficient equitable ground for preventing the legal right from taking effect. And, as I understand it, the principle of the decision (whether right or wrong) was this—not that the fund was a trust fund from the nature of the account, or that the bankers had notice of that, but that they had notice that it was an account against which claims were likely to be made, and that if the claim had, at the time of the bankruptcy, been made against it, they would have prevented the legal right of set-off from arising; but that, as it was not shown there were any equitable claims against the fund, the legal right of set-off could not be interfered with. That was the ratio decidendi, as I understand it.—p. 501.

16. SECURED CREDITORS.

Bird v. Barstow (1891) 61 L. J. Q. B. 1; [1892] 1 Q. B. 94; 65 L. T. 656; 40 W. R. 71; 56 J. P. 196.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.; *Keyworth, In re, Banner, Ex parte* (1874) 43 L. J. Bk. 102; L. R. 9 Ch. 379; 30 L. T. 630.—L.J.J.; affirming 22 W. R. 350; *Moojen, In re, Boschard, Ex parte* (1879) 48 L. J. Bk. 105; 12 Ch. D. 26; 28 W. R. 129.—C.A.; *Gordon, In re, Navalchand, Ex parte* (1897) 66 L. J. Q. B. 768; [1897] 2 Q. B. 516; 46 W. R. 31; 4 *Manson* 141.—V. WILLIAMS, J., applied.

Ford, In re, Macalister, Ex parte (1900) 69

L. J. Q. B. 690; [1900] 2 Q. B. 211; 82 L. T. 625; 45 W. R. 688; 7 Manson 281.—WRIGHT, J.

Rucker, Ex parte (1834) 3 Deac. & C. 704, 1 Mont. & Ayr. 481; *reversed, nom.* **Borowdaile, Ex parte** (1835) 2 Mont. & Ayr. 398.

Courtney, In re, Pollard, Ex parte (1837) 3 Mont. & Ayr. 340; 2 Deac 367; 6 L. J. Bk. 95; 1 Jur. 288; *reversed*, (1840) Mont. & C. 239; 4 Deac. 27.

Austin, In re, Sheffield, Ex parte (1879) 10 Ch. D. 434; 40 L. T. 15; 27 W. R. 622.—C.A., *considered*.

Cook v. Sturgis (1859) 28 L. J. Ch. 345; 3 De G. & J. 506; 5 Jur. (N.S.) 475.—L.J.J.; and **Wearing v. Ellis** (1856) 26 L. J. Ch. 15; 6 De G. M. & G. 596; 2 Jur. (N.S.) 1147.—L.C., *applied*.

Bird v. Philpott (1900) 69 L. J. Ch. 487; [1900] 1 Ch. 822; 82 L. T. 110; 7 Manson 251.—FARWELL, J.

Talbot, In re, King v. Chick (1888) 58 L. J. Ch. 70; 39 Ch. D. 667; 60 L. T. 49; 37 W. R. 233.—NORTH, J., *not followed*.

Barker, In re, Penfold, Ex parte (1851) 4 De G. & Sm. 282, *followed*.

London, Windsor and Greenwich Hotels Co., In re, Quartermaine's Case (1892) 61 L. J. Ch. 273; [1892] 1 Ch. 639; 66 L. T. 19; 40 W. R. 298.

STIRLING, J.—In argument on their (the mortgagees') behalf reliance was placed on *Talbot, In re, King v. Chick*, decided by North, J., in 1888. Unfortunately in that case *Savin, In re* (42 L. J. Bk. 14; L. R. 7 Ch. 760) was not cited; and I am authorised by the learned judge to say that if his attention had been called to that decision of the C. A., his own would have been different. I am of opinion, therefore, that the proceeds of sale are not applicable to payment of interest accrued subsequently to the commencement of the winding up. As regards the application of the income, I confess that if the matter were *res integra* I should have had some difficulty in holding that there was any difference between that and the proceeds of sale; but it appears to me that I am bound by the decisions in *Ransbottom, Ex parte* (4 L. J. Bk. 33; 2 Mont. & Ayr. 79), and *Penfold, Ex parte*. Both cases were cited in *Savin, In re*, and no doubt was cast upon them. I have made a careful search and cannot find that the rule there laid down has ever been overruled. I have ascertained, by communication with the learned senior registrar of the Court of Bankruptcy, that these cases are still treated as authorities. . . . It seems to me, therefore, that I must treat *Penfold, Ex parte*, as containing the rule of the Court of Bankruptcy on the subject, and that Quartermaine's executors must be admitted to proof on terms similar to those contained in the order in that case.—p. 278.

17. SURPLUS.

Hunter v. Greensill (or Greensill, In re) (1879) 42 L. J. C. P. 55; L. R. 8 C. P. 24; 37 L. T. 827; 21 W. R. 263.—C.P., *referred to*.

Spence v. Coleman (1901) 70 L. J. K. B. 632; [1901] 2 K. B. 199; 84 L. T. 703; 49 W. R. 516.—C.A. COLLINS and STIRLING, L.J.J.

18. EFFECT OF BANKRUPTCY ON EXECUTION.

Bullen, In re, Liverpool Loan Co., Ex parte (1872) 42 L. J. Bk. 14; L. R. 7 Ch. 732; 27 L. T. 669; 20 W. R. 1028.—L.J.J., *followed*.

Howes v. Young (or Stone) (1876) 45 L. J. Ex. 499; 1 Ex. D. 146; 84 L. T. 759; 24 W. R. 788.—EX.

Howes v. Young (or Stone) (1876) 1 Ex. D. 146; 45 L. J. Ex. 499; 34 L. T. 739; 24 W. R. 788, *observed upon*.

Grubb, In re, Sims, Ex parte, 4 Ch. D. 521; 36 L. T. 40; 25 W. R. 276.—BACON, C.J.: *affirmed*; (1876) 46 L. J. Bk. 103; 5 Ch. D. 375; 36 L. T. 340; 25 W. R. 453.—C.A.

Hall, In re, Rock, Ex parte (1871) 40 L. J. Bk. 70; L. R. 6 Ch. 795; 25 L. T. 287; 19 W. R. 1129.—L.C. and L.J.J.; *reversing* 24 L. T. 475; 19 W. R. 677.—C.J., *followed*.

Slater v. Pinder (1872) 41 L. J. Ex. 66; L. R. 7 Ex. 95; 26 L. T. 482; 20 W. R. 441.—EX. CH.

Slater v. Pinder (*supra*), *considered*.

Rogers, In re, Villars, Ex parte (1874) 43 L. J. Bk. 76; L. R. 9 Ch. 342; 30 L. T. 348; 22 W. R. 603.—L.C. and L.J.J.; *reversing* 30 L. T. 104; 22 W. R. 397.

MELLISH, L.J.—I am glad that my first impression of the law in this case has been corrected. No doubt the foundation of my opinion was that I treated the legislature as having made the act of bankruptcy itself void, unless there was something in the Act to the contrary. I considered that I could not decide otherwise consistently with Baron Martin's opinion as to the effect of the 87th section in *Slater v. Pinder*, and it did not occur to me to question the rule laid down by that eminent judge, which had, as I believed, been received with satisfaction by the profession. As, however, a more careful consideration of the Act has satisfied the other members of the Court that the fact of an execution being made an act of bankruptcy does not necessarily make it void, it follows that the execution creditor is entitled, in this case to have the benefit of his execution.—p. 446.

Rogers, In re, Villars, Ex parte (1874) 43 L. J. Bk. 76; L. R. 9 Ch. 342; 30 L. T. 348; 22 W. R. 603.—L.C. and L.J.J., *distinguished*.

Figg v. Moore (1894) 63 L. J. Q. B. 709; [1894] 2 Q. B. 690; 10 R. 549; 71 L. T. 232; 1 Manson 404.

VAUGHAN WILLIAMS, J.—By that section [sect. 45 of the Bankruptcy Act, 1883] an execution creditor is not entitled to the benefit of his execution unless he has completed it by seizure and sale before notice of the commission of any available act of bankruptcy by the debtor. The mere fact that the execution and sale is itself an act of bankruptcy does not deprive the execution creditor of his rights of the fruits of his diligence. That is decided by *Ex parte Villars*. But the present case is clearly distinguishable from *Ex parte Villars*. In such a case as *Ex parte Villars* the act of bankruptcy is not committed until immediately after the completion of the transaction on which it is founded. Here there was no sale; but the execution was completed by the sheriff being paid out on 19th

October, and on the preceding 17th the execution creditor had already notice of an act of bankruptcy by the debtor.

Figg v. Moore (*supra*), *applied and followed*.
Rogers, In re, Villars, Ex parte, distinguished.

Burns-Burns' Trustee v. Brown (1894) 64 L. J. Q. B. 248; [1895] 1 Q. B. 324; 14 R. 119; 71 L. T. 825; 43 W. R. 195; 2 Manson 23.—C.A. **LORD HALSBURY, LINDLEY and SMITH, L.JJ.**

LINDLEY, L.J.—It was said that the decision of Mr. Justice Vaughan Williams in *Figg v. Moore* was erroneous, and that therefore the trustee is not entitled. But I think that case was rightly decided, and for the reasons which the learned judge assigns; and I cannot think the Act can be construed otherwise than as he construed it.

Parsons v. Lloyd, L. R. 1 Ex. 307, n.—BRAMWELL, B. in Chambers, questioned.

Haydon, In re, Halling, Ex parte (1877) 7 Ch. D. 157; 47 L. J. Bk. 25; 37 L. T. 809; 26 W. R. 182.—C.A.

BAGGALLAY, L.J.—The decision in *Parsons v. Lloyd* is only stated by way of a note to the report of *O'Brien v. Brodie* (L. R. 1 Ex. 302); and in the principal case Baron Bramwell said that "the execution creditor certainly will, if he receives this money receive it by virtue of an execution. Our judgment must therefore be against him; but I do not understand this to be inconsistent with the case [*Parsons v. Lloyd*] decided by me at Chambers." The facts stated in the note are not sufficient to enable me to form a satisfactory opinion, but I think that the case was decided simply upon sect. 184 of the Bankruptcy Act of 1849.—p. 159.

Peacock, In re, Lovering, Ex parte (1874)

43 L. J. Bk. 58; L. R. 17 Eq. 452; 29 L. T. 897; 22 W. R. 365, *distinguished*.
Peavey, In re, Crossthwaite, Ex parte (1885) 14 Q. B. D. 966; 54 L. J. Q. B. 316; 33 W. R. 614; 52 L. T. 518; 2 Morrell 105.—CAVE, J.

Hassall, In re, Brook, Ex parte, 43 L. J. Bk. 35; 29 L. T. 653; 22 W. R. 205; *reversed*, (1874) 43 L. J. Bk. 49; L. R. 9 Ch. 301; 30 L. T. 108; 22 W. R. 395.—L.C. and L.JJ.

Hassall, In re, Brook, Ex parte (1874) 43

L. J. Bk. 49; L. R. 9 Ch. 301, *followed*.
Stock v. Holland (1874) L. R. 9 Ex. 147; 43 L. J. Ex. 112; 31 L. T. 121; 22 W. R. 661.

Stock v. Holland, explained.

Bird v. Mathews (1882) 46 L. T. 512.—C.A.

Holland, In re, Nichols, Ex parte, 33 W. R. 459.—CAVE, J.; *reversed, sub nom. Holland, In re, Warren, Ex parte* (1885) 54 L. J. Q. B. 320; 15 Q. B. D. 48; 53 L. T. 68; 33 W. R. 572; 2 Morrell 142.—C.A. **BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.**

Holland, In re, Warren, Ex parte, dicta followed.

Bellyse v. McGinn (1891) [1891] 2 Q. B. 227; 65 L. T. 318.—MATHEW and V. WILLIAMS, JJ.

Cripps, In re, Ross, Ex parte (1888) 58 L. J. Q. B. 19; 21 Q. B. D. 472; 59 L. T. 341; 36 W. R. 845; 5 Morrell 226.—CAVE, J., *appeal compromised*, 33 S. J. 28.—C.A.

O.C.

Butler v. Wearing (1885) 17 Q. B. D. 182; 3 Morrell 5.—MANISTY, J., *followed*.

Trehearne, In re, Ealing Local Board, Ex parte (1890) 63 L. T. 323.—CAVE, J.; *affirmed*, (1890) 60 L. J. Q. B. 50; 63 L. T. 798; 39 W. R. 116; 7 Morrell 261.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**

Trehearne, In re, Ealing Local Board, Ex parte (*supra*), in C.A., *applied*.

National United Investment Corporation, In re (1901) 70 L. J. Ch. 461; [1901] 1 Ch. 950; 84 L. T. 766.—WRIGHT, J.

Fanshaw, In re, Birmingham and Staffordshire Gas Light Co., Ex parte (1871) 40

L. J. Bk. 52; L. R. 11 Eq. 615; 24 L. T. 639; 12 W. R. 603.—C.J., *distinguished*.
Roberts, In re, Hill, Ex parte (1877) 46 L. J. Bk. 116; 6 Ch. D. 63; 37 L. T. 46; 25 W. R. 784.—C.A.

Fanshaw, In re, Birmingham Gas Light Co., Ex parte, and Roberts, In re, Hill, Ex parte, commented on.

Peake, In re, Harrison, Ex parte (1884) 13 Q. B. D. 753; 53 L. J. Ch. 977; 51 L. T. 878.—C.A. **BAGGALLAY, COTTON and LINDLEY, L.JJ.**
BAGGALLAY, L.J.—The first case is *Ex parte Birmingham Gas Light Co.*, the circumstances of which were similar to those of the present case. In that case, immediately after a liquidation petition had been filed, an interim injunction was granted by a County Court, professing under the 13th section of the Bankruptcy Act, 1869, restraining the company from further proceeding with a distress which they had levied on the property of the liquidating debtors, which was taken to be a leading proceeding on behalf of the company. Afterwards, the creditors having resolved upon a liquidation by arrangement, and appointed a trustee, the injunction was made perpetual. From that injunction an appeal was presented to Bacon, V.-C. The substantial question for him to consider was whether the distress was "an execution or legal process" within the meaning of the 13th section—whether there had been "proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy." Having regard to the terms of the 155th section of the special Act of 1845, the V.-C. was of opinion that the power of distress which was thereby conferred on the company—a power to levy a distress of the same nature and of the same kind which a landlord was entitled to put in for arrears of rent—was not a legal process within the meaning of the 13th section of the Bankruptcy Act. No doubt he had regard to the terms of the 155th section, because, without that section, there would have been no right on the part of the gas company to recover the amount due to them for gas by distress. The 155th section gave them that power. The V.-C.'s attention does not seem to have been directed very prominently to the 157th section of the special Act, which limited the right of distress to the goods of the person liable to pay the debt, for I do not find that it is adverted to in his judgment, though it was referred to in the course of the argument. The other case is *Ex parte Hill*. That was a very different case. There the

special Act did not give the company the same power to recover money due for gas as a landlord has to recover rent in arrear; but, as the headnote states it, "the special Act of a gas company empowered them to levy by distress all sums of money due to them for the supply of gas, the amount of which should not be disputed, and provided that any justice, on application, might inquire into and ascertain the amount due, and issue his warrant accordingly for levying the same." That is not the simple form of distress of which a landlord could take advantage; it is a special form of distress, and the Court held that "the company did not come within the words 'landlord or other person to whom any rent is due from the bankrupt' in sect. 34 of the Bankruptcy Act, 1869, but that the distress was a legal process against the estate of the debtor in respect of a provable debt, which the Court had under sect. 13 of the Act, or under rule 260 of the Bankruptcy Rules, 1870, power to restrain." The distress was clearly a legal process against the estate of the debtor, and upon that ground I think the decision in *Ex parte Hill* (*supra*) is to be supported. I was a party to the judgment, and it does not, I think, in any way conflict with the judgment of Bacon, V.-C. in the other case. The distress, as it appears to me, was in the nature of a legal process for enforcing the payment of a debt due, and it came within the 13th section of the Bankruptcy Act, 1869, and not within the 34th. —p. 760.

19. PROTECTED TRANSACTIONS.

Vernon v. Hankey (1787) 2 Term Rep. 113; 1 R. R. 444, *distinguished*.

Lawford, *In re*, Nicholas, *Ex parte* (1902) 71 L. J. K. B. 786; [1902] 2 K. B. 445; 86 L. T. 693; 50 W. R. 592.—WRIGHT, J.

Pooley, In re, Rabbidge, Ex parte (1878) 8 Ch. D. 367; 38 L. T. 663; 26 W. R. 646.—C.A.; and Scheibler, *In re, Holt-hausen, Ex parte* (1874) 44 L. J. Bk. 26; L. R. 9 Ch. 722; 31 L. T. 13.—L.J.J., *referred to*.

Powell v. Marshall, Parkes & Co. (1899) 68 L. J. Q. B. 477; [1899] 1 Q. B. 710; 80 L. T. 509; 47 W. R. 419; 6 Manson 157.—C.A. A. L. SMITH, COLLINS and ROMER, L.J.J.

Kerkham, In re (1886) 80 L. T. Jo. 322; **Pooley, In re, Rabbidge, Ex parte**, *referred to*.

Holloway v. York (1877) 25 W. R. 627, *distinguished*.

Pearce v. Bastable's Trustee (1901) 70 L. J. Ch. 446; [1901] 2 Ch. 122, 124; 84 L. T. 525; 8 Manson 287.—COZENS-HARDY, J.

Fawcett v. Feame (1844) 6 Q. B. 20; 8 Jur. 645.—Q.B., *followed*.

James, *In re*, Harris, *Ex parte* (1874) 44 L. J. Bk. 81; L. R. 19 Eq. 253; 31 L. T. 621; 23 W. R. 636.—BACON, C.J.

Harrison, In re, Meads, Ex parte (1879) 49 L. J. Bk. 47; 41 L. T. 660; 28 W. R. 308.—C.J., *reversed, sub nom. Harrison, In re, Jay, Ex parte* (1880) 14 Ch. D. 19; 42 L. T. 600; 28 W. R.

449; 44 J. P. 409.—C.A. JAMES, BRETT and COTTON, L.J.J.

Waugh, In re, Dickin, Ex parte (1876) 46 L. J. Bk. 26; 4 Ch. D. 524; 35 L. T. 769; 25 W. R. 258.—C.J., *distinguished*.

Harrison, *In re, Jay, Ex parte* (1880), *supra*. COTTON, L.J.—*In Brown v. Bateman*, the principle of the decision was this, that the Court considered the effect of the contract was to give the landlord, from the very time when the contract was entered into, an equitable interest in the chattels, and therefore the case was not within the principle of *Huginbotham v. Holme* (19 Ves. 88). The decision of the chief judge in *Ex parte Dickin* seems to have proceeded on the same principle. His view of the facts, whether right or wrong, was this, that a lien on the chattels in question had been given to the landlords from the very commencement of the contract, and that, though a power was given to them to seize the chattels in the event of the bankruptcy of the builder, it was only given in consequence of the interest which had been previously vested in them; the present case cannot be brought within the principle of those cases. There is no stipulation that advances are to be made by the lessor to the builder, in respect of which she was to have a lien on the materials. We must, therefore, hold that the materials have become the property of the trustee.—p. 26.

Curtoys, In re, Pillers, Ex parte (1881) 50 L. J. Ch. 691; 17 Ch. D. 653; 44 L. T. 691; 29 W. R. 575.—C.A. JAMES, BAGGALLAY and LUSH, L.J.J.; *reversing* 44 L. T. 224; 29 W. R. 568, *applied and followed*.

O'Shea's Settlement, *In re*, Courage v. O'Shea (1894) 64 L. J. Ch. 263; [1895] 1 Ch. 325; 12 R. 70; 71 L. T. 827; 43 W. R. 232; 2 Manson 4.—C.A. LORD HALSBURY, LINDLEY and SMITH, L.J.J.

LINDLEY, L.J.—I do not think this is a novel decision, having regard to *Ex parte Pillers*, where it was held that a garnishee order was not a "dealing" with a bankrupt under sect. 94 of the Bankruptcy Act, 1869, because it was a step *in invitum*, and not in any fair sense of the word a "dealing with" him. In substance and in principle that decision covers the present case.

O'Shea's Settlement, *In re*, Courage v. O'Shea, *followed*.

Wild v. Southwood (1896) 66 L. J. Q. B. 166; [1897] 1 Q. B. 317; 75 L. T. 888; 45 W. R. 224; 3 Manson 303.—V. WILLIAMS, J.

Pumfrey, In re, Hillman, Ex parte (1879) 48 L. J. Bk. 77; 10 Ch. D. 622; 40 L. T. 177; 27 W. R. 567.—C.A., *discussed and explained*.

Hance v. Harding (1888) 57 L. J. Q. B. 403; 20 Q. B. D. 732; 59 L. T. 659; 36 W. R. 629.—C.A. ESSER, M.R. and SIR J. HANNEN.

SIR JAMES HANNEN.—The settlement in question having been entered into in good faith on both sides, not with reference to the son's (the bankrupt's) creditors, but dictated by prudence as regards his children, is not to be set aside unless it comes clearly within the provisions of sect. 91 of the Bankruptcy Act, 1869. That depends on the meaning of the word "purchaser" in that section. It appears

to me that what was said in *In re, Pumphrey*, *Ex parte Hillman*, had reference only to a case where the conveyance was purely voluntary, and without any consideration moving from or to any of the parties. Therefore all that was intended to be said in that case was that "purchaser" does not mean a purchaser in the limited conveyancing meaning of the word, but that in order to constitute a party a purchaser there must be a *quid pro quo*. This there was in the present case.—p. 405.

Hance v. Harding (*supra*), *considered and distinguished*.

Vansittart, *In re*, Brown, *Ex parte* (1893) 62 L. J. Q. B. 279; [1893] 2 Q. B. 377; 5 R. 280; 68 L. T. 233; 41 W. R. 286; 10 Morrell 44.—v. WILLIAMS, J.

Shears v. Goddard (1896) 65 L. J. Q. B. 344; [1896] 1 Q. B. 406; 74 L. T. 128; 44 W. R. 402; 8 Manson 24.—ESHER, M.R., LOPES and RIGBY, L.J.J., *distinguished*. Sharp, *In re*, Gundry v. Johnson (1900) 88 L. T. 416.—WRIGHT, J.

Shears v. Goddard, *followed*.

Bullock v. Ardern (1901) 17 Times L. R. 285.—C.A. A. L. SMITH, M.R., COLLINS and ROMER, L.J.J.

Shears v. Goddard, *distinguished*.

Jukes, *In re*, Official Receiver, *Ex parte* (1902) 71 L. J. K. B. 710; [1902] 2 K. B. 58; 86 L. T. 456; 50 W. R. 560.—WRIGHT, J.

Evans v. Hallam (1871) 40 L. J. Q. B. 229; L. R. 6 Q. B. 713; 24 L. T. 939; 19 W. R. 1158.—Q.B., *observed upon*.

Lucas v. Dicker (1880) 50 L. J. Q. B. 190; 6 Q. B. D. 84; 43 L. T. 429; 29 W. R. 115.—C.A. SELBORNE, L.C., BRETT and BAGGALLAY, L.J.J.

Hooking v. Acraman (1843) 12 M. & W. 170; 13 L. J. Ex. 34, *questioned*.

Lucas v. Dicker, *supra*. SELBORNE, L.C. (for the Court).—It only remains now to see how far our decision is consistent with the authorities. It is consistent with all of them except the case of *Hooking v. Acraman*, and whether it can be reconciled with that or not, it is unnecessary for us now to inquire, for however much we may regret doing so, if it cannot be reconciled with this decision we must dissent from that authority; and thus we have not the same difficulty in doing as we should have had if it had been shown that that case had been recognised as an authority, and acted on in subsequent cases. I ought, however, to add that what we have heard on the subject of striking a docket under the old bankruptcy law shows that that case is really not consistent with our present decision.—p. 89.

Lucas v. Dicker (1880) *supra*; and Sedgwick, *In re*, Hobbs, *Ex parte* (1892) 9 Morrell 217, *limited*.

O'Shea's Settlement, *In re*, Courage v. O'Shea (1894).—C.A. (ante, col. 164).

LINDLEY, L.J.—I much doubt whether *Lucas v. Dicker* and *Sedgwick*, *In re*, can be relied on

as authority for the proposition that a man who has notice that a bankruptcy petition has been dismissed, has notice that an act of bankruptcy has been committed by the debtor.

Barnes, In re, Tilleard, Ex parte (1882) 30 W. R. 568, *not followed*.

Bedell, In re, Gilbey, Ex parte (1878) 47 L. J. Bk. 49; 8 Ch. D. 248; 38 L. T. 728; 26 W. R. 768.—C.A., *followed*.

Barnes, In re, Quilter, Ex parte (1882) 30 W. R. 739.—C.A.

Bedell, In re, Crosbie, Ex parte (1877) 47 L. J. Bk. 19; 7 Ch. D. 123; 37 L. T. 583; 26 W. R. 119.—C.A., *explained*.

Hood v. Newby (1882) 21 Ch. D. 605; 52 L. J. Ch. 204; 47 L. T. 721; 31 W. R. 185.—C.A. JESSEL, M.R., BRETT and COTTON, L.J.J.

COTTON, L.J.—Now, undoubtedly, in *Ex parte Bonchard*, and in two similar cases (*Ex parte Bonchard*, L. R. 12 Ch. D. 26, and *Ex parte Gilbey*, L. R. 8 Ch. D. 248) words were used by James, L.J., and by the members of the Court, which point to the particular adjudication. James, L.J. says: "It must mean notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered." Now, judges, as well as other persons, sometimes use short expressions which, if expanded, would be perfectly clear, but which applied to a different set of circumstances in their non-expanded form are ambiguous. The lord justice was dealing there with this question—whether an act of bankruptcy committed twelve months before the actual adjudication would be an act of bankruptcy available for adjudication within the meaning of this section, and what he there, to my mind, clearly means, having regard to the point before him, is adjudication at the particular time when the adjudication was in fact made. It is adjudication at that particular date which was the only thing material, not the particular adjudication in the sense of an adjudication on the petition of the creditor who actually did get the adjudication. I think this is the reasonable interpretation of the language of James, L.J.—p. 611.

Pearson v. Graham (1838) 6 A. & E. 899; 2 Nev. & P. 636; W. W. & D. 691; 7 L. J. Q. B. 247, *followed*.

Matanlê (or Matulle), In re, Schulte, Ex parte (1874) L. R. 9 Ch. 409; 30 L. T. 478; 22 W. R. 462.—L.J.

Matanlê (or Matulle), In re, Schulte, Ex parte (1874) L. R. 9 Ch. 409; 30 L. T. 478; 22 W. R. 462.—L.J., *followed*.

Bannister, *In re*, Vale, *Ex parte* (1881) 60 L. J. Ch. 797; 18 Ch. D. 137; 45 L. T. 200; 29 W. R. 855.—C.A. SELBORNE, L.C., BRETT and COTTON, L.J.J.

Matanlê (or Matulle), In re, Schulte, Ex parte, *followed*.

Tollemache, *In re*, Reveli, *Ex parte* (1884) 54 L. J. Q. B. 89; 13 Q. B. D. 727; 51 L. T. 376; 33 W. R. 288.—C.A. BAGGALLAY, COTTON and LINDLEY, L.J.J.

20. DISCLAIMER AND VESTING ORDERS.

Tuck v. Fyson (1829) 6 Bing. 321; 3 Moole & P. 715; 8 L. J. (O.S.) C. P. 10. *referred to.*
Stacey v. Hill (1901) 70 L. J. K. B. 435; [1901] 1 K. B. 660; 84 L. T. 410; 49 W. R. 390; 8 Mansf. 169.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.

Turner, In re, Ladbury, Ex parte (1881) 50 L. J. Ch. 838; 17 Ch. D. 532; 45 L. T. 5.—C.A. JESSEL, M.R., JAMES and LUSH, L.JJ., *explained.*
Knight, In re, Isherwood, Ex parte (1882) 22 Ch. D. 384; 52 L. J. Ch. 370; 48 L. T. 398; 31 W. R. 442.—C.A. JESSEL, M.R., COTTON and BOWEN, L.JJ.

JESSEL, M.R.—In *Ex parte Ladbury* a special case was made out, though I do not know the exact extent of it. It appears from the report of that case in the Law Times, in which the facts are more fully stated than in the Law Reports, that the trustee had kept possession of the demised property, which was supposed to be of some value over and above an equitable mortgage upon it, that he had sold the equity of redemption, that the purchaser was unable to complete his contract and had forfeited part of his deposit in order to be let off his bargain, and the sum so forfeited had, of course, gone to increase the bankrupt's estate. It also appears that the landlord had been kept out of possession, how I do not know. Whether there was no proviso for re-entry, or any clause in the lease to hinder the re-entry, does not appear. That being so, it was held, not that the landlord was entitled to his rent up to the date of the disclaimer, but that he was entitled to some compensation for the trustee's use and occupation of the property during the time for which he was kept out of the estate, and in the opinion of the Court of Appeal the compensation which had been awarded him by the registrar was not too much. That is all which was decided in *Ex parte Ladbury*.—p. 391.

Knight, In re, Isherwood, Ex parte, approved.
Bushell, In re, Izard, Ex parte (1883) 23 Ch. D. 115; 48 L. T. 502.—C.A. JESSEL, M.R., BAGGALLAY and LINDLEY, L.JJ.

Knight, In re, Isherwood, Ex parte, adopted.
Bushell, In re, Izard, Ex parte, observed upon.
Witton, In re, Arnal, Ex parte (1883) 24 Ch. D. 26; 49 L. T. 221.—C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ.

Roberts, In re, Foster, Ex parte (1878) 47 L. J. Bk. 101; 38 L. T. 888; 26 W. R. 834; *reversed, sub nom. Roberts, In re, Brook, Ex parte* (1878) 48 L. J. Bk. 22; 10 Ch. D. 100; 39 L. T. 458; 27 W. R. 255.—C.A.

Lavies, In re, Stephens, Ex parte (1877) 47 L. J. Bk. 22; 7 Ch. D. 127; 37 L. T. 618; 26 W. R. 136.—C.A., *considered.*

Roberts, In re, Foster, Ex parte; and Roberts, In re, Brook, Ex parte, supra.

Lavies, In re, Stephens, Ex parte; and Roberts, In re, Brook, Ex parte (supra), discussed and followed.

Latham, In re, Glegg (or Glegg), Ex parte (1881) 50 L. J. Ch. 711; 45 L. T. 31; 29 W. R. 898.—BACON, C.J.: *reversed on appeal*, 51 L. J. Ch. 367; 19 Ch. D. 7; 45 L. T. 484; 30 W. R. 144.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.JJ.

Latham, In re, Glegg (or Gregg), Ex parte, (1881) 51 L. J. Ch. 367, 19 Ch. D. 7; 45 L. T. 484; 30 W. R. 144.—C.A., explained.

Fussell, In re, Allen, Ex parte (1882) 51 L. J. Ch. 724; 20 Ch. D. 841; 47 L. T. 65; 30 W. R. 601.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ.

JESSEL, M.R.—Now, as I understand *Ex parte Glegg*, it decided two things. First of all, it decided that the thing to be got rid of by the disclaimer is the entire lease, and not a part of it, by which I mean all that is comprised in the lease. In that case it was not a question of property, but a question of proviso or covenant, and we held that the whole lease including the proviso was gone. A second point was no doubt decided there, though it appears in the report as if it was decided by me alone, but what I said was with the concurrence of the other members of the Court. That is, that though there are no words in the Act expressing it, and though all the Act says is that the lease is to be deemed to have been surrendered at the date of the adjudication, yet the Act intended to relieve the trustee from liability under the lease altogether, and that no interest in or liability under the lease should remain in him between the commencement of the bankruptcy and the date of the adjudication.—p. 344.

Smalley v. Hardinge (1881) 6 Q. B. D. 371.—MATHEW, J.: *reversed*, (1881) 50 L. J. Q. B. 867; 7 Q. B. D. 524; 44 L. T. 503; 29 W. R. 564.—C.A. BRANWELL, BAGGALLAY and LUSH, L.JJ.

Smalley v. Hardinge (supra) in C.A., commented on.

Levy, In re, Walton, Ex parte (1881) 50 L. J. Ch. 637; 17 Ch. D. 746; 45 L. T. 1; 30 W. R. 895.—C.A. JESSEL, M.R., JAMES and LUSH, L.JJ.
LUSH, L.J.—In *Smalley v. Hardinge*, the question of the effect of a disclaimer of a lease came before us in another form, and the point which has now been raised was not then present to our minds. There the trustee of a bankrupt had disclaimed a lease, and the lessor thought that he was entitled to get possession of the demised property, though the bankrupt had granted an underlease of it. Mr. Justice Mathew held that the lessor was entitled to eject the underlessee, and no doubt some expressions may be found in our judgments treating the disclaimer as having the same effect as an actual surrender of the lease. But the point which has now arisen was not then present to our minds at all. Now, however, that it has arisen, we shall still decide *Smalley v. Hardinge*, in the same way as we did then.—p. 758.

Taylor v. Giltott (1875) 44 L. J. Ch. 740; L. R. 20 Eq. 682; 32 L. T. 792; 24 W. R. 65.—V. C. *distinguished*.

Snalley v. Harlings (*supra*), in C.A.
LUSH, L.J.—Here a legal term had been created out of the original lease, and that term had vested in the defendant. A surrender at common law is a voluntary act, and if the original lease had been surrendered in the ordinary manner, by the operation of a modern statute, 8 & 9 Vict. c. 106, s. 9, the plaintiffs would have become entitled to a reversion expectant upon the defendant's lease. In *Taylor v. Giltott* only an agreement had been drawn up in favour of the underlessee. A disclaimer having been executed the original term was thereby surrendered. The intended lessee filed a bill in the Court of Chancery to compel the original lessor to execute a lease to him. I do not think the lessor could be compelled to carry out the contract of the lessee. No obligation existed upon the lessor, the estate of the lessee was entirely gone. I think that the Vice-Chancellor properly refused to stay the action of ejectment, and rightly dismissed the bill. The two cases are distinguishable.—p. 628.

East and West India Dock Co. v. Hill (1882) 52 L. J. Ch. 44; 22 Ch. D. 14; 47 L. T. 270; 31 W. R. 55.—C.A. SELBORNE, L.C., JESSEL, M.R. and COTTON, L.J. (*affirmed* in H.L., *infra*), *followed*.
Harding v. Preece (1882) 51 L. J. Q. B. 515; 9 Q. B. D. 281; 47 L. T. 100; 31 W. R. 42; 46 J. P. 646.

Hill v. East and West India Dock Co. (1884) 53 L. J. Ch. 842; 9 App. Cas. 448; 51 L. T. 163; 32 W. R. 925; 48 J. P. 788.—H.L. (E). LORDS CAIRNS, BLACKBURN and WATSON; LORD BRANWELL dissenting; and **Harding v. Preece**, *distinguished*.
Stacey v. Hill (1900) 69 L. J. Q. B. 796; 7 Manson 399 (*affirmed* in C.A. *infra*, col. 170).
PHILLIMORE, J.—This case is distinguishable from *Harding v. Preece* and *Hill v. East and West India Dock Co.* In those cases it was held that the disclaimer by the trustee in bankruptcy of the assignee of the lease did not destroy the original term. But in the present case the original lessee became bankrupt, and the effect of the disclaimer was to release the lessee, his property, and the trustee from liability to pay rent. As the defendant's guarantee only extended to the payment of rent in arrear, there is no liability under the guarantee for any rent after the date of the disclaimer.—p. 797.

Hill v. East and West India Dock Co., *applied*.
Railton v. Wood (1890) 59 L. J. P. C. 84; 15 App. Cas. 363; 63 L. T. 13.—P.C. LORDS SELBORNE, WATSON and FIELD and SIR B. PEACOCK.

Parkers, In re, Turquand, Ex parte (1884) 14 Q. B. D. 405; 51 L. T. 667; 33 W. R. 752; 1 Morrell 275.—CAVE, J., *dissented*.
Cock, In re, Shilson, Ex parte (1887) 20 Q. B. D. 343; 57 L. J. Q. B. 169; 58 L. T. 586; 36 W. R. 187; 5 Morrell 14.—CAVE and A. L. SMITH, JJ.

CAVE, J.—In *Ex parte Turquand*, I expressed a doubt whether the words in sect. 55, sub-sect. 6 of the Bankruptcy Act. 1883] "person claiming

an interest in any disclaimed property" include a landlord. They do of course include persons claiming under the bankruptcy, but, on further consideration, we think that they include the lessor also. For instance, if a lessee in possession who had neither given nor contracted to give any interest to any one else, were to become bankrupt, and his trustee were to disclaim, we think the Court would have authority under this section to give possession to the landlord on his application. . . . Where there is no person liable, either jointly with the bankrupt or alone, to perform the lessee's covenants, we are of opinion that, notwithstanding the doubt expressed in *Ex parte Turquand*, the landlord may apply that the sub-lessee may be put to his election.—pp. 347, 348.

Parkers, In re, Turquand, Ex parte, *referred to*.

Cock, In re, Shilson, Ex parte (1887) 57 L. J. Q. B. 169; 20 Q. B. D. 343; 58 L. T. 586; 36 W. R. 187; 5 Morrell 14.—CAVE and A. L. SMITH, JJ., *followed*.

Finley, In re, Clothworkers' Company (or Hanbury), Ex parte (1888) 57 L. J. Q. B. 626; 21 Q. B. D. 475; 60 L. T. 134; 37 W. R. 6; 5 Morrell 248.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

Finley, In re, Clothworkers' Co. (or Hanbury), Ex parte, 57 L. J. Q. B. 626; 60 L. T. 134; 37 W. R. 6; 5 Morrell 248.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ., *commented on*.

Morgan, In re and Ex parte (1889) 58 L. J. Q. B. 295; 22 Q. B. D. 592; 60 L. T. 941; 37 W. R. 344; 6 Morrell 57.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Finley, In re, Hanbury (or Clothworkers' Co.), Ex parte, *referred to*.
Stacey v. Hill (1901) 70 L. J. K. B. 435; [1901] 1 K. B. 660; 84 L. T. 410; 49 W. R. 390; 8 Manson 169.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.

Cock, In re, Shilson, Ex parte (*supra*); **Finley, In re, Clothworkers' Co. (or Hanbury), Ex parte**; and **Morgan, In re and Ex parte** (*supra*), *discussed and followed*.
Baker, In re, Lupton, Ex parte (1901) 70 L. J. K. B. 856; [1901] 2 K. B. 628; 85 L. T. 33; 49 W. R. 691; 8 Manson 279.—C.A. RIGBY, COLLINS and ROMER, L.JJ.

Woods, In re, Ditton, Ex parte (1876) 45 L. J. Bk. 141; 3 Ch. D. 459; 24 W. R. 1008.—C.A., *followed*.

Hawes, In re, Sadler, Ex parte (1881) 51 L. J. Ch. 201; 19 Ch. D. 122; 30 W. R. 178.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.JJ.

Genese, In re, Kearsley, Ex parte (1886) 55 L. J. Q. B. 326; 17 Q. B. D. 1; 34 W. R. 474; 3 Morrell 57.—CAVE, J., *referred to*.
The Lord of the Isles, **Williams v. Knight** (1894) 64 L. J. P. 15; [1894] P. 342; 71 L. T. 92.—BRUCE, J.

21. OFFICIAL RECEIVER.

Parkers, In re, Turquand, Ex parte (1884) 14 Q. B. D. 407; 52 L. T. 185; 33 W. R. 262.—CAVE, J.; *reversed, non*. **Parker, In re, Board of**

Trade, Ex parte (1885) 54 L. J. Q. B. 372; 15 Q. B. D. 196; 52 L. T. 670.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.J.J.; the latter decision *affirmed*, *nom.* **Turquand v. Board of Trade** (1886) 55 L. J. Q. B. 417; 11 App. Cas. 286; 55 L. T. 30.—H.L. (K.) LORDS SELBORNE, BLACKBURN, WATSON, FITZGERALD and HALSBURY.

New Land Development Association and Gray, In re (1892) 61 L. J. Ch. 328; [1892] 2 Ch. 138; 66 L. T. 104; 40 W. R. 295.—C.A. LINDLEY, BOWEN and KAY, L.J.J., *discussed*.

Calcott and Elvin's Contract, In re (1898) 67 L. J. Ch. 327; 78 L. T. 417; 46 W. R. 457; 5 Manson 116.—KEKEWICH, J.; *reversed*, (1898) 67 L. J. Ch. 553; [1898] 2 Ch. 460; 78 L. T. 826; 46 W. R. 673; 5 Manson 208.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.J.J.

22. THE TRUSTEE.

Wilson and Armstrong, In re, Fenning, Ex parte (1876) 3 Ch. D. 455; 35 L. T. 830; 23 W. R. 185.—C.A., *discussed*.
McHenry, In re, Credit Company, Ex parte (1883) 53 L. J. Ch. 161; 24 Ch. D. 353; 49 L. T. 385; 32 W. R. 47.—C.A. BRETT, M.R., COTTON and BOWEN, L.J.J.

Games, In re, Board of Trade, Ex parte (1884) 1 Morrell 216.—CAVE, J., *considered*.

Martin, In re, Board of Trade, Ex parte (1888) 57 L. J. Q. B. 384; 21 Q. B. D. 29; 58 L. T. 889; 36 W. R. 698; 5 Morrell 129.—CAVE, J.

Lamb, In re, Board of Trade, Ex parte (1894) 64 L. J. Q. B. 71; [1894] 2 Q. B. 805; 71 L. T. 312; 1 Manson 373; 9 R. 636.—C.A. ESHER, M.R., KAY and SMITH, L.J.J.; *reversing* 42 W. R. 544.—WILLIAMS, J., *discussed and followed*.

Mardon, In re (1895) [1896] 1 Q. B. 140; 65 L. J. Q. B. 111; 73 L. T. 480; 44 W. R. 111; 2 Manson 511.

VAUGHAN WILLIAMS, J.—When I decided *In re Lamb*, I thought that I ought to perform the same sort of duty which the Board of Trade in the first instance has to perform, that is, to decide whether in any particular case the Board of Trade ought to object to the appointment of the trustee. In other words, to decide whether, having regard to all the facts of the case, it is antagonistic to the impartial performance of his duties or the interests of the creditors to appoint a particular person trustee because of his knowledge of the affairs of the bankrupt. I still think that it would have been for the advantage of the creditors if the law had been as I supposed, and if I had a right to exercise that discretion which I then attempted to exercise. But the Court of Appeal have held otherwise, and, therefore, I content myself with deciding that the objection is valid on the ground that I have stated, namely, that the trustee will, upon the examination of the accounts, have to act in a matter in which he is personally interested.—p. 145.

Dobbs, In re, Jones, Ex parte (1866) 15 L. T. 74, *overruled*.

Cooper, In re, Moss, Ex parte (1867) L. R. 3 Ch. 29; 17 L. T. 279; 16 W. R. 65.—L.J.

Harrison, In re, Crowther, Ex parte (1871) 24 L. T. 330, *not followed*.

Thruff, In re, Kimber, Ex parte (1879) 11 Ch. D. 869.—C.A.

Leonard, In re, Lewis, Ex parte (1819) 1 Glyn & J. 69.—L.C., *unappealable*.

Thompson, In re, Buxton, Ex parte (1823) 1 Glyn & J. 355.—V.-C.

Pooley v. Quilter, A. Drew 184; 27 L. J. Ch. 180; 4 Jur. (N.S.) 45.—V.-C.; *reversed*, (1858) 2 De G. & J. 327; 27 L. J. Ch. 374; 4 Jur. (N.S.) 345; 6 W. R. 402.—L.J.J.

Moore, In re and Ex parte (1881) 51 L. J. Ch. 72; 30 W. R. 123; 45 L. T. 558.—BACON, C.J., *distinguished*.

Gallard, In re and Ex parte (1897) 66 L. J. Q. B. 484; [1897] 2 Q. B. 8; 76 L. T. 327; 45 W. R. 556; 4 Manson 52.—V. WILLIAMS, J.

Chudley, In re (1884) 14 Q. B. D. 402; 33 W. R. 708; 2 Morrell 8.—CAVE, J., *explained*.

Cornish, In re, Board of Trade, Ex parte (1895) [1895] 2 Q. B. 634; 73 L. T. 478; 2 Manson 500.—WILLIAMS and KENNEDY, J.J.; *affirmed*, (1895) 65 L. J. Q. B. 106; [1896] 1 Q. B. 99; 73 L. T. 602; 44 W. R. 161; 3 Manson 48.—C.A. ESHER, M.R., LOPES and KAY, L.J.J.

Prager, In re, Société Cockrill, Ex parte (1876) 45 L. J. Bk. 124; 3 Ch. D. 115; 34 L. T. 665, *distinguished*.

Ware, In re, Carter, Ex parte (1878) 8 Ch. D. 731; 39 L. T. 185; 27 W. R. 106.—C.A.

JAMES, L.J.—*Ex parte Société Cockrill, Re Prager*, was quite a different case from this, for there the trustee, by his certificate, admitted that he had received the money to pay the claimant's dividend.—p. 186.

Joyner, In re, Elsee, Ex parte (1829) 1 Mont. 1.—V.-C., *overruled*.

Sharpe, In re, Joyner, Ex parte (1832) 2 Mont. & Ayr. 1.—L.C.

23. THE BANKRUPT.

Fraudulent Preference.

Clay, In re, Trustee, Ex parte (1895) 3 Manson 31.—WILLIAMS and KENNEDY, J.J., *distinguished*.

Eaton, In re, Viney, Ex parte (1897) 66 L. J. Q. B. 491; [1897] 2 Q. B. 16; 4 Manson 111.

V. WILLIAMS, J.—... This case cannot be brought within the principle of *In re Clay & Sons*. I say again, as I said then, that the mere fact a man in business, when insolvent, meets a bill of exchange raises no inference of an intention or view to prefer the holder of the bill, because in the ordinary course of business a man must either meet his bills or put up his shutters. But the reason why *In re Clay & Sons* does not apply here is because the acceptance was not paid in due course. It was not presented at maturity, but afterwards and by express request. The result is, that this was a voluntary payment, and not a payment in ordinary course.

Eaton, In re, Viney, Ex parte (1897) 66 L. J. Q. B. 491; [1897] 2 Q. B. 16; 4 Manson 111.—V. WILLIAMS, J., *dictum in dissent*ed from.

Laure, In re, Green, Ex parte (1898) 67 L. J. Q. B. 431; 46 W. R. 491; 5 Manson 48.

WRIGHT, J. said that the *dictum* of Vaughan Williams, J., in *Eaton, In re, Viney, Ex parte*, to the effect that where a payment is impeached by a trustee in bankruptcy as constituting a fraudulent preference, it is sufficient for him to show insolvency without showing an intention by the bankrupt to make a preference, was not one upon which he could act in the face of the judgment of Cotton, L.J., in *Launceston, Ex parte, Marsden, In re* (53 L. J. Ch. 1123; 25 Ch. D. 311).

Zucco, In re, Cooper, Ex parte (1875) 44 L. J. Bk. 121; L. R. 10 Ch. 510; 33 L. T. 8; 23 W. R. 782.—L.J.J., *considered*.

Willmott v. London Celluloid Co. (1886) 56 L. J. Ch. 89; 84 Ch. D. 147; 55 L. T. 696; 35 W. R. 145.—C.A. COTTON and FRY, L.J.J., and SIR J. HANNEN; *affirming* (1886) 31 Ch. D. 425; 55 L. J. Ch. 449; 34 W. R. 342; 54 L. T. 206.—BACON, V.-C.

Marks v. Feldman, 38 L. J. Q. B. 220; L. R. 4 Q. B. 481; *reversed*, (1869) 39 L. J. Q. B. 101; L. R. 5 Q. B. 275; 10 B. & S. 371.—EX. CH.

Butcher v. Stead (1875) 44 L. J. Bk. 129; L. R. 7 H. L. 839; 33 L. T. 541; 24 W. R. 463.—H.L. (E); LORD SELBORNE *dubitant*, *distingushed*.

Tomkins v. Maffery (1877) 47 L. J. Bk. 11; 3 App. Cas. 213; 37 L. T. 758; 26 W. R. 62.—H.L. (E).

[Distinguished by Lord Cairns, L.C., on the ground that there the creditor had no means of knowing that he was being fraudulently preferred, and a payment made under those circumstances would be protected.]

Wilkinson, In re, Stubbins, Ex parte (1881) 50 L. J. Ch. 547; 17 Ch. D. 58; 44 L. T. 877; 29 W. R. 653.—C.A. JAMES, BRETT and COTTON, L.J.J., *followed*.

Goldsmid, In re, Taylor, Ex parte (1886) 56 L. J. Q. B. 195; 18 Q. B. D. 295; 35 W. R. 148.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J.J.

Wilkinson, In re, Stubbins, Ex parte; and Goldsmid, In re, Taylor, Ex parte (1886) 56 L. J. Q. B. 195; 18 Q. B. D. 295; 35 W. R. 148.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J.J., *followed*.

Hutchinson, In re, Ball, Ex parte (1887) 35 W. R. 264.—C.A. SIR J. HANNEN, BOWEN and FRY, L.J.J.

Goldsmid, In re, Taylor, Ex parte, and Hutchinson, In re, Ball, Ex parte (1886) 35 W. R. 264.—C.A., *followed*.

New's Trustee v. Hunting (1897) 66 L. J. Q. B. 554; [1897] 2 Q. B. 19; 76 L. T. 742; 45 W. R. 577; 4 Manson 103.—C.A. ESHER, M.R., SMITH and CHITTY, L.J.J.; *affirmed, nom.* Sharp v. Jackson (1899) 68 L. J. Q. B. 866; [1899] A. C. 419; 80 L. T. 841; 6 Manson 264.—H.L. (E). LORDS HALSBURY, L.C., MACNAGHTEN, MORRIS and SHAND.

Butcher v. Stead (*supra*) and **Thompson v. Freeman** (1786) 1 Term Rep. 155; 1 R. R. 169, *approved*.
Sharp v. Jackson, *supra*.

New's Trustee v. Hunting, applied.

Fletcher, In re, Suffolk, Ex parte (1891) 9 Morrell 8; and **Vingoe and Davies, In re, Viney, Ex parte** (1894) 1 Manson 416.—V. WILLIAMS, J., *followed*.

Blackburn & Co., In re, Buckley's Case (1899) 68 L. J. Ch. 764; [1899] 2 Ch. 725; 81 L. T. 520.—WRIGHT, J.

Sharp v. Jackson (*supra*), *dictum questioned*.

Goldsmid, In re, Taylor, Ex parte, applied.
Lake, In re, Dyer, Ex parte (1901) 70 L. J. K. B. 890; [1901] 1 K. B. 710; 84 L. T. 430; 49 W. R. 241; 8 Manson 145.—C.A. RIGBY, WILLIAMS and STIRLING, L.J.J., *reversing* WRIGHT, J.

Middleton v. Pollock, Elliott, Ex parte (1876) 45 L. J. Ch. 293; 2 Ch. D. 104.—M.R.; and **New's Trustee v. Hunting, affirmed, nom.** Sharp v. Jackson (*supra*), *applied*.

Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231; 84 L. T. 897; 49 W. R. 451.—C.A. WILLIAMS and STIRLING, L.J.J.; RIGBY, L.J. *dissenting*.

Paine, In re, Read, Ex parte (1896) 66 L. J. Q. B. 71; [1897] 1 Q. B. 129; 75 L. T. 316; 3 Manson 309.—V. WILLIAMS, J., *not followed*.

Mills, In re, Official Receiver, Ex parte (1888) 5 Morrell 55; 58 L. T. 871.—C.A. ESHER, M.R., FRY and LOPES, JJ.; and **Goldsmid, In re, Taylor, Ex parte** (*supra*), *followed*.

Wilkinson, In re, Stubbins, Ex parte (*supra*), *approved*.

Warren, In re, Tranter, Ex parte (1900) 69 L. J. Q. B. 425; [1900] 2 Q. B. 138; 82 L. T. 502; 48 W. R. 523; 7 Manson 137. WRIGHT and PHILLIMORE, JJ.

WRIGHT, J.—The only difficulty is as to *Paine, In re, Read, Ex parte*, and I agree with *Caine* for the appellant that *prima facie* the Court there appears to have held that the payment off by the bankrupt of the creditor was to be treated as a payment to or for the benefit of the acceptor of the accommodation bill drawn by the bankrupt. I think, however, that the money was there paid in substance to enable the acceptor to take up the bill. At variance with that view we have, however, the judgment of the C. A., in *Mills, In re, Official Receiver, Ex parte*, and those judgments, though based on the decision in *Goldsmid, In re, Taylor, Ex parte*, nevertheless contain *dicta* which we cannot overlook. The lords justices there seem to take the view that to constitute a fraudulent preference, the payment must be made to the person intended to be preferred.—p. 426.

• **Paine, In re, Read, Ex parte, followed.**

• **Mills, In re, Official Receiver, Ex parte; and Warren, In re, Tranter, Ex parte, distinguished.**

Blackpool Motor Car Co., In re, Hamilton v. Blackpool Motor Car Co. (1900) 70 L. J. Ch. 61; [1901] 1 Ch. 77; 49 W. R. 124; 8 Manson 139.—BUCKLEY, J.

Mills, In re, Official Receiver, Ex parte, *followed.*

Stenographer, Ltd., In re. Hastings v. Stenographer, Ltd. (1900) 70 L. J. Ch. 84; [1901] 1 Ch. 250; 84 L. T. 149; 8 Manson 208.—COZENS-HARDY, J.

Rights.

Spence v. Rogers (1843) 11 M. & W. 191; 2 D. (N.S.) 999; 12 L. J. Ex. 259.—EX.; *affirmed*, *now*, **Rogers v. Spence** (1844) 13 M. & W. 571; 15 L. J. Ex. 49.—EX. CH.; the latter decision *affirmed*, (1846) 12 Cl. & F. 700.—H.L.

Rogers v. Spence, applied.

Beckham v. Drake (1849) 2 H. L. Cas. 579; 11 M. & W. 315; 12 L. J. Ex. 486; 13 Jur. 921.—H.L.

Rogers v. Spence, applied.

Wetherell v. Julius (1850) 10 C. B. 267; 19 L. J. C. P. 367; 14 Jur. 700.—C.P.

Rogers v. Spence, referred to.

Rose v. Buckett (1901), *infra*.

Hodgson v. Sidney (1866) 35 L. J. Ex. 182; 1 L. R. 1 Ex. 313; 12 Jur. (N.S.) 694; 14 L. T. 624; 14 W. R. 923; 4 H. & C. 492.—EX., *followed.*

Morgan v. Steble (1872) 41 L. J. Q. B. 260; 1 L. R. 7 Q. B. 611; 26 L. T. 906.—Q.B.

Beckham v. Drake, referred to.

Wadling v. Oliphant (1875) 45 L. J. Q. B. 173; 1 Q. B. D. 145, 150; 33 L. T. 837; 24 W. R. 246.—Q.B.D.

Beckham v. Drake, adopted.

Emden v. Carte (1881) 50 L. J. Ch. 492; 17 Ch. D. 172; 29 W. R. 600.—FRY, J.; *affirmed*, 51 L. J. Ch. 41; 17 Ch. D. 768; 44 L. T. 636.—C.A. JESSEL, M.R., JAMES and LUSH, L.JJ.

Beckham v. Drake, commented on.

Beyts and Craig, In re, Cooper, Ex parte (1894) 10 R. 148; 70 L. T. 561; 42 W. R. 432; 1 Manson 56.

Beckham v. Drake; Brewer v. Dew (or Drew) (1843) 11 M. & W. 625; 1 D. & L. 383; 12 L. J. Ex. 448; 7 Jur. 953.—EX.; **Hodgson v. Sidney** (*supra*); and **Morgan v. Steble**, *referred to.*

Rose v. Buckett (1901) 70 L. J. K. B. 736; [1901] 2 K. B. 449; 84 L. T. 670; 50 W. R. 8; 8 Manson 259.—C.A. COLLINS and STIRLING, L.JJ.

Beckham v. Drake, principle applied.

Bailey v. Thurston (1902) 72 L. J. K. B. 37; 51 W. R. 162.—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.; *affirming* [1902] 2 K. B. 397; 87 L. T. 364.—PHILLIMORE, J.

Huggins, In re and Ex parte (1882) 51 L. J. Ch. 935; 21 Ch. D. 85; 47 L. T. 559; 30 W. R. 878.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ., *referred to.*

Emden v. Carte (*supra*), *held inapplicable.*

Hutton, In re, Benwell, Ex parte (1884) 54 L. J. Q. B. 53; 14 Q. B. D. 301; 51 L. T. 677; 33 W. R. 242.—C.A. BRETT, M.R., COTTON and LINDLEY, L.JJ.

LINDLEY, L. J.—It appears to me that an income of this nature [of a surgeon] cannot be impounded under sect. 90. In *Ex parte Huggins* the income of the bankrupt was a pension payable by a Colonial Government, and was analogous to the pensions which are referred to in sect. 89. That affords an illustration of the kind of case which sect. 90 was intended to meet. No other case of importance has been referred to except *Emden v. Carte*, which does not really touch the present point. That case only decided that the trustee of a bankrupt could insist on suing for damages for the breach after the bankruptcy of a contract which had been entered into with the bankrupt before the bankruptcy.

Elliott v. Clayton (1851) 16 Q. B. 581; 20 L. J. Q. B. 217; 15 Jur. 298.—Q.B.; and

Emden v. Carte, distinguished.

Mercer v. Vans Colina (1897) 67 L. J. Q. B. 424; 78 L. T. 21; 4 Manson 363.—WRIGHT, J.

Emden v. Carte and Wadling v. Oliphant (*supra*), *adopted.*

Roberts, In re and Ex parte (1899) 69 L. J. Q. B. 19; [1900] 1 Q. B. 122; 81 L. T. 467; 48 W. R. 132; 7 Manson 5.—C.A. LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.JJ.

Emden v. Carte and Wadling v. Oliphant, distinguished.

Bailey v. Thurston (1902)—C.A. (*supra*), col. 175).

Brindle (or Brindley), In re and Ex parte, 56 L. T. 498; 35 W. R. 596; 4 Morrell 104, *adopted.*

Shine, In re and Ex parte (1892) 61 L. J. Q. B. 253; [1892] 1 Q. B. 522; 66 L. T. 146; 40 W. R. 386; 9 Morrell 40.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Hutton, In re, Benwell, Ex parte (*supra*), *followed.*

Jones, In re, Lloyd, Ex parte (1891) 60 L. J. Q. B. 751; [1891] 2 Q. B. 231; 64 L. T. 804; 40 W. R. 95; 8 Morrell 210.—CAVE and CHARLES, JJ.

Hutton, In re, Benwell, Ex parte, discussed.

Rogers, In re, Collins, Ex parte (1893) 63 L. J. Q. B. 178; [1894] 1 Q. B. 425; 10 R. 469; 70 L. T. 107; 1 Manson 387.—WILLIAMS, J.

Hutton, In re, Benwell, Ex parte.

Shine, In re and Ex parte (1892) 61 L. J. Q. B. 253; [1892] 1 Q. B. 522; 66 L. T. 146; 40 W. R. 386; 9 Morrell 40.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ., *explained.*

Roberts, In re and Ex parte (1899), *supra*.

LINDLEY, M.R.—Benwell, Ex parte, Hutton, In re does not conflict with other cases. That case turned entirely on sect. 53, and is only an authority for the proposition that a prospective order cannot be made impounding the future personal earnings of a bankrupt. Similar observations apply to *Shine, In re*. Those cases are no authority for the proposition that property of a bankrupt acquired by his personal exertion since his bankruptcy, and not wanted for his

present support, do not belong to his trustee. No such doctrine can be maintained in face of sect. 44. After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustees, save only what is necessary for his support.—p. 23.

Rogers, In re Collins, Ex parte (*supra*), distinguished.

Mercer v. Vans Colina (1897) 67 L. J. Q. B. 424; 78 L. T. 21; 4 Manson 363.—WRIGHT, J.

Mercer v. Vans Colina, followed.

Beall, In re, Official Receiver, Ex parte (1899) 68 L. J. Q. B. 462; [1899] 1 Q. B. 638, 80 L. T. 267; 6 Manson 163.—WRIGHT, J.

Mercer v. Vans Colina, followed.

Shoolbred v. Roberts (1899) 68 L. J. Q. B. 998; [1899] 2 Q. B. 560; 81 L. T. 522; 6 Manson 397.—PHILLIMORE, J.; *varied*, 69 L. J. Q. B. 800; [1900] 2 Q. B. 497, 83 L. T. 37; 7 Manson 388.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

Rogers, In re Collins, Ex parte (*supra*);

Graydon, In re, Official Receiver, Ex parte

(1896) 65 L. J. Q. B. 328; [1896] 1 Q. B. 417; 74 L. T. 175; 44 W. R. 493; 3 Manson 5.—V. WILLIAMS, J.; and **Mercoer v. Vans Colina, adopted.**
Chippendall v. Tomlinson (1785) 4 Dougl. 318; 7 East 57, n.; 1 Cooke's Bk. Laws (8th ed.), 428, explained and distinguished.

Roberts, In re and Ex parte (1899) 69 L. J. Q. B. 19; [1900] 1 Q. B. 122; 81 L. T. 467; 48 W. R. 132; 7 Manson 5.—C.A., LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.J.

LINDLEY, M.R. (for the Court).—According to the report in 4 Douglas, Lord Mansfield said: "The single question is, whether the assignees are entitled to the earnings of a bankrupt, and we are all clearly of opinion that they are not."

According to the report in Cooke's Bankrupt Laws, Lord Mansfield said, "The only question is whether the assignees of a bankrupt are entitled to the profits arising from his personal labour. The assignees cannot let out the bankrupt; they cannot contract for his labour." Attempts have been made to establish on the foundation of these statements the doctrine that whatever a bankrupt earns by his personal labour or ability after the bankruptcy belongs to him.

Chippendall v. Tomlinson is not an authority for any such proposition, and according to a note in the report in 4 Douglas, both Mr. Justice Buller and Lord Mansfield stated that if a bankrupt acquired a large sum of money or considerable effects they would undoubtedly belong to his assignees. So also said Lord Alvanley in *Hesse v. Stevenson* (1803) 3 Bos. & P. 565). . . . It may be that a bankrupt's trustee cannot maintain an action for money earned by the bankrupt since his bankruptcy by his personal exertions, if such money is required by him for his support and maintenance—see *Williams v. Chambers* ((1847) 16 L. J. Q. B. 280; 10 Q. B. 387), the pleadings in which, however, alleged promises to pay to the assignees for work done by the bankrupt.

The Bankruptcy Act of 1883, like its predecessors, excepts a bankrupt's tools and contemplates the acquisition of future property by a bankrupt,

and he must live to use his tools and acquire such property. The present Act, like previous Bankruptcy Acts, must be construed so as to enable him to do so, and the language of sect. 44, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live. But, on the other hand, the necessity is the limit of the exception. This is in entire accordance with modern decisions: *Mercoer v. Vans Colina*, *Graydon, In re*, *Wadding v. Oliphant*, *Ewden v. Curte*, and *Rogers, In re Collins, Ex parte*.—p. 22.

Wicks, In re, Wicks (or Chatterley), Ex parte (1881) 44 L. T. 159; 29 W. R. 400; *reversed*, (1881) 50 L. J. Ch. 620; 17 Ch. D. 70; 44 L. T. 836; 29 W. R. 525.—C.A. JAMES, BRETT and COTTON, L.JJ.

Wicks, In re and Ex parte, in C.A. (*supra*), followed.

Webber, In re and Ex parte (1886) 56 L. J. Q. B. 209; 18 Q. B. D. 111; 55 L. T. 816; 35 W. R. 808, 3 Morrell 288.—CAVE and A. L. SMITH, JJ.

Herbert v. Sayer (1844) 5 Q. R. 965; 2 D. & L. 49; 13 L. J. Q. B. 208; 8 Jur. 812, approved and followed.

Jameson v. Bruck and Stone Co. (1878) 48 L. J. Q. B. 249; 4 Q. B. D. 208; 39 L. T. 594; 27 W. R. 221.—C.A.

Herbert v. Sayer, applied.
Cohen v. Mitchell (1890), *infra*.

Stafford, In re, Hannington, Ex parte (1870) 18 W. R. 959, *questioned*.

Caughey, In re, Ford, Ex parte (1876) 45 L. J. Bk. 96; 1 Ch. D. 521; 34 L. T. 634; 24 W. R. 590.—C.A., approved.

Meggy v. Imperial Discount Co. (1879) 3 Q. B. D. 711; 38 L. T. 309; 26 W. R. 342.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.; *affirming* (1877) 47 L. J. Q. B. 119.—LUSH, J.

Cohen v. Mitchell (1890) 59 L. J. Q. B. 409; 25 Q. B. D. 262; 63 L. T. 206; 38 W. R. 551; 7 Morrell 207.—C.A. ESHER, M.R., FRY and LOPES, L.JJ., explained and distinguished.

New Land Development Association and Gray, In re (1892) 61 L. J. Ch. 323; [1892] 2 Ch. 138; 66 L. T. 404; 40 W. R. 295.—C.A. LINDLEY, BOWEN and KAY, L.JJ.; *affirming* CHITTY, J.

Cohen v. Mitchell, held inapplicable.
Rogers, In re Collins, Ex parte (*ante*, col. 176).

Caughey, In re, Ford, Ex parte (*supra*), followed.

Cohen v. Mitchell, distinguished.
Clark, In re, Beardmore, Ex parte (1894) 63 L. J. Q. B. 806; [1894] 2 Q. B. 398; 9 R. 498; 70 L. T. 761; 1 Manson 207.—C.A. ESHER, M.R., SMITH and DAVEY, L.JJ.; *reversing* WILLIAMS and WRIGHT, L.JJ.

DAVEY, L.J.—In my opinion the case as between trustees in two successive bankruptcies is decided by *Ex parte Ford*; and I agree with the other members of the Court that there is

nothing to distinguish that case from this. . . . All that *Cohen v. Mitchell* says is that, as between the bankrupt and any person dealing with him for value, the transaction is valid, and that that rule is only in favour of persons who have so dealt. But the persons who are claiming this property before us are not claiming it under the deed of assignment, but as property that vests in the trustee in the second bankruptcy.

Cohen v. Mitchell, applied.

Clayton and Barclay's Contract, *In re* (1895) 64 L. J. Ch. 615; [1895] 2 Ch. 212; 13 R. 556; 72 L. T. 764; 43 W. R. 549; 69 J. P. 489; 2 Manson 345.—CHITTY, J.

Cohen v. Mitchell and Graydon, In re, Official Receiver, Ex parte (1896) 65 L. J. Q. B. 328; [1896] 1 Q. B. 417; 74 L. T. 175; 44 W. R. 495; 3 Manson 5.—V. WILLIAMS, J., *applied*.

Mercer v. Vans Colna (1897) 67 L. J. Q. B. 424; 78 L. T. 21; 4 Manson 363.—WRIGHT, J.

Cohen v. Mitchell, followed.

Hunt v. Frapp (1897) 67 L. J. Ch. 877; [1898] 1 Ch. 675; 77 L. T. 516; 46 W. R. 125; 5 Manson 105.—BYRNE, J.

Leadbitter and Harvey, In re (1878) 48 L. J. Ch. 242; 10 Ch. D. 388; 39 L. T. 286; 27 W. R. 267.—C.A., *explained*.

Bird v. Philpott (1900) 69 L. J. Ch. 487; [1900] 1 Ch. 822; 82 L. T. 110; 7 Manson 251.—FARWELL, J.

Simmons, In re, Kelly, Ex parte (1877) 47 L. J. Bk. 30; 7 Ch. D. 161; 37 L. T. 584; 26 W. R. 120.—C.A., *explained*.

Smith, *In re, Green v. Smith* (1883) 24 Ch. 672; 52 L. J. Ch. 921; 49 L. T. 297.

Liabilities and Duties.

Crawford, In re and Ex parte (1878) 28 L. T. 244; 21 W. R. 509, *approved and followed*.

Moir, *In re and Ex parte* (1882) 51 L. J. Ch. 981; 21 Ch. D. 61; 47 L. T. 267; 30 W. R. 738.—C.A. JESSEL, M.R., LINDLEY and HOLKER, L.JJ.

Garnett, In re, Bullock, Ex parte (1885) 55 L. J. Q. B. 77; 16 Q. B. D. 698; 53 L. T. 769; 34 W. R. 79.—CAVE, J., *approved*.

Board of Trade v. Block (1888) 58 L. J. Q. B. 113; 13 App. Cas. 570; 59 L. T. 734; 37 W. R. 259; 53 J. P. 164.—H.L. (E.). LORDS HALSBURY, L.C., WATSON, FITZGERALD and MACNAGHTEN; *affirming* S. C. *nom.* Betts, *In re, Board of Trade, Ex parte* (1887) 56 L. J. Q. B. 370; 19 Q. B. D. 39; 56 L. T. 804; 35 W. R. 530; 4 Morrell 170.—C.A. ESHER, M.R. and LOPES, L.J.; FRY, L.J. *dissenting*.

Betts, In re, Board of Trade, Ex parte (supra), *dicta discussed*.

Jones, *In re and Ex parte* (1890) 59 L. J. Q. B. 331; 25 Q. B. D. 285; 38 W. R. 609; 7 Morrell 111.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.; *affirming* 62 L. T. 370.—CAVE and SMITH, JJ.

Offences.

Appleby, In re, Brown, Ex parte (1876) 45 L. J. Bk. 115; 2 Ch. D. 799; 35 L. T. 10; 24 W. R. 750.—C.A., *followed*.
Orbell, *In re, Evans, Ex parte* (1881) 44 L. T. 762; 29 W. R. 578.—C.A. BRETT and COTTON, L.JJ.

Leonard, In re and Ex parte (1875) 44 L. J. Bk. 80; L. R. 19 Eq. 269; 31 L. T. 853; 23 W. R. 253, *explained*.

Marsden, *In re and Ex parte* (1876) 45 L. J. Bk. 141; 2 Ch. D. 786; 34 L. T. 700; 24 W. R. 714.—BACON, C.J.; *affirmed in C.A.*

Ballard, In re (1863) 9 L. T. 399, *dissented from*.
Newberry, *In re, Hyams, Ex parte* (1864) 11 L. T. 390.

Burden, In re, Wood, Ex parte (1888) 57 L. J. Q. B. 570; 21 Q. B. D. 24; 16 L. T. 149; 36 W. R. 896; 5 Morrell 66.—CAVE and SMITH, JJ., *explained*.

Reg. v. Beck (1889) 16 Cox C. C. 718; 61 L. T. 596; 54 J. P. 360.—C.C.R.

COLERIDGE, C.J.—We have been pressed with the authority of the case of *Re Burden, Ex parte Wood*, upon the 13th, 14th, and 15th sub-sections of sect. 11 of the Debtors Act, 1869, in which my learned brothers Cave and Smith—because Parliament had used different language from the language used in those sub-sections, each of which relates solely to offences committed within four months next before the presentation of a bankruptcy petition against the bankrupt, whereas the words substituted by sect. 163 of the Bankruptcy Act, 1883, are “if after the presentation of a bankruptcy petition by or against him”—came to the conclusion that Parliament had not used words affecting those sub-sections, and, therefore, held that those sub-sections were not to be read as if they were affected by the later Act. Now, why, because the Act of Parliament had not affected certain sub-sections which it does not profess to affect, we should hold that it does not affect another sub-section [9] which it does profess to affect, I am unable to see.—p. 721.

Reg. v. Peters (1886) 55 L. J. M. C. 173; 16 Q. B. D. 636; 54 L. T. 545; 34 W. R. 399; 16 Cox C. C. 36; 50 J. P. 631.—C.C.R., *followed*.

Reg. v. Juby (1886) 55 L. T. 788; 35 W. R. 168; 51 J. P. 810; 16 Cox C. C. 160.—C.C.R.

Rex v. Walters (1831) 5 Car. & P. 188, *overruled*.

Courtivron v. Meunier (1851) 6 Ex. 74; 20 L. J. Ex. 104; 15 Jur. 275.

POLLOCK, C.B.—At the trial I thought that the bankrupt had a *locus penitentiae* till the close of his final examination; and . . . that the language of Parke, B., in *Rex v. Walters*, must be considered as an authority in the defendant's favour. On examination, however, of the subject, it appears to me that what was there said is not law, and that the true construction of the 38th section is this—that if a bankrupt has so concealed his goods as to offend against the 32nd section, then his certificate is void under the 38th.

24. JURISDICTION AND COURTS.

Pollard, In re. Dickin, Ex parte (1878) 8 Ch. D. 377; 38 L. T. 860; 26 W. R. 731.—C.A., *distinguished*.

White v. Simmons (1871) 40 L. J. Ch. 689; L. R. 6 Ch. 553; 19 W. R. 939.—L.C., *observed upon*.

Hart, In re. Fletcher, Ex parte (1878) 9 Ch. D. 381; 39 L. T. 187; 26 W. R. 843.—C.A.

JAMES, L.J.—The cases in which the Court of Bankruptcy has decided that it ought not to assume jurisdiction are cases where it was asked to draw within its jurisdiction a person outside, merely because his opponent had become a bankrupt. Where, however, the proceeding is not *in personam*, but a person who has a claim against the property of the bankrupt, real or personal, is willing to submit the determination of his rights to the Court of Bankruptcy, it is very wrong, very reprehensible for the trustee to raise objections to the exercise of jurisdiction by that Court under whose care the property of the bankrupt is placed, and by which it is being administered (p. 884). What Lord Hatherley said in *White v. Simmons* was only one of the reasons which he gave for his decision, the decision being that the Court of Chancery had concurrent jurisdiction with the Court of Bankruptcy to realise the security of an equitable mortgagee of a bankrupt, a matter about which there could be no doubt.—p. 885.

Pollard, In re. Dickin, Ex parte, followed.

Wood, In re. Musgrave, Ex parte (1878) 48 L. J. Bk. 39; 10 Ch. D. 94; 39 L. T. 647; 27 W. R. 372.—C.A.

Yates, In re. Brown, Ex parte (1879) 48 L. J. Bk. 78; 11 Ch. D. 148; 40 L. T. 402; 27 W. R. 651.—C.A.; and **Harrison, In re. Butters, Ex parte** (1880) 14 Ch. D. 265; 43 L. T. 2; 28 W. R. 876.—C.A.; *reversing* 49 L. J. Bk. 80, *commented on*.

Learoyd & Co., In re. Armitage, Ex parte (1881) 17 Ch. D. 13; 44 L. T. 262; 29 W. R. 772.—C.A. **JAMES, COTTON and LUSH, L.JJ.**

JAMES, L.J.—I do not wish in any way to withdraw from or qualify what has been said in the cases which have been referred to, viz., that cases which involve bankruptcy law, which involve the peculiar and paramount right of the trustee in a bankruptcy as distinct from the right which he takes as representing the bankrupt, are, ordinarily speaking, fit and proper to be tried in the Court of Bankruptcy. But it was not intended to decide that in cases of that kind the Court should never be able to exercise its judicial discretion not to assume the trial of the case. They merely laid down a general rule.—p. 17.

Learoyd & Co., In re. Armitage, Ex parte, approved.

Roberts, In re. Price, Ex parte (1882) 21 Ch. D. 553; 47 L. T. 402; 31 W. R. 104.—C.A. **JESSE, M.R., BRETT and COTTON, L.JJ.**

Palmer, In re and Ex parte (1870) 39 L. J. Bk. 48; L. R. 5 Ch. 470; 22 L. T. 323; 18 W. R. 587.—L.J., *distinguished and limited*.

Anderson, In re and Ex parte (1870) 39 L. J. Bk. 49; L. R. 5 Ch. 473; 22 L. T. 361; 18 W. R. 715.—L.J.

Anderson, In re and Ex parte, distinguished. **Ellis v. Silber** (1879) L. R. 8 Ch. 83; 42 L. J. Ch. 666; 28 L. T. 156; 21 W. R. 346.—L.C. **SELBORNE, L.C.**—It was admitted very frankly by Sir Richard Bagallay that the cases which he cited, with the exception of two of them, are as remote as possible from touching this question, being merely cases in which an attempt was made to transfer the proper administration from the Court of Bankruptcy into this Court, the subject of the suit relating to the bankrupt's estate. One of them is *Ex parte Anderson*, in which some pictures had been transferred by the debtor to his nephew, but that nephew had come in and made certain arrangements as to those pictures with creditors of the bankrupt, and, therefore, the matter was *prima facie* brought by his own submission and his own acts under the administration in bankruptcy.—p. 86.

White, In re. Morley v. White (1897) 42 L. J. Bk. 76; L. R. 8 Ch. 214; 27 L. T. 736; 21 W. R. 746.—L.J., *distinguished*. **Charlton, In re and Ex parte** (1878) 38 L. T. 295; 26 W. R. 468.—BACON, C.J.

New Par Consols, In re (1898) 67 L. J. Q. B. 598; [1898] 1 Q. B. 669; 73 L. T. 312; 46 W. R. 369; 5 Manson 277.—C.A. **SMITH, CHITTY and COLLINS, L.JJ., applied.**

Reg. v. Northallerton County Court Judge (1898) 68 L. J. Q. B. 24; [1898] 2 Q. B. 680; 79 L. T. 327; 47 W. R. 68.—C.A. **SMITH, RIGBY and WILLIAMS, L.JJ., affirmed, non. Skinner v. Northallerton County Court Judge** (1899) 68 L. J. Q. B. 896; [1899] A. C. 439; 80 L. T. 814; 63 J. P. 756; 6 Manson 274.—H.L. (E.). **LORDS HALSBURY, MACNAGHTEN, MORRIS, STAND and BRAMPTON.**

Wickenden and Mansell, In re. Ruck and Wickham, Ex parte, 7 L. T. 308; *reversed*, (1862) 32 L. J. Bk. 9; 7 L. T. 405; 11 W. R. 126.—L.C.

25. PRACTICE AND PROCEDURE.

Practice.

Jerningham, In re and Ex parte (1878) 47 L. J. Bk. 115; 9 Ch. D. 466; 39 L. T. 186; 27 W. R. 157.—C.A., *distinguished*.

Mason, In re. Kirkwood, Ex parte (1879) 11 Ch. D. 724; 40 L. T. 566; 27 W. R. 806.—C.A.

JAMES, L.J.—In *Ex parte Jerningham* we were of opinion that the description given by the debtor was really misleading, because he did not give his private residence, so that his private creditors would not know anything about him. But here the chief judge was of opinion that no such case was made out. No one could really have been misled by the fact that this debtor called himself a cattle dealer, which was a business that he actually carried on. He was a farmer really, but no one seems to have been misled. The appellant was not misled; he knew very well what the man was, and no one else was misled. I am as certain as I can be of anything that no human being could have been misled by the description of "cattle dealer," because every one knows that it is one of the commonest things in the world for a farmer to be a cattle dealer also.—p. 729.

Woods, In re, Ditton, Ex parte (1879) 11 Ch. D. 56; 40 L. T. 207; 27 W. R. 401.—*C.A. explained.*

Sidebotham, In re and Ex parte (1880) 42 Ch. D. 458; 49 L. J. 8k 41; 42 L. T. 783; 28 W. R. 715.—*C.A. JAMES, BAGGALLAY and BRAMWELL, L.JJ.*

JAMES, L.J.—I wish to add that, in *Ex parte Ditton*, the question whether a creditor was entitled to appeal was not really argued. We stopped Mr. Winslow, who appeared for the trustee, on that point, and we only heard him on the question whether the appellant should be allowed a further opportunity of proving his alleged debt. All that we decided was, that a person who alleged himself to be a creditor, but who had not tendered any proof of debt, could not appeal.—p. 467.

Sidebotham, In re and Ex parte, considered.
Read, In re, Official Receiver, Ex parte (1887) 56 L. J. Q. B. 447; 19 Q. B. D. 174; 56 L. T. 876; 35 W. R. 660; 4 Morrell 225.—*C.A. ESHER, M.R. and LOPES, L.J.; FRY, L.J. dissenting.*

Harris, In re and Ex parte (1889) 38 W. R. 195.—*C.A., referred to.*

Webber, In re and Ex parte (1889) 59 L. J. Q. B. 581; 24 Q. B. D. 313; 62 L. T. 485; 38 W. R. 195; 6 Morrell 313.—*C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.; affirming* 61 L. T. 650.

Mason, In re, Kirkwood, Ex parte (1879) 11 Ch. D. 724; 40 L. T. 566; 27 W. R. 806.—*C.A., commented on.*

Bageist, In re and Ex parte (1888) 24 Ch. D. 477; 33 L. J. Ch. 124; 49 L. T. 272; 32 W. R. 215.—*C.A.*

BRETT, M.R.—This case, therefore, is not within rule 295; the appellant was not entitled to prove his debt at that time, and the registrar could not receive his proof, and he was not, within the meaning of the rule 295, a creditor who could be heard in opposition to the registration. I think this is what Bacon, C.J., meant to decide in *Ex parte Kirkwood*. He considered that the appellant Kirkwood had no *locus standi*, that he was not a creditor who could object to the registration of resolutions, because he had withdrawn his proof. I cannot say with the chief judge that "the rules are very clear and distinct." Though I agree with him that "the scheme is most carefully prepared and expressed in the rules." I think the chief judge intended to say that the appellant in that case could not give a proper notice to the registrar of his desire to be heard on the question of the registration of the resolutions, because he was not a creditor who had previously proved a debt. And I cannot help thinking that when James, L.J. said (11 Ch. D. 729): "It is not necessary for us to consider the second point, upon which, however, as at present advised, I am quite clear. It would require a great deal of argument to satisfy me that the chief judge was not right upon that point" (that is that the creditor had no *locus standi*, because he had not proved a debt)—

I cannot help thinking that James, L.J. meant that he had a clear opinion that the chief judge was right, because the creditor had not proved a debt, and could not prove it before the registrar on the hearing of the application to register

the resolutions. We are told that this interpretation of *Ex parte Kirkwood* has ever since been acted upon by all the registrars in bankruptcy, and this fortifies me in my view that that was the intention of James, L.J. Though that expression of his opinion is not actually binding on the Court yet with the deference which I should always give to his opinion, I say that it is also my opinion.—p. 481.

Jones, In re, Williams, Ex parte, 30 W. R. 416; *reversed*, (1882) 46 L. T. 242.—*C.A. JESSER, M.R., COTTON and LINDLEY, L.JJ.*

Speight, In re, Brooks, Ex parte (1881) 13 Q. B. D. 42.—*CAVE, J., followed.*

Blinkhorn, In re, Blease, Ex parte (1884) 14 Q. B. D. 123; 33 W. R. 432; 1 Morrell 280.—*MATHEW and CAVE, JJ.*

Speight, In re, Brooks, Ex parte, and Blinkhorn, In re, Blease, Ex parte, not followed.

Mundy, In re, Shead, Ex parte (1885) 15 Q. B. D. 338; 53 L. T. 655; 2 Morrell 227.—*C.A. BRETT, M.R., BAGGALLAY and FRY, L.JJ.*

McHenry, In re (1886) 55 L. J. Q. B. 496; 17 Q. B. D. 351; 35 W. R. 20.—*C.A. ESHER, M.R., BOWEN and FRY, L.JJ., distinguished.*

Phillips, In re, Treboeth Brick Co., Ex parte (1896) [1896] 2 Q. B. 122; 65 L. J. Q. B. 648; 3 Manson 156.

VAUGHAN WILLIAMS, J., after stating that it was not usual to increase the deposit of 20*l.* prescribed by rule 131 of the Bankruptcy Rules, 1886, in cases where the debtor is appealing from the receiving order, as to do so might increase his difficulties in appealing, continued: "*In re McHenry* does not apply. It was not an appeal from an order of adjudication. There adjudication had taken place, and the bankrupt was contesting the proofs of the parties with whom he had been engaged in long and profitless litigation. In this case I do not see any special circumstances to justify me in making the order that is asked for. The application must be dismissed."—p. 123.

Nathan, In re, Stapleton, Ex parte (1879) 10 Ch. D. 586; 40 L. T. 14; 27 W. R. 327.—*C.A., not followed.*

Mackenzie, In re, Herefordshire Sheriff, Ex parte (1899) 68 L. J. Q. B. 1003; [1899] 2 Q. B. 566; 81 L. T. 214.—*C.A. LINDLEY, M.R., JEUNE, P. and HOMER, L.J.; reversing WRIGHT and BIGHAM, JJ.*

[On the authority of the above case, it was submitted by counsel that a trustee in bankruptcy who was respondent to a successful appeal should not be ordered to pay the costs personally, but that they should only come out of the estate.]

LINDLEY, M.R.—I do not think the practice is so settled as that. The Court must consider what is the trustee's right in each particular case. Our order now is that the appeal must be allowed with costs.

Collins v. Godfrey (1831) 1 B. & Ad. 950; 9 L. J. (o.s.) K. B. 158; 1 D. P. C. 326, *distinguished.*

Chamberlain v. Stoneham (1889) 59 L. J. Q. B. 95; 24 Q. B. D. 113; 61 L. T. 590; 33 W. R. 107.—*HUDDLESTONE, B. and STEPHEN, J.*

Dowson, In re, Jaynes, Ex parte (1888) 57 L. J. Q. B. 522; 21 Q. B. D. 417; 59 L. T. 416; 30 W. R. 864; 5 Morrell 240.
—CAVE, J., *distinguished*.

Procter, In re, Board of Trade, Ex parte (1891) [1891] 2 Q. B. 133; 65 L. T. 318; 39 W. R. 655; 8 Morrell 251.

CAVE, J.—The 112th rule [of the Bankruptcy Rules, 1886] provides that where the bankrupt's assets do not exceed 300*l.*, a lower scale of costs shall be allowed "on all proceedings under the Act in which costs are payable out of the estate." Now, it seems to me that this is a case contemplated by that rule. . . . The fact that the Court has a discretion to disallow costs which otherwise would be payable out of the estate, does not, I think, prevent the application of the rule. The case of *In re Dowson* does not apply. There the trustee was ordered to pay the costs of other parties and to recoup himself out of the estate.

Procter, In re, followed.

Marsh, In re, Board of Trade, Ex parte (1894) 13 R. 1; 71 L. T. 776; 13 W. R. 208.—V. WILLIAMS, J.

Cooper, In re, Moss, Ex parte (1867) L. R. 3 Ch. 29; 17 L. T. 279; 16 W. R. 65.—CAIRNS, J., and **Taylor, In re, Barnett, Ex parte** (1868) L. R. 4 Ch. 68; 19 L. T. 106; 17 W. R. 88.—J.J., *observed upon*.
Taylor, In re, Barnett, Ex parte (1869) L. R. 4 Ch. 352.—J.J.

SELWYN, J.—With respect to the case of *Ex parte Moss*, we are informed by the registrar in Court, that the order, although not so stated in the report, was made by the registrar sitting for the commissioner.

As to the other case, *Ex parte Barnett*, the point was not brought to the attention of the Court: for if it had been, neither the Lord Chancellor nor I would have consented to hear the appeal; for I strongly entertain the same opinion as has been expressed by the Lord Chancellor, that we ought not to constitute this Court a Court of primary jurisdiction, and that we ought not, except under very special circumstances, to make orders without the advantage of a formal discussion and decision in an inferior Court.—p. 354.

Golden, In re, Norton, Ex parte (1873) L. R. 16 Eq. 397; 21 W. R. 102, *questioned*.

Simpson, In re, Morgan, Ex parte (1870) 2 Ch. D. 72; 15 L. J. Bk. 36; 31 L. T. 329; 24 W. R. 114.—C.A.

BRETT, J.—If an issue has been properly directed upon a sufficient controversy of fact (as observed by Turner, J., in *Morrison v. Barron* (1 D. P. & J. 639)), and a jury has found upon it, and there has been a conflict of evidence upon it, and no leave has been reserved, neither the first Court, nor the Court of Appeal, can make an order or decree inconsistent with the findings of the jury, though satisfied that there was a misdirection which caused the miscarriage, or that the verdict was against the weight of evidence. The only remedy is a new trial. The reason is that in either case there is, after the verdict is set aside, still matter of controversy which another jury may not unreasonably find either way. This is decided by *Fulton v.*

Andrew (L. R. 7 H. L. 448), as well as by *Fernie v. Young* (L. R. 1 H. L. 68), and *Simpson v. Holliday* (L. R. 1 H. L. 315). I cannot but think that the case of *Ex parte Norton* is in conflict with the decisions of the House of Lords, and that it cannot be supported.—p. 97.

Jeavons, In re, Brown, Ex parte (1874) 13 L. J. Bk. 105; L. R. 9 Ch. 304; 30 L. T. 108; 22 W. R. 602.—L.C. and J.J.; and **Dickson v. Harrison** (1878) 9 Ch. D. 243; 47 L. J. Ch. 761; 38 L. T. 794; 26 W. R. 730.—C.A. JESSE, M.R., BRETT and COTTON, J.J.; *varying* HALL, V.-C., *followed*.

Elham Valley Ry. Co. In re, Dickson's Case (1879) 48 L. J. Ch. 766; 12 Ch. D. 298; 41 L. T. 184; 27 W. R. 880.—FRY, J.

Walker, In re, Sharp, Ex parte (1886) 34 W. R. 550; 54 L. T. 682; 3 Morrell 69.—CAVE and GRANTHAM, J.J.; and **Easy, In re, Hill, Ex parte** (1887) 56 L. J. Q. B. 624; 19 Q. B. D. 538; 35 W. R. 819; 4 Morrell 281.—C.A. BISHOP, M.R., LINDLEY and LOPES, J.J., *applied*.
Hardy, In re, Hardy, R. Farmer (1896) 65 L. J. Ch. 161; [1896] 1 Ch. 904; 74 L. T. 403; 44 W. R. 503; 3 Manson 150.—CHITTY, J.

Lewer, In re, Garrard, Ex parte (1877) 46 L. J. Bk. 70; 5 Ch. D. 61; 36 L. T. 12; 25 W. R. 364.—C.A., *limited*.
Hinton, In re and Ex parte (1875) 44 L. J. Bk. 36; L. R. 10 Eq. 266; 31 L. T. 532.—BACON, C.J., *explained*.
Sendall, In re, Cochran, Ex parte (1878) 48 L. J. Bk. 31; 9 Ch. D. 698; 38 L. T. 820; 26 W. R. 818.—BACON, C.J.

Hookey, Ex parte (1862) 4 De G. F. & J. 456.—L.C., *followed*.
Graves, In re, Whitton, Ex parte (1880) 49 L. J. Bk. 31; 13 Ch. D. 881; 42 L. T. 63; 28 W. R. 432.—BACON, C.J.

Evidence.

Ehrenstrom, In re, Vogel, Ex parte (1818) 2 B. & Ald. 219; 20 R. R. 410, *followed*.
Cathcart, In re, Campbell, Ex parte (1870) L. R. 5 Ch. 703; 23 L. T. 289; 18 W. R. 1056.—J.J.

Brünner, In re, Board of Trade, Ex parte (1887) 56 L. J. Q. B. 606; 19 Q. B. D. 572; 57 L. T. 418; 35 W. R. 719; 4 Morrell 235.—CAVE, J., *distinguished*.
Gavene, In re (1893) [1894] 1 R. R. 183.

BOYD, J. held that where property in the possession of assignees was claimed by a third party, depositions exclusively relating to the question of the property, and signed by the witnesses, were admissible in evidence against the claimant, who had had notice of the examination of the witnesses, and was served with notice of the assignees' intention to use the depositions upon the hearing of the claim, and that the case was distinguishable from *Brünner, In re*.

Reg. v. Scott (1856) Denb. & B. C. C. 16; 25 L. J. M. C. 123; 2 Jur. (N.S.) 1006; 4 W. R. 777; 7 Cox C. C. 164.—C.C.N., *followed*.

Reg. v. Widdop, (1872) 42 L. J. M. C. 9; 7

L. R. 2 C. C. 3; 27 L. T. 693; 21 W. R. 176; 12 Cox C. C. 261.—C.G.R.

Reg. v. Scott, principle applied.

Reg. v. Erchheim (1896) 65 L. J. M. C. 176; [1896] 2 Q. B. 260; 74 L. T. 734; 44 W. R. 607; 3 Manson 142.—C.G.R.

Purvis, In re, Rooke, Ex parte, (1887)
56 L. T. 579, *explained*.

Scharrer, In re, Tilly, Ex parte (1888) 20 Q. B. D. 518; 59 L. T. 188; 36 W. R. 388; 5 Morrell 79.—C.A. Esher, M.R., Fry and Lopes, L.JJ.

ESHER, M.R.—I have spoken to Cave, J., and he tells me that he is astonished that any one could have put such a construction on what he said in *Re Purvis*, and that he never intended to say that [when a witness is being examined under sect. 27 of the Bankruptcy Act, 1883] the judge was bound to accept the witness's first answer, or that he could not be cross-examined and sifted to the end. Cave, J., tells me that he merely meant to say that at the end of the witness's examination his answer must be accepted, that is, witnesses cannot be called to contradict him . . . with that explanation of *Re Purvis*, which I am authorised by Cave, J., to give, I entirely agree.—p. 521.

Bennett, In re, Glave, Ex parte (1876) 45 L. J. Bk. 126; 3 Ch. D. 315; 34 L. T. 949; 24 W. R. 504; *reversed, sub nom. Bennett and Glave, In re, Glave, Ex parte (1877)* 46 L. J. Bk. 1; 5 Ch. D. 145; 36 L. T. 429; 25 W. R. 504.—C.A.

Wensley, In re and Ex parte (1861) 1 De G. J. & S. 273; 32 L. J. Bk. 23; 1 De G. J. & S. Bk. App. 49; 11 W. R. 241.—L.C., *questioned*.

Barron, In re, Potter, Ex parte (1864) 34 L. J. Bk. 46; 11 Jur. (N.S.) 49; 11 L. T. 435; 13 W. R. 189.—WESTBURY, L.C.

Wensley, In re and Ex parte, approved and followed.

Barron, In re, Potter, Ex parte, questioned.
Ponsford v. Walton (1868) L. R. 3 C. P. 167; 37 L. J. C. P. 113; 17 L. T. 511; 16 W. R. 368.
BOVILL, C.J.—With regard to the case of *Ex parte Potter*, which was also decided by Lord Westbury, although the question was not as to the necessity of a stamp under the 194th section of the Bankruptcy Act, 1861, but under the general stamp laws, I find it difficult to reconcile that case with the principle of *Ex parte Wensley*; it would almost seem as if there were some mistake in the report, because I find the Lord Chancellor is reported to have said that it was clear the deed was produced as having been an effectual conveyance of the bankrupt's property, while from the rest of the report it would appear to have been put in evidence as having been an act of bankruptcy, and therefore void; and further, the cases which illustrate the ground on which we now hold, that a stamp is not necessary, were not cited in the course of the Lord Chancellor's judgment in that case. If, however, the report is correct, and I am driven to elect between the two cases, I should not hesitate to adopt the decision in *Ex parte Wensley*.—p. 172.

Ponsford v. Walton, followed.

Gouldwell, In re. Squire, Ex parte (1868) L. R. 4 Ch. 47; 38 L. J. Bk. 13; 19 L. T. 272; 17 W. R. 40.—L.JJ.

Special Procedure.

Weaver, In re, Higgs v. Weaver (1885) 54 L. J. Ch. 749; 29 Ch. D. 236; 52 L. T. 512; 33 W. R. 874.—PEARSON, J., *approved*.
Baker, In re, Nichols v. Baker (1890) 59 L. J. Ch. 661; 44 Ch. D. 262; 62 L. T. 817; 38 W. R. 417.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Contempt of Court and Committal.

Backhouse (or Bellhouse) v. Mellor (or Melton) (1859) 4 H. & N. 116; 28 L. J. Ex. 141. 5 Jur. (N.S.) 175, *followed*.

Bowers, Ex parte (1852) 1 De G. M. & G. 460.—L.JJ., *commented on*.
Tomline v. Cadman (1860) 6 C. B. (N.S.) 733.

Robinson, In re (1851) Fonb. Rep. 205, *approved*.
Chichester, In re (1868) 19 L. T. 188.

MR. COMMISSIONER BACON.—I should be very sorry to depart from the established practice of this Court, and I have the highest respect for the opinion of so learned and experienced a judge as Mr. Commissioner Holroyd. . . . But I have the statute before me, no rules exceeding its limits can be maintained. . . . I find by the 112th section that the bankrupt is entitled to his release unless it be shown that he has done certain things therein expressly named to disentitle him to it; here nothing has been shown against him.

Forrest, In re, Murray, Ex parte (1873) 42 L. J. Bk. 96; L. R. 16 Eq. 215; 28 L. T. 678; 21 W. R. 768, *explained*.

In re Berger (1873) 42 L. J. Bk. 97; L. R. 16 Eq. 623; 29 L. T. 76; 21 W. R. 883.
BACON, C.J.—What I said in *Ex parte Murray* has been misunderstood. The law on this subject is plain. In *Ex parte Murray* the assets were enough to pay the debts twice over. The trustee's affidavit showed that a certain sum would be sufficient to pay the creditors in full. It would lead to almost uncontrolled abuses if I were to adopt the view which has now been pressed upon me, if the trustee's mere guess as to the value of the assets were to be necessarily adopted.

26. FOREIGN BANKRUPTCIES.

Carter v. Dimmock (1853) 4 H. L. Cas. 337; 22 L. J. Bk. 55; 1 Bk. & Ins. R. 12; 17 Jur. 615.—H.L. (R.), *explained*.

Lyall v. Jardine (1870) L. R. 3 P. C. 318; 39 L. J. P. C. 43; 22 L. T. 882; 18 W. R. 1056.—P.C.

CAIRNS, L.C.—Their lordships observe that the case of *Carter v. Dimmock*, decided in the House of Lords, which was referred to in argument, does not appear to them to have any contrary bearing to the conclusion at which they have arrived. In that case it appeared that the bankrupt, having abstained from showing cause against the adjudication, although he was in the country and might have done so in the shorter

time appointed by the English statute, afterwards applied to the commissioner in London within the twelve months, not upon any new materials, but simply for the purpose of disputing the propriety of the adjudication upon the materials upon which it was made, and against which he might have shown cause within the proper time. The House of Lords held that this was a course which was not open to him; and Lord Cranworth, in pronouncing the decision of the House of Lords, states expressly that it was only playing with words to treat that proceeding as anything but an appeal: that the second application to the commissioner, without any change of the materials upon which it was to be supported, was simply appealing to the commissioner from his own order, and upon the same materials; and that, on the proper construction of the English Act, the course which ought to have been taken was to make an application in such a case to the Court of Appeal, viz., the lords justices, and not to the commissioner. Those remarks have no relevancy to a case where the second application to a primary Court is made not on the same, but on different, materials.—p. 329.

Smith v. Buchanan (1800) 1 East 6; 5 R. R. 499; and **Bartley v. Hodges** (1861) 1 R. & S. 375; 30 L. J. Q. B. 352; 8 Jur. (N.S.) 52; 4 L. T. 445; 9 W. R. 693; observations considered.

Gilbs v. Société Industrielle et Commerciale des Métaux (1890) 59 L. J. Q. B. 510; 25 Q. B. D. 399; 63 L. T. 503.—C.A. **ESHER, M.R., LINDLEY and LOREN, L.J.**

LOREN, L.J.—Assuming that there were what is equivalent to a discharge in bankruptcy in France, of which I am very doubtful, I am of opinion that such discharge cannot operate as a discharge in respect of a contract made in England, though the defendants be domiciled in France. That proposition seems to me to be the result of the judgment of Lord Kenyon in *Smith v. Buchanan* and that of Lord Blackburn in *Bartley v. Hodges*.

27. COMPOSITION AND ARRANGEMENT DEEDS.

Butler v. Rhodes (1794) 1 Esp. 236; Peake 238, distinguished.
Boyd v. Hind (1857) 26 L. J. Ex. 164; 1 H. & N. 938; 3 Jur. (N.S.) 566; 5 W. R. 361.—EX. CH.

Watson v. Knight (1854) 19 Beav. 369.—M.R., followed.
Merodith, In re, Meredith v. Facey (1885) 54 L. J. Ch. 1106; 29 Ch. D. 745; 33 W. R. 778.—PEARSON, J.

Latter v. White (1870) 40 L. J. Q. B. 9; L. R. 5 Q. B. 622; 23 L. T. 242; 19 W. R. 65; reversed, (1871) 40 L. J. Q. B. 162; L. R. 6 Q. B. 474; 25 L. T. 158; 19 W. R. 1149.—EX. CH.; the latter decision affirmed, (1872) 41 L. J. Q. B. 842; L. R. 6 H. L. 578.—H. L. (C.).

Smith, In re, Ex parte Cockburn (1864) 33 L. J. Bk. 17; 10 Jur. (N.S.) 573; 10 L. T. 252; 12 W. R. 673.—L.C., dictum held overruled.

McLaren v. Baxter (1867) 36 L. J. C. P. 247; L. R. 2 C. P. 559; 16 L. T. 521; 15 W. R. 1017.

MONTAGUE SMITH, J.—The authority first relied upon by Mr. Piffard was the dictum of Lord Westbury in *Ex parte Cockburn*, that, "as the deed is between the parties, no person who is not a party could sue upon the covenant." But that was not necessary to the decision of the case, and must be considered as overruled by the cases of *Greasy v. Gibson* (L. R. 1 Ex. 112) and *Reeves v. Watts* (L. R. 1 Q. B. 412).

McLaren v. Baxter (*supra*), approved.
Isaacs v. Green (1867) 36 L. J. Ex. 253; L. R. 2 Ex. 352; 16 L. T. 633.—EX.

Greasy v. Gibson (1866) 35 L. J. Ex. 74; L. R. 1 Ex. 112; 12 Jur. (N.S.) 319; 13 L. T. 676; 14 W. R. 284; 4 H. & C. 23.—EX., approved and followed.

Reeves v. Watts (1866) 35 L. J. Q. B. 171; L. R. 1 Q. B. 412; 12 Jur. (N.S.) 565; 14 L. T. 478; 14 W. R. 672.—Q.B.

Bissell v. Jones (1868) 38 L. J. Q. B. 2; L. R. 4 Q. B. 40; 9 B. & S. 884; 19 L. T. 262; 17 W. R. 49, followed.

Nicholson, In re and Ex parte (1870) L. R. 5 Ch. 332; 22 L. T. 286; 18 W. R. 411.—L.J.

Hernuliewicz v. Jay (1865) 6 B. & S. 697; 34 L. J. Q. B. 201; 11 Jur. (N.S.) 319; 12 L. T. 494; 13 W. R. 807; and **Corner v. Sweet** (1866) 35 L. J. C. P. 151; L. R. 1 C. P. 456; 12 Jur. (N.S.) 413; 14 W. R. 584; 1 H. & R. 405, followed.

Bailey v. Bowen (1868) 37 L. J. Q. B. 61; L. R. 3 Q. B. 133; 17 L. T. 470; 16 W. R. 396.

Cowen, In re and Ex parte (1867) L. R. 2 Ch. 563; 16 L. T. 469; 15 W. R. 859.—L.J., followed.

Hart v. Smith (1868) 38 L. J. Q. B. 25; L. R. 4 Q. B. 61; 9 B. & S. 543; 19 L. T. 419; 17 W. R. 158.—Q.B.

Brompton, &c. Waterworks Co. v. Jennings (1865) 19 C. B. (N.S.) 149, overruled.
Coles v. Turner (1866) L. R. 1 C. P. 373, 381, n.—REPORTER'S NOTE.

Coles v. Turner, 18 C. B. (N.S.) 796; 34 L. J. C. P. 198; 13 W. R. 811; reversed, (1866) 35 L. J. C. P. 169; L. R. 1 C. P. 873; 1 H. & R. 386; 12 Jur. (N.S.) 688; 14 W. R. 402.—EX. CH.

Woodhouse, In re, Morgan, Ex parte (1863) 32 L. J. Bk. 15; 1 De G. J. & S. 288; 1 De G. J. & S. Bk. Ap. 64; 12 Jur. (N.S.) 559; 7 L. T. 729; 11 W. R. 316.—L.C.; and **Josephs, In re, Spyer, Ex parte** (1863) 32 L. J. Bk. 62; 1 De G. J. & S. 318; 9 Jur. (N.S.) 949; 8 L. T. 743; 11 W. R. 1008.—L.C., followed.

Pearson v. Pearson (1866) 35 L. J. Ex. 172; L. R. 1 Ex. 308; 12 Jur. (N.S.) 589; 4 H. & C. 316.—EX.

Pearson v. Pearson, considered.
Brooksbank, In re, Atkinson, Ex parte (1870) 39 L. J. Bk. 10; L. R. 9 Eq. 786; 22 L. T. 279; 18 W. R. 588.—BACON, C.J.

Pearson v. Pearson, approved.
Bencke v. Whittall (1877) 46 L. J. P. C. 81; 2 App. Cas. 602; 37 L. T. 73; 25 W. R. 913.—P.C.

Richmond Hill Hotel Co., In re, King, Ex parte, 86 L. J. Ch. 718; L. R. 4 Eq. 566; *reversed in part*, (1867) 38 L. J. Ch. 541; L. R. 3 Ch. 10; 17 L. T. 188; 16 W. R. 57.—L.J.

Dell v. King (1863) 2 H. & C. 84; 33 L. J. Ex. 47; 10 Jur. (N.S.) 427; 12 W. R. 280, *disented from in part only*.

Hidson v. Barclay (1865) 3 H. & C. 361; 34 L. J. Ex. 217; 12 L. T. 353; 13 W. R. 588.—EX. CH.; *reversing* 3 H. & C. 9.

The doctrine laid down in this case, "That a creditor has a right to have a deed presented to him for execution, which, when executed, will put no burthen on him to which he ought not to be subject," disapproved of by the Court of Exchequer Chamber.—p. 372.

Daughish v. Tennent (1866) 36 L. J. Q. B. 10; L. R. 2 Q. B. 49; 15 W. R. 196; 8 B. & S. 1, *approved*.

Milner, In re and Ex parte (1885) 54 L. J. Q. B. 425; 15 Q. B. D. 605; 33 W. R. 867; 2 Morrell 190.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.

Jackman v. Mitchell (1807) 13 Ves. 581; 9 R. R. 229, *inapplicable*.

Smith v. Salzmann (1854) 23 L. J. Ex. 177; 9 Ex. 535, *applied*.

McHenry, In re, McDermott v. Boyd (1894) 64 L. J. Ch. 13; [1894] 3 Ch. 365; 7 R. 532. 71 L. T. 502.—C.A. HERSCHELL, L.C., LINDLEY and DAVEY, L.JJ.; *reversing* 42 W. R. 474; 1 Manson 224.—NORTH, J.

HERSCHELL, L.C. (speaking of *Jackman v. Mitchell*).—It was obvious that the transaction in that case could not stand.

DAVEY, L.J.—I think *Smith v. Salzmann* supports the view we are taking of this case.

Lane v. Husband (1845) 14 Sim. 656; 9 Jur. 1001, *observed upon*.

Baber's Trusts, In re (1870) 40 L. J. Ch. 144; L. R. 10 Eq. 554; 18 W. R. 1181.—V.-C.

MALINS, V.-C.—Lane v. Husband was not a case which seemed to stand by itself, and was not in accordance with the other authorities.—p. 144.

Dunch v. Kent (1684) 1 Vern. 260, *overruled*.

Whitmore v. Targuand (1861) 30 L. J. Ch. 345; 3 De G. F. & J. 107; 7 Jur. (N.S.) 377; 4 L. T. 38; 9 W. R. 488.—L.C.

CAMPBELL, L.C.—I think it unnecessary again to go over the long list of cases cited in the argument, and most minutely analysed and commented upon by the Vice-Chancellor. I content myself with saying that I concur with his remarks upon them, except the leading case of *Dunch v. Kent*, and of that I think the first view taken by his honour is the sounder one. I likewise place great reliance on his own previous decision in *Nicholson v. Tuttle* (2 Kay & J. 18).—p. 354.

Wood v. Dunn (1886) 7 B. & S. 94; 36 L. J. Q. B. 27; L. R. 2 Q. B. 78; 15 W. R. 180; 15 L. T. 411.—EX. CH.; *reversing* 35 L. J. Q. B. 11; L. R. 1 Q. B. 77; 12 Jur. (N.S.) 331; 13 L. T. 403; 14 W. R. 84.—Q.B., *followed*.

Turnbull v. Robertson (1878) 47 L. J. C. P. 294; 38 L. T. 389; 26 W. R. 557.

Carter v. Warne (1880) 1 M. & M. 479; 4 Car. & P. 191, *overruled*.

White v. Hunt (1870) 40 L. J. Ex. 23; L. R. 6 Ex. 32; 28 L. T. 559.—EX.

BRAMWELL, B.—Then it has been urged that to decide this case in favour of the respondent will be to overrule the decision of Lord Tentenden in *Carter v. Warne*. Now, even if the point in that case had been fully before Lord Tentenden *in banc* and he had decided it there as he has here ruled at Nisi Prius, I should not have hesitated to question such a decision; but it is not necessary to go so far as that here, for the opinion which he there expressed was so expressed in the inevitable haste of a trial at Nisi Prius, and on a point which was not before him; and when I see that the case has been doubted, and, shall I say, "blown upon," by the case of *Haw v. Kennett* (3 A. & E. 162; 4 L. J. K. B. 220), and the opinions of the learned judges who decided that case, then I think that I am not at all bound by *Carter v. Warne*, and that we may overrule it, as we now do.

Redpath v. Wigg (1866) 35 L. J. Ex. 211; L. R. 1 Ex. 385; 12 Jur. (N.S.) 903; 14 L. T. 764; 14 W. R. 866; 4 H. & C. 432.—EX. CH., *followed*.

Easterbrook v. Barker (1870) 40 L. J. C. P. 17; L. R. 6 C. P. 1; 23 L. T. 535; 19 W. R. 208.—C.P.

Forster v. Wilson (1843) 13 L. J. Ex. 209; 12 M. & W. 191, *approved*.

Davies, In re, Cleland, Ex parte (1867) 36 L. J. Bk. 45; L. R. 2 Ch. 808; 16 L. T. 403; 15 W. R. 525.—CAIRNS, J.J., *commented upon and distinguished*.

Mercer v. Graves (1872) 41 L. J. Q. B. 212; L. R. 7 Q. B. 499; 26 L. T. 551; 20 W. R. 605. BLACKBURN, J.—As to the cases, only one has any semblance of authority for the plaintiff (*Ex parte Cleland*), but it will be found to be plainly distinguishable. There an adjudication of bankruptcy against Cleland had been set aside, and it was ordered that he should be at liberty to enforce the order for costs against the petitioning creditor, if they remained unpaid, by execution. The debt due to the creditor from Cleland was larger than the amount of costs; but Cleland's attorney was unpaid, and had claimed a lien on the costs. Cairns, L.J., under these circumstances, held that the solicitor's lien must be respected, and that the debt ought not to be set off against the costs. No doubt there are expressions used by Cairns, L.J., which, to a certain extent, justify the reliance Mr. O'Malley put upon them; but all that they really amount to is, that the Court of Chancery would not, any more than a Court of law, interfere to allow a debt to be set off against an execution, except on the terms of the attorney's lien being discharged. It is, therefore, no authority for saying that the relation of trustee and *cestui que trust* exists between a judgment creditor and his attorney; and to do this would be to introduce great mischief, and would be to run counter to decided cases.—p. 505.

LUSH and QUAIN, JJ. to the same effect.

Whitmore v. Wakerly (1865) 3 H. & C. 538; 34 L. J. Ex. 83; 11 Jur. (N.S.) 189; 11 L. T. 683; 13 W. R. 550; and **Hartley v. More** (1865) 19 C. B. (N.S.) 85; 34 L. J.

C. P. 187; 11 Jur. (N.S.) 625; 12 L. T. 424; 13 W. R. 777, *considered*.

Staffordshire Joint-Stock Banking Co. v. Emmott (1867) 36 L. J. Ex. 105; L. R. 2 Ex. 208; 16 L. T. 175; 15 W. R. 1135.

[KEELY, C.B., holding these two cases to be at variance, preferred *Hartley v. Mare*, and decided for the defendant.

BRAMWELL, B. preferred *Whitmore v. Wakerly*, and decided for the plaintiff.

CHANNELL, B. held the two cases to be perfectly consistent and both rightly decided. He decided for the plaintiff.

PIGOTT, B. held for the defendant, believing the two cases to be at variance, and preferring *Hartley v. Mare*.]

Irving v. Veitch (1837) 7 L. J. Ex. 25; 3 M. & W. 90; Mur. & H. 513, *followed*.

Stock, In re, Amos, Ex parte (1866) 66 L. J. Q. B. 146; 75 L. T. 423; 45 W. R. 480; 3 Manson 324.—WILLIAMS and WRIGHT, JJ.

Batten, In re, Milne, Ex parte (1889) 60 L. T. 271; 37 W. R. 383.—CAVE and CHARLES, JJ., *reversed*, (1889) 58 L. J. Q. B. 333; 22 Q. B. D. 685; 37 W. R. 499; 6 Morrill 110.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

BARRISTER.

Matthews v. Munster (1887) 57 L. J. Q. B. 49; 20 Q. B. D. 141; 57 L. T. 922; 36 W. R. 178; 62 L. J. P. 260.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ., *distinguished*.

Lewis v. Lewis (1890) 59 L. J. Ch. 712; 45 Ch. D. 281; 63 L. T. 84; 39 W. R. 75.

KEKEWICH, J. distinguished the above case on the ground that there the compromise was entered into by counsel without any instructions or authority other than were implied in the employment of counsel, whereas in the present case the intention to compromise had been conceived by the parties themselves.

Lamplough v. Brathwait (1616) Hobart 105, *distinguished*.

Kennedy v. Brown (1863) 13 C. B. (N.S.) 677; 32 L. J. C. P. 137; 9 Jur. (N.S.) 119; 7 L. T. 626; 11 W. R. 284.—C.P.

Kennedy v. Brown, *approved and followed*.

Mostyn v. Mostyn (1870) 39 L. J. Ch. 780; L. R. 5 Ch. 457; 22 L. T. 461; 18 W. R. 657.—GIFFARD, L.J.

Kennedy v. Brown, *commented on*.

Reg. v. Doutre (1884) 9 App. Cns. 745; 53 L. J. C. P. 85; 51 L. T. 669.—P.C.

LORD WATSON (for J. C.).—Their lordships are willing to assume that the law of England, so far as it concerns the right of the bar of England to sue or make agreements for payment of their fees, was rightly applied in the case of *Kennedy v. Brown*; but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J. It appears to them that the decision may be

O.C.

supported by usage and the peculiar constitution of the English bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the bar alone excepted, can recover their fees by an action at law.—p. 751.

Brown v. Kennedy (1864) 33 Beav. 133; *affirmed*, 4 De G. J. & S. 217; 33 L. J. Ch. 342; 10 Jur. (N.S.) 141; 9 L. T. 736; 12 W. R. 360.—L.JJ., *followed and applied*.

Robertson v. McDonough (1880) 14 Cox C. C. 469; 6 L. R. Ir. 433.—Q.B.

Jenkins v. Slade (1824) 1 Car. & P. 270, *overruled*.

Poucher v. Norman (1826) 3 B. & C. 744; 5 D. & R. 618; 3 L. J. (O.S.) K. B. 115.—K.B.

BASTARDY.

Cope v. Cope (1833) 5 Car. & P. 604; 1 M. & Rob. 269, *explained*.
Reg. v. Mansfield (1841) 1 Q. B. 414; 1 G. & D. 7; 5 Jur. 505.—Q.B.

Reg. v. Hughes (1857) 26 L. J. M. C. 133; Deares. & B. 188; 3 Jur. (N.S.) 448; 5 W. R. 526; 7 Cox C. C. 286.—C.C.R., *distinguished*.

Reg. v. Myott (1863) 32 L. J. M. C. 138; 7 L. T. 785; 11 W. R. 424.—Q.B.

Reg. v. Thomas (1863) 8 L. T. 460; 27 J. P. 694.

Reg. v. Gannt (1867) 8 B. & S. 365; 36 L. J. M. C. 89; L. R. 2 Q. B. 466; 16 L. T. 379; 15 W. R. 1172.

Approved and followed.
Staples v. Staples (1879) 41 L. T. 347.—HUDDLESTON, B.

Reg. v. Thomas and Staples v. Staples, *followed*.

Reg. v. Lancashire JJ. (1874) 29 L. T. 886; 22 W. R. 329.—Q.B., *distinguished*.

Reg. v. Robinson, Corbishley, Ex parte (1898) 67 L. J. Q. B. 510; [1898] 1 Q. B. 734; 78 L. T. 350; 46 W. R. 462; 62 J. P. 309.

RUSSELL, C.J.—First, it is said that the hearing . . . was not a hearing and determination of the summons so as to exhaust the application upon which it was granted, and that the case consequently comes within the principle of *Reg. v. Lancashire JJ.* It is said that all that took place on that occasion was that there was an intimation from the magistrates that they were not satisfied with the evidence given in support of the mother's claim, that they did not dismiss the summons upon the

merits, and that if she could bring further evidence she might apply again. But, as regards her coming again it must be observed that that in no way depended upon the will of the magistrates. Within twelve months from the birth of the child she would have had the right to come again without their consent. Therefore, this intimation did not qualify their decision in any way; and, that being the case, I feel bound to hold that the summons was disposed of on the merits, and to give effect to the decision of the Court of Queen's Bench in *Reg. v. Thomas*, and also to the decision of the Exchequer Division in *Staples v. Staples*.—p. 513. MATHEW, J. concurred.

Brittain v. Kinnaird (1819) 1 Br. & B. 432; 1 Moore, 50, *distinguished*.

Reg. v. Evans (or Rice Jones), Ex parte (1850) 4 New Sess. Cas. 191: 1 L. M. & P. 357; 19 L. J. M. C. 151, *approved*.

Reg. v. Farmer (or Salford JJ.) (1891) 61 L. J. M. C. 65; [1892] 1 Q. B. 637; 65 L. T. 736; 40 W. R. 228; 17 Cox C. C. 413; 56 J. P. 341.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Reg. v. Murrey (1703) 1 Salk. 122, *overruled*.

Rex v. Luffe (1807) 8 East 193; 9 R. R. 406.—K.B.

Rex v. Luffe, followed.

Reg. v. Collingwood (1848) 17 L. J. M. C. 163; 12 Q. B. 681; 3 New Sess. Cas. 252; 12 Jur. 750.—Q.B.

Rex v. Luffe and Reg. v. Collingwood, approved.

Grimes, Ex parte (1853) 22 L. J. M. C. 153, *nom.*; **Reg. v. Filkington**, 2 El. & Bl. 546; 17 Jur. 554; 1 W. R. 410.—Q.B.

Rex v. Luffe, Reg. v. Collingwood and Grimes, Ex parte, adopted.

Jones v. Davies (1900) 70 L. J. K. B. 38; [1901] 1 K. B. 118; 83 L. T. 412; 49 W. R. 136.—LAWRANCE and KENNEDY, JJ.

Reg. v. Glynne (or Flintshire JJ.) (1871) 41 L. J. M. C. 58; L. R. 7 Q. B. 16; 26 L. T. 61; 20 W. R. 94.—Q.B., *distinguished*.

Reg. v. May (or Essex Justices) (1880) 49 L. J. M. C. 67; 5 Q. B. 632; 42 L. T. 772; 28 W. R. 918.—LUSH and MANISTY, JJ.

LUSH, J.—*Reg. v. Glynne* sets forth distinctly the principles applicable to a case of this description. There the Court of quarter sessions arrived at a decision on the merits. No case has been decided which speaks of the justices' decision at quarter sessions being final where not on the merits. An order quashed for any formal defect is not conclusive. See 8 & 9 Vict. c. 10, s. 2. What is the meaning of the words, "on the merits"? They must mean on the evidence produced before the justices. Here the order was quashed because no evidence was forthcoming.—p. 68. MANISTY, J. agreed.

Reg. v. Glynne, distinguished.

Anderson v. Collinson (1901) 70 L. J. K. B.

620; [1901] 2 K. B. 107; 84 L. T. 465; 49 W. R. 623.—LORD ALVERSTONE, C.J. and LAW-RANCE, J.

Stacey v. Lintell (1879) 48 L. J. M. C. 108; 4 Q. B. D. 291; 40 L. T. 553; 27 W. R. 551.

—MELLOR and LUSH, JJ., and **Southeran v. Scott** (1881) 50 L. J. M. C. 56; 6 Q. B. D. 518; 41 L. T. 522; 29 W. R. 666; 45 J. P. 423.—FIELD and MANISTY, JJ., *disapproved*.

Hardy v. Atherton (1881) 50 L. J. M. C. 105; 7 Q. B. D. 264; 44 L. T. 776; 29 W. R. 788; 45 J. P. 638.

HUDDLESTON, B.—Our view of the law is supported by *Southeran v. Scott*, where, with one exception, this very point was practically decided by Field and Manisty, JJ. It is true that the case did not contain the element that the husband was able to maintain the bastard child, and it was suggested that had that element appeared, Field, J. would have been of a contrary opinion, but I have taken the opportunity of consulting my brother Field, and he has told me that he and Mr. Justice Manisty were of opinion that the competency of the husband ought to have no effect, and he also added that the passage in the Law Reports by which he is represented to have inclined to the other view was rather an observation which fell from him in deference to what had been said by Mr. Justice Lush in a previous case, and not because he agreed with him. The report in the Law Journal Reports, though in substance it is the same, is somewhat different, and does not represent Mr. Justice Field as speaking so positively on the point. . . . In the other case which was cited—*Stacey v. Lintell*—the question was, whether the order could be obtained by a married woman, and it is therefore not an authority in point. It is true that in giving judgment, Lush, J. threw out a suggestion that on the marriage of the mother the justices would have a discretion whether they would continue an order previously made on the putative father, but, with all respect to that learned judge, I do not see that the justices have any such discretion.—p. 107.

HAWKINS, J. to the same effect.

Stacey v. Lintell, applied.

Jones v. Davies (*supra*, col. 195).

Hardy v. Atherton, commented on.

Davies v. Evans (1882) 9 Q. B. D. 238; 51 L. J. M. C. 132; 46 L. T. 418; 30 W. R. 548; 46 J. P. 471.—Q.B.

HUDDLESTON, B. and GROVE, J. disagreed, the latter holding that the Act (35 & 36 Vict. c. 65, s. 4) was not imperative as to enforcing payment, and that the opinion of Huddleston, B., in *Hardy v. Atherton*, on the question of discretion, "was an *obiter dictum* not necessary to the decision of the case."—p. 241.

Nichole v. Allen (1827) 3 Car. & P. 36, *dis-sented from*.

Mortimore v. Wright (1840) 6 M. & W. 482; 9 L. J. Ex. 158; 4 Jur. 465.

LORD ABINGER, C.B.—That is only a *nisi prius* decision, and I cannot assent to any such doctrine.—p. 485.

BILLS OF EXCHANGE.

1. FORM AND OPERATION.
2. FOREIGN BILLS AND NOTES.
3. CONSIDERATION.
4. ACCEPTANCE.
5. NEGOTIATION.
6. PRESENTMENT FOR PAYMENT.
7. DISHONOUR.
8. PROTEST.
9. LIABILITIES OF PARTIES.
10. DISCHARGE.
11. ACTIONS ON.
12. STAMPS.
13. CHEQUES.
14. APPROPRIATION OF SECURITIES.

I. FORM AND OPERATION.

Crutchley v. Clarence (1813) 2 M. & S. 90; 14 R. R. 596, *observed upon*.

McCall v. Taylor (1865) 19 C. B. (N.S.) 302; 84 L. J. C. P. 365; 11 Jur. (N.S.) 529; 12 L. T. 461; 18 W. R. 840.

BYLES, J.—The marginal note is equivocal.—p. 305.

Duffy, In re, Dutch v. O'Leary (1880) 5 L. R. Ir. Ch. 92.—*v. o.*, *followed*.

Carter v. White (1882) 51 L. J. Ch. 465; 20 Ch. D. 225.—**KAY, J.**; *affirmed*, (1883) 54 L. J. Ch. 138; 25 Ch. D. 666; 50 L. T. 670; 32 W. R. 692.—**C.A. COTTON, LINDLEY** and **FRY, L.J.**

Keates v. Whieldon (1828) 8 B. & C. 7; 6 L. J. (O.S.) K. B. 226, *overruled*.

Cheetham v. Butler (1833) 5 B. & Ad. 837; 3 L. J. K. B. 9; 2 N. & M. 453.

DENMAN, C.J.—We are all of opinion that that decision cannot be supported.—p. 839.

Reg. v. Hawkes (1838) 2 Moody C. C. 60, *overruled*.

Peto v. Reynolds (1854) 9 Ex. 410.—**EX. : S. C.** in error, 11 Ex. 418.—**EX. CH.**

ALDERSON, B.—With respect to the question whether this instrument is or is not a bill of exchange, the case of *Reg. v. Hawkes* is undoubtedly in point. I must own, however, that I now think I was wrong on that occasion. The case seems to have been decided on the ground that *Gray v. Milner* (3 Taunt. 739) governed it; and the fact was not adverted to that *Gray v. Milner* may be thus explained; that a bill of exchange made payable at a particular place or house is meant to be addressed to the person who resides at that place or house.—p. 415.

Roberts v. Tucker (1851) 16 Q. B. 560; 20 L. J. Q. B. 270; 15 Jur. 987.—**EX. CH.**, *distinguished and approved*.

Woods v. Thiedemann (1862) 1 H. & C. 478; 10 W. R. 846.

MARTIN, B.—I should be sorry if it were supposed for a moment that I thought the case of *Roberts v. Tucker* was not rightly decided. I believe it to have been perfectly rightly decided, but it has no bearing on this case.—p. 491.

Bennett v. Farnell (1807) 1 Camp. 130, *overruled*.

Phillips v. Im Thurn (1865) 18 C. B. (N.S.) 694; 11 Jur. (N.S.) 489; 12 L. T. 487; 13 W. R. 750.—**C.F.**

Roberts v. Tucker, explained and distinguished.

Bennett v. Farnell (1807) 1 Camp. 130, 133, n. **Stone v. Freeland** (1769) 1 H. Bl. 317, n. **Cooper v. Meyer** (1830) 8 L. J. (O.S.) K. B. 171; 10 B. & C. 468.

Considered.

Bank of England v. Vagliano—in *H.L.* (*infra*). [*Head note.*—The respondent's clerk, by forging letters of advice, and preparing and filling in forged drafts, in which he inserted the name of a foreign correspondent of the respondent as being that of the drawer, and the names of a foreign firm, who were existing persons and actual correspondents of the respondent, as being the names of the payees, procured his employers' acceptance of those forged instruments, and obtained payment for them across the counter from the appellant bank. The clerk appropriated the moneys to his own use, which were thus lost to the bank:—*Held (dissentientibus, LORDS BRAMWELL and FIELD)* that the loss incurred on the forged bills must fall upon the respondent.] See judgments.

Vagliano v. Bank of England (1888) 58 L. J. Q. B. 27; 22 Q. B. D. 103; 59 L. T. 864.—

CHARLES, J.; *affirmed*, (1889) 58 L. J. Q. R. 367; 23 Q. B. D. 243; 61 L. T. 419; 37 W. R. 640; 53 J. P. 564.—**C.A. COTTON, LINDLEY, BOWEN, FRY** and **LOPES, L.J.**; **ESHER, M.R.** *dissenting*; *reversed, nom. Bank of England v. Vagliano* (1891) 60 L. J. Q. B. 145; [1891] A. C. 107; 64 L. T. 553; 39 W. R. 657; 55 J. P. 676.—**H.L. (E.) LORDS HALSBURY, L.C., SELBORNE, WATSON, HERSCHELL, MACNAGHTEN, and MORRIS; BRAMWELL and FIELD dissenting.**

Bank of England v. Vagliano, *followed*.

Clutton v. Attenborough (1895) 65 L. J. Q. B. 122; [1895] 2 Q. B. 707; 73 L. T. 496; 44 W. R. 114; 60 J. P. 54.—**C.A.**; *affirmed*, (1896) 66 L. J. Q. B. 221; [1897] A. C. 90; 75 L. T. 556; 45 W. R. 276.—**H.L. (E.) LORDS HALSBURY, L.C., MACNAGHTEN, SHAND and DAVEY.**

Yeo v. Dawe, 32 W. R. 208; *reversed*, (1885) 53 L. T. 125; 33 W. R. 739.—**C.A. BRETT, M.R.** and **BAGGALLAY, L.J.**; **BOWEN, L.J.** *dissenting*.

Norton v. Ellam (1837) 2 M. & W. 461; 1 M. & H. 69; 6 L. J. Ex. 121; 1 Jur. 433, *referred to*.

Bethell, In re (1887) 56 L. J. Ch. 334; 34 Ch. D. 561; 56 L. T. 92; 35 W. R. 330.—**STIRLING, J.**

Norton v. Ellam, *followed*.

George, In re, Francis v. Bruce (1890) 59 L. J. Ch. 709; 44 Ch. D. 627; 63 L. T. 49; 38 W. R. 617.—**CHITTY, J.**

Hall v. Smith (1823) 1 B. & C. 407; 2 D. & R. 584; 1 L. J. (O.S.) K. B. 142, *overruled*.

Buckley, Ex parte (1845) 14 M. & W. 469; 14 L. J. Ex. 341.

PARKE, B.—I must really say that I think *Hall v. Smith* cannot be supported.—p. 475.

PLATT, B.—I have no doubt that *Hall v. Smith* cannot be supported.—p. 476.

2. FOREIGN BILLS AND NOTES.

Rothschild v. Currie (1841) 1 Q. B. 43; 4 P. & D. 737; 10 L. J. Q. B. 77; 5 Jur. 865, *followed*.
Hirschfeld v. Smith (1866) 35 L. J. C. P. 177; 1 R. 1 C. P. 340; 12 Jur. (N.S.) 523; 1 H. & R. 284; 14 L. T. 886; 14 W. R. 455.—C.P.

Rothschild v. Currie, *commented on*.

Hirschfeld v. Smith, *approved*.

Aymar v. Sheldon, 12 Weldon (N. Y.) 439, *commented on*.

Horne v. Ronquette (1878) 3 Q. B. D. 514; 39 L. T. 219; 26 W. R. 894.—C.A. **BRETT, BRAMWELL** and **COTTON**, L.JJ.

Trimbey v. Vignier (1834) 1 Bing. (N.C.) 151; 4 M. & S. 695; 6 Car. & P. 25, *not followed*.

Bradlaugh v. De Rin (1870) 39 L. J. C. P. 254; L. R. 5 C. P. 473; 22 L. T. 623; 18 W. R. 931.
 —EX. CH.: *reversing* (1868) 37 L. J. C. P. 318; L. R. 3 C. P. 538; 18 L. T. 904; 16 W. R. 1128.

COCKBURN, C.J.—With the greatest respect for the high authority of the very learned judges who presided on the occasion, I must say that the decision of the Court in *Trimbey v. Vignier* surprises me. The opinions given by the two French advocates in that case seem to me to be perfectly reconcilable with each other. One of them, that of M. Blanchet, is positive that the 138th article of the Code de Commerce is only available on behalf of the party making the indorsement in blank against the immediate holder under such indorsement. I, therefore, do not feel myself bound by that case.—p. 475.

Lebel v. Tucker (1867) 37 L. J. Q. B. 46; L. R. 3 Q. B. 77; 17 L. T. 244; 16 W. R. 338; 8 B. & S. 830; and **Bradlaugh v. De Rin**, *distinguished*.

Lee v. Abdy (1886) 17 Q. B. D. 309; 34 W. R. 653; 55 L. T. 297.—**DAY** and **WILLS**, JJ.

Lebel v. Tucker, *distinguished*.

Alcock v. Smith (1892) 61 L. J. Ch. 161; [1892] 1 Ch. 238; 66 L. T. 126.—C.A. **LINDLEY**, **LOPES** and **KAY**, L.JJ.

Bank of Bengal v. Macleod (1849) 5 Moore, Ind. App. 1; 7 Moore, P. C. 35; 13 Jur. 945.—P.C., *distinguished*.

Jonmenjoy Coondoo v. Watson (1884) 9 App. Cas. 561; 35 L. J. P. C. 80; 50 L. T. 411.—P.C.

Polhill v. Walter (1832) 3 B. & Ad. 114; 1 L. J. K. B. 92, *considered*.

Derry v. Peek (1889) 58 L. J. Ch. 864; 14 App. Cas. 337; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292.—H.L. (E); *reversing* C.A. and *restoring* **STIRLING, J.**

Polhill v. Walter, *distinguished*.

Oliver v. Bank of England (1901) 70 L. J. Ch. 377; [1901] 1 Ch. 632; 84 L. T. 253; 49 W. R. 391.—**KEKEWICH, J.**

3. CONSIDERATION.

Forman v. Wright; Southall v. Rigg (1851) 11 C. B. 481; 20 L. J. C. P. 145; 15 Jur. 706, *followed*.

Edwards v. Chancellor (1888) 52 J. P. 454.—**POLLOCK, B.** and **CHARLES, J.**

Sison v. Kidman (1842) 3 Man. & G. 810; 4 Scott (N.R.) 429; 11 L. J. C. P. 100, *explained*.

Crofts v. Beale (1851) 20 L. J. C. P. 186; 11 C. B. 172; 15 Jur. 709.

MAULE, J.—There (*Sison v. Kidman*) the plea was that the defendant never had any value or consideration for the note; it admits that there was a consideration, but alleges that the defendant had none.

JERVIS, C.J.—The language of the plea is somewhat differently, and evidently more correctly stated in the report in the Law Journal than in other books.—p. 173.

Crofts v. Beale, *distinguished*.

Crears v. Hunter (or Burnyeat) (1887) 56 L. J. Q. B. 518; 19 Q. B. D. 341; 57 L. T. 554; 35 W. R. 821.—C.A. **ESHER, M.R.**, **LINDLEY** and **LOPES, L.JJ.**

4. ACCEPTANCE.

Montague v. Perkins (1853) 22 L. J. C. P. 187; 17 Jur. 577; 1 W. R. 437, *distinguished*.

Carter v. White (1882) 51 L. J. Ch. 465; 20 Ch. D. 225.—**KAY, J.**; *affirmed* in C.A. (*ante*, col. 197).

Armfield v. Allport (1857) 27 L. J. Ex. 42; 6 W. R. 63, *distinguished*.

McCall v. Taylor (1865) 34 L. J. C. P. 365; 19 C. B. (N.S.) 801; 11 Jur. (N.S.) 529; 12 L. T. 461; 18 W. R. 840.

WILLES, J.—That case would seem to have been an application of the doctrine in *Penny v. Jones* (1 C. M. & R. 439; 4 L. J. Ex. 12), that a person who puts his name on the back of a bill may be treated as a new drawer; but that doctrine is inapplicable to notes, by reason of the Stamp Act.—p. 366.

Smith v. Vertue (1860) 30 L. J. C. P. 56; 9 C. B. (N.S.) 214; 7 Jur. (N.S.) 395; 3 L. T. 583; 9 W. R. 146, *adopted*.

Decroix v. Meyer (1890) 59 L. J. Q. B. 538; 25 Q. B. D. 343; 63 L. T. 414; 39 W. R. 2.—C.A. **ESHER, M.R.**, **LINDLEY** and **BOWEN, L.JJ.**; *affirmed*, *nom.* **Meyer v. Decroix** [1891] A. C. 520.—H.L. (E). **LORDS HALSBURY, L.C.**, **WATSON** and **HERSCHELL**; **LORDS BRAMWELL** and **MORRIS dissenting**.

Chaplin v. Levi (1852) 9 Ex. 531; 23 L. J. Ex. 117; 2 C. L. R. 556; 2 W. R. 241, *commented on*.

Sharples v. Rickard (1857) 26 L. J. Ex. 302; 2 H. & N. 57; 5 W. R. 568.—EX.

Garrard v. Lewis (1882) 10 Q. B. D. 30; 47 L. T. 408; 31 W. R. 475.—**BOWEN, L.J.**, *dicta applied*.

Harvey v. Cane (1876) 34 L. T. 64; 24 W. R. 400, *considered*.

Herdman v. Wheeler (1901) 71 L. J. K. B. 270; [1902] 1 K. B. 361; 86 L. T. 48; 50 W. R. 300.—**LORD ALVERSTONE, C.J.**, **DARLING** and **CHANNELL, JJ.**

5. NEGOTIATION.

Smith, In re, Yates, Ex parte (1857) 2 De G. & J. 191; 27 L. J. Bk. 9; 4 Jur. (N.S.) 619; 6 W. R. 178.—*L.J.*, commented on.
Lecanu v. Kirkman (1859) 6 Jur. (N.S.) 17; 7 W. R. 499.—*C.P.*

Evans v. Cramlington (1608) Carth. 5; 2 Vent. 307; Skin. 264; 1 Show. 4, distinguished.
Sigourney v. Lloyd (1828) 8 B. & C. 622; 3 M. & R. 58; 7 L. J. (O.S.) K. B. 73; 32 R. R. 504.—*K.B.*

Murrow v. Stuart (1853) 8 Moo. P. C. 267, followed.
Buckley v. Jackson (1868) L. R. 3 Ex. 135; 18 L. T. 886.—*EX.*

Patterson, In re, Mitchell v. Smith, 10 Jur. (N.S.) 578; reversed, (1864) 33 L. J. Ch. 596; 12 W. R. 941; 10 L. T. 801; 4 De G. J. & S. 422; 4 N. R. 310.

Bartrum v. Caddy (1838) 1 P. & D. 207; 9 A. & B. 275; 1 W. W. & H. 724; 8 L. J. Q. B. 31, distinguished.
Glasscock v. Balls (1889) 59 L. J. Q. B. 51; 24 Q. B. D. 13; 62 L. T. 163; 38 W. R. 155.—*C.A.* **ESHER, M.R., LINDLEY and LOPES, L.JJ.**
ESHER, M.R.—This case is not within the decision in *Bartrum v. Caddy*, first, because here the note was not paid; and, secondly, because, even if it had been paid, it was never returned to the hands of the maker.—p. 52.

Goodall v. Ray (1835) 4 D. P. C. 76; 1 H. & W. 333, questioned.
Whitehead v. Walker (1842) 10 M. & W. 696; 12 L. J. Ex. 28; 7 Jur. 330.
PARKE, B.—The case of *Burrough v. Moss* (10 B. & C. 558) is good law, and has been recognised in this Court. Nor do I think that case is affected by the decision of Coleridge, J., in *Goodall v. Ray*. It seems to me that either there must be some inaccuracy in the report, or there must have been in that case that sort of formal notice to the plaintiff which is equivalent to an agreement to set off the cross demand as against him. On that ground the case may, perhaps, be supported, otherwise I cannot assent to the position that a mere notice of a set-off between the payee and the maker can operate to restrict the negotiability of a promissory note. Besides, the decision of the point was unnecessary in that case, inasmuch as the plaintiff's demand was for a sum less than the amount of the note. I cannot, therefore, consider that case as an authority that mere notice of the set-off makes any difference.—p. 698.

Whitehead v. Walker, followed.
Oulds v. Harrison (1854) 10 Ex. 572; 3 C. L. R. 353; 24 L. J. Ex. 66; 3 W. R. 160.—*EX.*

Jones v. Lane (1839) 3 Y. & C. 281. 294; 8 L. J. Ex. 41; 3 Jur. 265, overruled.
Deuters v. Townsend (1864) 33 L. J. Q. B. 301; 10 Jur. (N.S.) 1072; 12 W. R. 1002; 10 L. T. 602; 5 B. & S. 613.—*Q.B.*
[Jones v. Lane, deciding that when an overdue bill or note is indorsed after action brought, the indorsee, with notice of the action, has no right of action upon it, is overruled in *Deuters v. Townsend*.]

Foster v. Mackinnon (1869) 38 L. J. C. P. 310; L. R. 4 C. P. 704; 20 L. T. 887; 17 W. R. 1105, *discussed*.
Lewis v. Clay (1897) 67 L. J. Q. B. 224; 77 L. T. 653; 46 W. R. 319.—*RUSSELL, C.J.*

Foster v. Mackinnon and Lewis v. Clay, considered.
Herdman v. Wheeler (1901) 71 L. J. K. B. 270; [1902] 1 K. B. 361; 86 L. T. 48; 50 W. R. 300.—*LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.*

Thiedemann v. Goldschmidt, 1 Giff. 142; 5 Jur. (N.S.) 855; 83 L. T. (O.S.) 298; 7 W. R. 627; reversed, (1859) 1 De G. F. & J. 4; 1 L. T. 50; 8 W. R. 14.—*L.O. and L.JJ.*

Robinson v. Reynolds (1841) 2 Q. B. 196; 3 P. & D. 611; 1 G. & D. 526; 9 L. J. Q. B. 249.—*EX. CH., approved*.
Thiedemann v. Goldschmidt (*supra*).—*L.JJ.*

Dawson v. Prince, 26 L. J. Ch. 849; 3 Jur. (N.S.) 902.—*M.R.*; reversed, (1857) 2 De G. & J. 41; 27 L. J. Ch. 169; 4 Jur. (N.S.) 497; 6 W. R. 161.—*C.A.*

Redfern v. Rosenthal (1901) 85 L. T. 313.—*CHANNELL and BUCKNILL, JJ.*; reversed, (1902) 86 L. T. 855.—*C.A.* **COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.**

6. PRESENTMENT FOR PAYMENT.

Ambrose v. Hopgood (1809) 2 Taunt. 61; and **Callaghan v. Aylett** (1810) 2 Camp. 549, overruled.

Fenton v. Goudry (1811) 13 East 459.
LORD ELLENBOROUGH, C.J.—I admit that in *Callaghan v. Aylett* a different doctrine prevailed; and therefore in giving the opinion which I now hold, I do it with a reserve to look into that case; and if I see grounds to suspend or alter my present opinion, I shall declare it before the end of the term.—p. 470. **GROSE and BAYLEY, JJ.** agreed.

[No further notice was taken of this case in the course of the term, and therefore the judgment of the Court stood for the plaintiff.]

Cocks v. Masterman (1829) 9 B. & C. 902; 4 M. & R. 676; 8 L. J. (O.S.) K. B. 77, followed.

London and River Plate Bank v. Bank of Liverpool (1895) 65 L. J. Q. B. 80; [1896] 1 Q. B. 7; 73 L. T. 473.—*MATHEW, J.*

7. DISHONOUR.

Bickerdike v. Bollman (1786) 1 Term Rep. 405; 1 R. R. 242, considered.
Rucker v. Hiller (1812) 16 East 43; 3 Camp. 217; 14 R. R. 278.

Bickerdike v. Bollman, approved.
Walwyn v. St. Quintin (1797) 1 Bos. & P. 652; 2 Esp. 515, disapproved.
Gory v. Scott (1820) 3 B. & Ald. 619.
ABBOTT, C.J.—There is, however, great difficulty in distinguishing this case from *Walwyn v. St. Quintin*. But I must say that I cannot assent to the law there laid down; for, if notice had in that case been given to the drawer he might have had his remedy over against a third person.—p. 622.

Bickerdike v. Bollman, considered.

Laffite v. Slatter (1830) 6 Bing. 623; 4 M. & P. 467; 8 L. J. (O.S.) C. P. 273; 31 R. R. 510.

TINDAL, C.J.—*Bickerdike v. Bollman* has always been considered as an excepted case; and, perhaps, it applies only where the bill has been accepted for the accommodation of the drawer, who, in such case, if he knew that the acceptor had no assets, can incur no damage from want of notice. The principle of that case therefore is not to be extended. And in many other decisions, particularly in *Rucker v. Hiller*, it has been laid down that the drawer is entitled to notice if he have reasonable ground to expect the bill will be paid, although he have no assets in the acceptor's hands.—p. 626.

Cory v. Scott (supra), followed.

Norton v. Pickering (1828) 8 B. & C. 610; 3 M. & Ry. 23; 7 L. J. (O.S.) K. B. 85.—K.B.

Tindal v. Brown (1786) 1 Term Rep. 167, and Barclay, Ex parte (1802) 7 Ves. 597.

—L.C., overruled.

Chapman v. Keane (1835) 3 A. & E. 193; 4 N. & M. 607; 4 L. J. K. B. 185.

DENMAN, C.J. (for the Court).—The objection to the plaintiff's recovery was founded on the case of *Tindal v. Brown*, in which all the judges of this Court, except Lord Mansfield, considered a notice given by one who was not the holder as no notice, on the ground that the drawer was not thereby apprised of the holder's intention to look to him for payment; and this case was distinctly recognised, and its principle adopted, by Lord Eldon, in *Ex parte Barclay* (7 Ves. 597). Notwithstanding these high authorities, it is clear from *Jameson v. Swinton* (2 Camp. 378), *Wilson v. Swanley* (1 Stark. 34), and also from the learned treatises on Bills of Exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice given in due time by any party to it. In the *nisi prius* cases just referred to, no express allusion was made to *Tindal v. Brown*, or *Ex parte Barclay*, but we can hardly conceive that they were not present to the recollection of Lord Ellenborough and Lawrence, J., or the counsel engaged. These learned judges, indeed, decided them at *nisi prius*, but without question. We are now compelled to determine whether the case of *Tindal v. Brown*, as to this point, be good law. We think that it is not. If it were, the holder might secure his own right against his immediate indorser by regular notice; but the latter, and every other party to the bill, would be deprived of all remedy against anterior indorsers, and the drawer, unless each of those parties should in succession take up the bill immediately on receiving notice of dishonour, a supposition which cannot be reasonably made. We may add that this point was not necessary for the decision of the case, as this Court, including Lord Mansfield, granted a new trial on a different ground.—p. 197.

Chapman v. Keane, followed.

Harrison v. Ruscoe (1846) 15 M. & W. 231; 15 L. J. Ex. 110; 10 Jur. 142.—EX.

De Berdt v. Atkinson (1794) 2 H. Bl. 336, held overruled.

Maltass v. Siddie (1859) 5 Jur. (N.S.) 1169; 28 L. J. C. P. 257; 6 C. B. (N.S.) 494; 7 W. R. 149.

BYLES, J.—The case of *De Berdt v. Atkinson* may, I think, be considered overruled.—p. 1171. [See *Saunders v. Clarke*, 8 C. B. 751; 19 L. J. C. P. 84.]

Warrington v. Furber (1807) 6 Esp. 89; 8 East 242; and Swinyard v. Bowes (1816) 5 M. & S. 62; 17 R. R. 274, distinguished.

Camidge v. Allenby (1827) 6 B. & C. 373; 9 D. & R. 391; 5 L. J. (O.S.) K. B. 95.

BAYLEY, J.—One short observation disposes of *Warrington v. Furber* and *Swinyard v. Bowes*, the authorities cited to show that it was not necessary in this case to prove presentment for payment. In those cases, the person insisting on the want of presentment was not a party to the bill; but here the defendant was a party to the notes, for they were payable to the bearer on demand, and he was the holder of them, and when such notes are passed from hand to hand the person taking them must trace his right through the former holder.—p. 381.

Strange v. Price (1839) 10 A. & E. 125; 8 L. J. Q. B. 197; 2 P. & D. 278; 3 Jur. 361, held overruled.

Paul v. Joel (1858) 27 L. J. Ex. 380.—EX.; affirmed, (1859) 4 H. & N. 355; 28 L. J. Ex. 143; 5 Jur. (N.S.) 603; 7 W. R. 287.—EX. CH.

MARTIN, B.—I own I consider *Bailey v. Porter* (14 M. & W. 44; 14 L. J. Ex. 244) overrules that.—p. 382.

Boulton v. Welsh (1837) 3 Bing. (N.C.) 688; 4 Scott 425; 3 Hodges 77; 6 L. J. C. P. 243; 1 Jur. 263, overruled.

Robson v. Carlewiss (1842) 2 Q. B. 421; 1 Car. & M. 378; 8 G. & D. 69.

DENMAN, C.J.—In *Messenger v. Southey* (1 M. & G. 76), Tindal, C.J. admits that *Hedger v. Stearnson* (2 M. & W. 790) may have been properly decided; and in *Furze v. Sharwood* (2 Q. B. 414), we observed that "*Messenger v. Southey* shows a great relaxation of the rule laid down in the Exchequer Chamber [in *Solarte v. Palmer* (1 Cro. & J. 417)], and House of Lords [*ibid.* (1 N. Cas. 194)], on the part of the Lord Chief Justice, and that *Boulton v. Welsh* can hardly be now deemed a satisfactory authority."—p. 422.

[In 1 Car. & M. p. 379, it is stated that the Court expressly overruled the case of *Boulton v. Welsh*.]

8. PROTEST.**Harris v. Benson (1831) 2 Str. 910, overruled. Rea v. Meggott (1734) Cas. temp. Hardw. 77, held overruled.****Lumley v. Palmer (1834) 2 Str. 1000, approved.**

Windle v. Andrews (1819) 2 B. & Ald. 696; 2 Stark. 425.

ABBOTT, C.J.—In *Harris v. Benson*, which arose in the 5 Geo. 2, it was held that the drawer of an inland bill of exchange was not chargeable with interest for want of a protest; and about two years subsequent to that decision, the Lord Chief Justice of the Common Pleas held, in the

case of *Rea v. Meggott*, that a parol acceptance of an inland bill was not binding: both these points depend upon the same clause in the stat. 3 & 4 Anne, c. 9. Lord Hardwicke, however, shortly afterwards, in the case of *Lumley v. Palmer*, overruled the latter of these decisions, and the Court of King's Bench, upon argument, supported him in that opinion; to which the Lord Chief Justice of the Common Pleas afterwards acceded. From that time to the present *Lumley v. Palmer* has been considered to be, and has been acted upon, as law.—p. 699.

Yandewall v. Tyrrell (1827) Moo. & M. 87, *considered*.

Gerardynlo v. Wieler (1851) 10 C. B. 690; 20 L. J. C. P. 105; 15 Jur. 316.—C.P.

9. LIABILITIES OF PARTIES.

Lambert, Ex parte (1806) 13 Ves. 179, *held overruled*.

Overynd, Gurney & Co., In re, Swan, Ex parte (1868) L. R. 6 Eq. 344; 18 L. T. 230; 16 W. R. 660.

MALINS, V.-C.—The authorities show that the broad proposition for which *Ex parte Lambert* was relied upon by the counsel for the official liquidator, namely, that the transferee of a bill after dishonour can under no circumstances have a better right against the acceptor than the drawer would have, cannot at this day be maintained, and, indeed, they most conclusively show that that case is no longer law.

Sleigh v. Sleigh (1850) 5 Ex. 514; 19 L. J. Ex. 315, *commented on*.

Cook v. Lister (1863) 13 C. B. (N.S.) 543, 594; 32 L. J. C. P. 121; 9 Jur. (N.S.) 823; 7 L. T. 712; 11 W. R. 369, *approved*.

Fox, In re, Bishop, Ex parte (1880) 50 L. J. Ch. 18; 15 Ch. D. 400; 43 L. T. 165; 29 W. R. 144.—C.A.

THESSIGER, V.-C.—I will assume that *Sleigh v. Sleigh* was rightly decided, and therefore that the indorser of a bill of exchange, who pays it without having had any notice of dishonour, though he waives his right to have that notice, has no right of action against the person who is primarily liable to pay the bill. I will further assume that *England v. Marsden* was correctly decided; in other words, that, though a person who has been compelled to pay a bill of exchange has a right of action against the person primarily liable, he has no such right when he has voluntarily placed himself in the position of being compelled to make the payment. Though, however, I assume for the purpose of the present case that those cases were rightly decided, I will not say that I do not think they may be open to further consideration when the occasion for it arises, for I think that the observations of the late Mr. Justice Willes in *Cook v. Lister* are well worthy of consideration.—p. 417.

Hindhaugh v. Blakey (1878) 47 L. J. C. P. 345; 3 C. P. D. 136; 38 L. T. 221; 26 W. R. 480, *held erroneous*.

Don v. Watt (1812) F. C. Vol. xvi. 647; and **Watters** (1818) F. C. Vol. xix. 489, *observed upon*.

Matthews v. Bloxsome (1864) 33 L. J. Q. B. 209; 10 Jur. (N.S.) 998; 10 L. T. 415; 12 W. R. 759, *questioned*.

Steele v. McKinlay (1880) 5 App. Cas. 754; 43 L. T. 358; 29 W. R. 17.—H.L. (SC).

LORD BLACKBURN.—The case of *Matthews v. Bloxsome* was much, and properly, relied upon by the counsel for the appellants. It was one very peculiar in its circumstances. . . . It was perfectly manifest that the defendant gave authority to fill up the blank stamp paper in such a way as would make him liable as indorser to the plaintiffs, and meant that to be done; if the blanks had been filled up by the plaintiffs with the name of one of their clerks as drawer of a bill payable to bearer, there could have been no defence. But by a blunder of the plaintiffs, it was filled up inserting their own names as drawers. No one could help wishing to baffle such a defence. I was a party to the judgment of the Queen's Bench by which they did so, but I greatly doubt if it was sound. It seems to me to be a very violent thing to construe a document which, on the face of it, purported not to be drawn by the plaintiffs, and indorsed for them by the defendant, who purported to be the drawer, as being, in consequence of extrinsic evidence, in legal effect drawn by the defendant, and indorsed to the person who purported on it to be drawer. But the case, if good law, can only be an authority for considering a bill as if it were amended, so as to be what it was intended to be, when the evidence is clear what the intention was, and the bill was drawn up in its actual form by blunder.—p. 773.

LORD SELBORNE, L.C.—As the decision in the Court below was mainly rested upon the view taken by the Court of the proper construction of the Mercantile Law Amendment (Scotland) Act, 1856, s. 11, and the subsequent Act of 1878 (41 Vict. c. 13), I think it right to add the expression of my own clear opinion that the Act of 1878 is in effect a declaration by the Legislature that the decision of the English Common Pleas Division in the case of *Hindhaugh v. Blakey* was erroneous; and, as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish Act between one kind of acceptance and another, I think that the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill (which was the actual case in *Hindhaugh v. Blakey*) is necessary to displace the whole construction of the English statute on which that decision was found.—p. 785.

Steele v. McKinlay, distinguished.

Holmes v. Amara Duxice (1883) 1 Cab. & E. 23. **WILLIAMS, J.**—The second point is that a bill of exchange being the creature of the law merchant, the defendant did not become an indorser to the plaintiffs of the bill in question, because, according to that law, the only person who becomes a true and proper indorser of a bill must be himself a holder to whom the bill has been transferred and who, by indorsement, transfers his rights to an indorsee, and that what the defendant did here was essentially different from this; that the defendant, if liable at all, could only be so upon a contract of suretyship which required to be verified by a memorandum in writing according to the Statute of Frauds; and that, there being no such memorandum in this case, the action must fail. In support of this contention, the opinion of Lord Blackburn in *Steele v. McKinlay* was

cited. The actual point before me was not, however, judicially decided.—p. 25.

Steele v. M'Kinlay, distinguished.

Reynolds v. Wheeler (1861) 10 C. B. (N.S.) 561; 30 L. J. C. P. 350; 7 Jur. (N.S.) 1290; 4 L. T. 472, *approved*.

Macdonald v. Whitfield (1883) 8 App. Cas. 733; 52 L. J. P. C. 70; 49 L. T. 486.—*p.c.*

LORD WATSON (for the Privy Council).—The authority of *Reynolds v. Wheeler*, and similar cases, is in nowise affected by the decision of the House of Lords in the Scotch case of *Steele v. M'Kinlay*, which is referred to in the judgment of the Court below.—p. 748. [The learned lord then proceeded to distinguish that case at length.]

Steele v. M'Kinlay, confirmed.

Jenkins v. Comber (1898) 67 L. J. Q. B. 780; [1898] 2 Q. B. 168; 78 L. T. 752; 47 W. R. 48.—**WILLS and KENNEDY, JJ.**

10. DISCHARGE.

Johnson v. Kennion (1765) 2 Wils. 262, *commented on*.

Bacon v. Searles (1788) 1 H. Bl. 88.

WILSON, J.—That case is inaccurately reported; and I am disposed to think that the Chief Justice never said what he is there stated to have said.—p. 90.

Bacon v. Searles, questioned.

Purssord v. Peck (1841) 9 M. & W. 196; 12 L. J. Ex. 108.

[Counsel urged that in *Bacon v. Searles* it was held that the indorsee of a bill of exchange, having received part of the contents from the drawer, could not recover more than the residue from the acceptor; and that when the drawer pays the whole, the acceptor is entirely discharged; and further, that the doctrine is repudiated, that, after receiving payment for the amount, the holder can be trustee for the drawer.]

LORD ABINGER, C.B.—If that be the principle of that case, it may be a question whether, if it were now considered, it would not be overruled.—p. 201.

Bacon v. Searles, overruled.

Beck v. Robley (1774) 1 H. Bl. 89, *n.*, *commented on*.

Jones v. Broadhurst (1850) 9 C. B. 178.

CRESSWELL, J. (for the Court).—Considering this case of *Bacon v. Searles* with reference to the point decided—that part of a bill (accepted for value) being paid by a drawer or indorser, disentitles the indorsee to recover from the acceptor more than the balance remaining unpaid—it has been overruled by modern decisions, and is not now deemed to be law; and, if it is to be considered as the case of an accommodation bill, it is inapplicable to the questions which arise on this plea.—p. 186.

Jones v. Broadhurst, questioned.

Solomon v. Davis (1885) 1 Cab. & E. 83.

STEPHEN, J.—I am satisfied that *Jones v. Broadhurst* does not apply to this case (the case where a bill has been accepted for the accommodation of the drawer) at all, and I entertain some

doubt whether *Cook v. Lister* (18 C. B. (N.S.) 543), a later decision of the same Court, has not greatly shaken the authority of *Jones v. Broadhurst*, although *Jones v. Broadhurst* is cited as an authority in a still later case in the Court of Common Pleas, viz., *Thornton v. Maynard* (L. R. 10 C. P. 695), which passes over *Cook v. Lister* unnoticed. . . . The judgment in *Jones v. Broadhurst* is, however, based upon the fact that the bill in that case was a bill for value, and it is repeatedly stated in the elaborate judgment that it has no application to accommodation bills. This is clearly pointed out in *Cook v. Lister*.

George, in re, Francis v. Bruce (1890) 59 L. J. Ch. 709; 44 Ch. D. 627; 63 L. T. 49; 38 W. R. 617.—**CHITTY, J.**, *followed*.

Foster v. Dawber (1851) 6 Ex. 839; 20 L. J. Ex. 385, and **Crowe v. Clay** (1854) 9 Ex. 604; 23 L. J. Ex. 150; 18 Jur. 654; 2 W. R. 204.—**EX. CH.**, *adopted*.

Edwards v. Walters (1896) 65 L. J. Ch. 557; [1896] 2 Ch. 157; 74 L. T. 896; 44 W. R. 547.—**G.A. LINDLEY, LOPES and KAY, L.JJ.**

De Bernales v. Fuller (1810) 14 East 590, *n.*; 2 Camp. 426, *explained*.

Warwick v. Rogers (1843) 5 M. & G. 340; 6 Scott (N.R.) 1; 12 L. J. C. P. 113, *approved*.

Prince v. Oriental Bank Corporation (1878) 47 L. J. P. C. 42; 3 App. Cas. 325; 38 L. T. 41; 26 W. R. 543.—*p.c.*

SIR MONTAGUE SMITH (for J. C.).—The case of *De Bernales v. Fuller* appears to be, in some degree, an exceptional one, and turned upon the precise circumstances existing in it. At first sight, it seems opposed to the general rule that a principal cannot sue a sub-agent for want of privity existing between them. The case has been referred to in several later decisions. It has never been overruled, and it has been put on a ground on which it may stand by Mr. Justice Maule in *Warwick v. Rogers* (5 M. & G. 340). He says: "In *De Bernales v. Fuller*, where money was paid into a banking-house for the purpose of taking up a particular bill which was lying there for payment, it was held to be money had and received to the use of the then owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor who paid the money, though the bankers' clerk had said at the time the money was paid in that he would not give up the bill till he had seen his master. But that decision turned upon the fact, that the money having been expressly paid into the defendants' house for the specific purpose declared at the time of taking up that particular bill, and that purpose not having been directly repudiated till afterwards, it must be taken to have been received at the time for the use of the holder of the bill." It would seem, therefore, that the case may be supported on the ground that money had been paid in specifically for the payment of the particular bill, and had been accepted by the bankers for that purpose, and that they made themselves, by so accepting the money, agents to hold it for the plaintiffs.—26 W. R., p. 545.

Princed v. Oriental Bank, referred to.
Bank of Africa v. Colonial Government (1888)
57 L. J. P. C. 66; 13 App. Cas. 215; 58 L. T.
427.—P.C. LORDS WATSON, HOBHOUSE and
MACNAGHTEN, SIR B. PEACOCK and SIR
R. COUCH.

Laxton v. Peat (1809) 2 Camp. 185.

Collett v. Haigh (1812) 3 Camp. 281.

Overruled.

Fentum v. Peacock (1813) 5 Taunt. 192; 1
Marsh. 14.

MANSFIELD, C.J.—This case of *Laxton v. Peat* certainly is the first in which it was ever supposed that the acceptor of a bill of exchange was not the person and the last person compellable to pay that bill to the holder of it, and that anything could discharge the acceptor, except payment, or a release; and I never before knew that there was any difference between an acceptance given for accommodation, and an acceptance for value. When I first saw that case in *Campbell*, I was in the same state as *Gibbs, J.*, and doubted a great deal whether it could be law. The case of *Collett v. Haigh* must be considered, not as a separate decision, but as resting on the authority of the former. It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point which comes before him at *nisi prius*, and whoever looks through *Campbell's Reports* will be greatly surprised to see, among such an immense number of questions, many of them of the most important kind, which come before that noble and learned judge [Ellenborough], not that there are mistakes, but that he is in by far the most of the causes so wonderfully right, beyond the proportion of any other judges. But upon this case we think we are bound to differ from him, and to hold that it is impossible for us to consider the acceptor of an accommodation bill in the light of a surety for the payment of the drawer, and that we cannot therefore say that he is discharged by the indulgence shown to the drawer (p. 195). . . . The case before *Gibbs, J.* (*Kerrison v. Cooke*, 3 Camp. 362) has shaken this decision in *Laxton v. Peat*, and we think rightly.—p. 196.

Renewal.

Gibben v. Scott (1817) 2 Stark. 286; 19

R. L. 723, *discharged*.

Maillard v. Page (1870) L. R. 5 Ex. 312; 39
L. J. Ex. 235; 23 L. T. 80.—EX.

Alteration.

Bishop v. Chambre (1827) Moody & M. 116;

3 Car. & P. 55, *corrected*.

Knight v. Clements (1838) 8 A. & E. 215;
3 N. & P. 375; 7 L. J. Q. B. 144; 1 W. W. & H.
280; 2 Jur. 395.

DENMAN, C.J. (for the Court).—The case of *Bishop v. Chambre* was cited on the trial for the plaintiff, and the marginal note appears favourable to him. But Lord Tenterden's proceeding on that occasion was, in truth, the other way; he permitted the jury to inspect the bill, to see if there had been any alteration, which there manifestly had, and then decided against the party producing it for want of proof that it was made before the instrument was complete.—p. 221.

Catton v. Simpson (1838) 8 A. & E. 136,
overruled.

Gardiner v. Walsh (1855) 5 El. & Bl. 83; 24
L. J. Q. B. 285; 1 Jar. (N.S.) 828; 3 W. R. 460
CAMPBELL, C.J. (for the Court).—That case certainly does very nearly resemble the present. The defendant had, as surety, signed a joint and several promissory note with the principal debtor, having no reason to suppose that any one else was to sign it. Afterwards the payee, without the knowledge of the defendant, induced another person to sign it, with a view to strengthen the security; and the Court held that the defendant was liable still upon it. But the decision took place merely on refusing a rule to show cause why there should not be a new trial. It seems to have proceeded on the ground that, as the new surety could not be liable on the note by reason of the stamp laws, the alteration operated nothing, although the counsel urged that "a note with an altered date does not bind any one to the new contract, yet the old contract is void." The judgment of the Court was without further reasons in these words: "In the absence of all authority, we shall hold that this was not an alteration of the note, but merely an addition which had no effect." With sincere respect to the learned judges who concurred in this decision, we feel bound to say that, in our opinion, it is contrary to the authorities, and that it is not law.—p. 90.

Catton v. Simpson and Gardiner v. Walsh,
observed upon.

Aldous v. Cornwell (1868) 37 L. J. Q. B. 201;
L. R. 3 Q. B. 573; 9 B. & S. 607; 16 W. R. 1045.
—Q.B.

Pigot's Case (1614) 11 Rep. fol. 27a, *dis-
sentented from*.

Aldous v. Cornwell (1868), *supra*.

[The second resolution in *Pigot's Case* stated that, "if the obligee himself alters the deed . . . although it is in words not material, yet the deed is void."]

LUSH, J. (for the Court).—This being the state of the authorities we think we are not bound by the doctrine in *Pigot's Case*, or the authority cited for it; and, not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written.—p. 579.

Price v. Shute, Molloy, b. 2, ch. 10, § 28,
questioned.

Paton v. Winter (1809) 1 Taunt. 420.

LAWRENCE, J. observed that in *Master v. Miller* (4 T. R. 320), three judges against Buller, J. thought there must have been some mistake in Molloy's account of that decision, or that the case was not law; and that Lord Kenyon, C.J. held that the case did not conflict with *Master v. Miller*, because there the acceptance only was altered, but there was no alteration of the bill itself: in *Master v. Miller* it was held that an alteration made in the bill vitiated the bill against all parties.—p. 423.

Parry v. Nicholson (1845) 13 M. & W. 778; 2 D. & L. 640; 14 L. J. Ex. 119, *questioned*.

Hirschman v. Budd (1878) 42 L. J. Ex. 113; L. R. 8 Ex. 171; 28 L. T. 602; 21 W. R. 582.

KELLY, C.B.—But then we are pressed with the authority of *Parry v. Nicholson*, and especially with the observation there attributed to Parke, B., that the date of a bill is immaterial. Now, there can be no question that in some cases the date would be immaterial, and, although altered, the defendant would still be bound. In *Parry v. Nicholson* the facts are not clearly stated; and the decision may perhaps be supported on the ground that, according to the evidence there given, the date was immaterial. But I cannot think that the learned judge could have laid down as a general principle that the date of a bill is not material, although it may have been true as to the particular case; and the cases he referred to do not by any means bear out any such general proposition. I will add, especially with regard to *Hemming v. Treney* (9 A. & E. 926), on which he bases his judgment, that it was an action on a guarantee. The plea was *non assumpsit*. Upon the trial it was proved that the instrument had been interlined; but the first count of the declaration was upon it in its original form, and it was held very properly that the defence of alteration ought to have been specially pleaded.

11. ACTIONS ON.

Leftley v. Mills (1791) 4 Term Rep. 170; 2 R. R. 350, *distinguished*.

Wells v. Giles (1836) 2 Gale 209; and **Hartley v. Case** (1825) 1 Car. & P. 555;

6 D. & R. 505; 4 B. & C. 339; 8 L. J. (o.s.) K. B. 262, *followed*.

Kennedy v. Thomas (1894) 63 L. J. Q. B. 761; [1894] 2 Q. B. 759; 9 R. 564; 71 L. T. 144; 42 W. R. 641.—C.A. **LINDLEY, LOPES and DAVEY, L.J.**

Lost Bill.

Moscop v. Eadon (1810) 16 Ves. 430, *held overruled*.

Macartney v. Graham (1828) 2 Sim. 285.

SHADWELL, V.C.—The case of *Moscop v. Eadon* has been overruled by the decision in *Hansard v. Robinson* (7 B. & C. 90).—p. 287.

Macartney v. Graham, questioned.

Hansard v. Robinson (1828) 7 B. & C. 90; R. & M. 404, n.; 3 D. & R. 860; 5 L. J. (o.s.) K. B. 242; 31 R. R. 166, *not followed*.

* **Wright v. Maidstone** (Lord) (1855) 1 Kay & J. 701; 24 L. J. Ch. 623; 1 Jur. (N.S.) 1013; 3 W. R. 613.

PAGE-WOOD, V.C.—In *Hansard v. Robinson* a Court of law refused relief in case of a lost bill of exchange; and the learned judge who decided *Macartney v. Graham* there said that *Hansard v. Robinson* had overruled *Moscop v. Eadon*. That is hardly correct. The real effect of that decision is, that it cut away the principle on which relief was refused in such cases in equity. Sir W. Grant said that a suit in equity could not be sustained, because relief would be given at law in case of a lost bill of exchange. The Court of law has since held that relief cannot be given at law.

Amount Recoverable.

Francis v. Rucker (1768) Amb. 672, *approved*.

Woolsey v. Crawford (1810) 2 Camp. 445, *impeached*.

Walker v. Hamilton (1861) 1 De G. F. & J. 602. **CAMPBELL, L.C.**—*Woolsey v. Crawford* is at most a *non prius* case, and the point there decided only applied to the re-exchange, not to a sum which was liquidated, which could have been easily ascertained: and as to this *non prius* case, if it had been expressly in point, I should have said that it could not at all outweigh the solemn decision of *Francis v. Rucker*.—p. 611.

Woolsey v. Crawford and Napier v. Schneider

(1810) 12 East 420, *treated as overruled*. General South American Co., In re (1877) 47 L. J. Ch. 67; 7 Ch. D. 637; 37 L. T. 899; 26 W. R. 232.

MALINS, V.C.—It has been argued before me at considerable length that, although a drawer is liable to pay the re-exchange—and it is immaterial whether this is re-exchange in the strict sense of the word or not—an acceptor is not liable to do so. The only two authorities relied upon, in support of that proposition, are *Woolsey v. Crawford* and *Napier v. Schneider*. Now I think that after the decision of the Court of Appeal in *Walker v. Hamilton* (*supra*), those authorities must be considered as overruled. Lord Campbell, in giving judgment in that case, does not, in terms, overrule them; but he speaks of *Woolsey v. Crawford* as a mere *non prius* decision, and of *Napier v. Schneider* as a case in which, if the percentage had been fixed, the result would probably have been different. I cannot, therefore, accede to the argument that the drawer of a bill of exchange is under a greater liability than the acceptor.—p. 68.

Francis v. Rucker, and Willans v. Ayers (1877) 47 L. J. P. C. 1; 3 App. Cas. 133; 37 L. T. 732.—P.C., *commented on*.

Commercial Bank of South Australia, In re (1887), *infra*.

NORTH, J.—It appears from *Francis v. Rucker* that a liquidated sum of 20 per cent. was substituted for re-exchange in the State of Pennsylvania, and from *Roberts, Ex parte* (*infra*), it appears that in Tobago a liquidated sum of 10 per cent. has been substituted for re-exchange. I have considered whether it would be possible to treat the 10 per cent. in the present case as really a liquidated sum in lieu of re-exchange. But there are difficulties about that, particularly having regard to *Willans v. Ayers*.—p. 134.

Walker v. Hamilton and General South American Co., In re, followed.

Gillespie, In re, Roberts, Ex parte (1885) 55 L. J. Q. B. 181; 16 Q. B. D. 702; 53 L. T. 770; 34 W. R. 258.—**CAVE, J.**, *affirmed, with variation*, (1886) 56 L. J. Q. B. 74; 18 Q. B. D. 286; 56 L. T. 599; 35 W. R. 128.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.J.**

Allen v. Kemble (1848) 6 Moore P. C. 314, 321; 13 Jur. 287; and **Gibbs v. Fremont** (1853) 22 L. J. Ex. 28; 9 Ex. 25; 17 J. R. 820, *approved*.

Commercial Bank of South Australia, In re, Commercial Banking Co. of Sydney, Ex parte (1887) 57 L. J. Ch. 131; 36 Ch. D. 522; 57 L. T. 395; 36 W. R. 550.—**NORTH, J.**

Gillespie, *In re*, Roberts, *Ex parte*, explained.

Commercial Bank of South Australia, *In re*, *supra*.

NORTH, J.—That, therefore, is a decision on sect. 57 of the English Act [the Bills of Exchange Act, 1882], which is identical with that with which I have now to deal [sect. 57 of the South Australian Bills of Exchange Act, 1884], that, in the case of a bill dishonoured abroad—that is, in a place foreign to that where it is drawn and indorsed—the remedy is under sub-sect. 2 for re-exchange. That sub-section in each of the Acts is founded, not upon anything peculiar to the law either of England or of Australia, but upon the general law of merchants, and is of international application. . . . It seems to me, therefore, that this claim for interest [under sub-sect. 1] is wrong.—p. 133.

Gillespie, *In re*, Roberts, *Ex parte*; and *Prehn v. Royal Bank of Liverpool* (1870) 39 L. J. Ex. 41; L. R. 5 Ex. 92; 21 L. T. 830; 18 W. R. 463, explained and distinguished.

English Bank of the River Plate, *In re*, Bank of Brazil, *Ex parte* (1893) 62 L. J. Ch. 578; [1893] 2 Ch. 438; 3 R. 518; 69 L. T. 14; 41 W. R. 521.

CHITTY, J.—Now it is plain, on a comparison of sects. 51 and 57, that a distinction is drawn between protests which are necessary, and those which are not necessary, but merely permissive. Where the bill is dishonoured by non-payment, it "must" be duly protested for non-payment—sect. 51, sub-sect. 2; where the acceptor (as here) suspends payment before the bill matures, the holder "may" cause the bill to be protested for better security—sect. 51, sub-sect. 5; and sect. 57 makes the expenses of protest recoverable against the acceptor only when the protest is necessary. It appears to me that the language of these sections is definite and precise, and that the expenses of an unnecessary protest are not recoverable. I cannot see my way to deal with the case of expenses of protest on the principle adopted by the C. A. in *Gillespie, In re*, in reference to the question of damages for re-exchange which they had to decide, or to treat it as a *casus omnis*us letting in sect. 97. . . .

My observations on the claim for the expenses of the protest for better security apply generally to the claim for commission. The claim was supported principally on sect. 97, and the doctrine of damages for re-exchange. Here also the text-books and the authorities have been searched with the same result as above-mentioned, and no evidence has been adduced of any mercantile custom. One authority only was relied on—namely, *Prehn v. Royal Bank of Liverpool*. But the action there was brought, not on the bill of exchange, but on a special contract which justified the Court in allowing the claim for commission as special damages. The decision, therefore, is not in point.—pp. 280, 281.

Evidence.

Lomax v. Landells (1848) 6 C. B. 577; 6 D. & L. 396; 13 Jur. 88, disapproved.

Reg. v. Dale (1851) 17 Q. B. 64; 20 L. J. M. C. 240; 15 Jur. 657.

CAMPBELL, C.J.—With reference to the second objection I do not see that there is any reason for supposing that the magistrate's actual name is not "J. H. Hamper." The objections which might be raised as to this point upon a bill of exchange do not appear to me to apply to proceedings like these. Nor can I acquiesce in the distinction suggested, in *Lomax v. Landells*, between a consonant and a vowel. There is no doubt that a vowel may be a good christian name; why not a consonant? I have been informed by a gentleman of the bar, sitting here, on whose accuracy we can rely, that he knows a lady who was baptised by the name of "D." Why may not a gentleman as well be baptised by a consonant?—p. 61.

Woodbridge v. Spooner (1819) 3 B. & Ald. 233; 1 Chit. 661; 22 R. R. 365, followed.

Stott v. Fairlamb, 52 L. J. Q. B. 420; 48 L. T. 574.—DENMAN, J.; reversed (but on other points) (1883) 53 L. J. Q. B. 47; 49 L. T. 525; 32 W. R. 354.—C.A.

Young v. Austen (1869) 38 L. J. C. P. 233; L. R. 4 C. P. 553; 20 L. T. 896; 17 W. R. 706, followed.

New London Credit Syndicate v. Neale (1898) 67 L. J. Q. B. 825; [1898] 2 Q. B. 487; 48 L. T. 323.—C.A.

Pacock v. Billing (1824) Ry. & M. 127; 2 Bing. 269; 9 Moore 499; 1 Car. & P. 230; 3 L. J. (O.S.) C. P. 264, commented on.

Barough v. White (1825) 4 B. & C. 325; 6 D. & R. 379; 2 Car. & P. 8; 3 L. J. (O.S.) K. B. 227.

ABBOTT, C.J.—The only point decided in *Pacock v. Billing* was, that in an action on a bill of exchange, declarations of a prior holder could not be received, unless they were made when he had possession of the bill. That which fell from the Lord Chief Justice as to such declarations being admissions, and receivable when adverse to the interest of the party making them, was extra-judicial, and such observations are always to be taken rather as illustrations than as authorities in law, for we all know that they are constantly made without the same consideration and care as those which belong to the point in judgment.—p. 328.

Powell v. Ford (1817) 2 Stark. 164, disapproved.

Lewis v. Sapio (1827) Moo. & M. 39.

ABBOTT, C.J.—I will not abide by any such decision as that.

Bingham v. Stanley (1841) 9 Car. & P. 374; 2 Q. B. 117; 10 L. J. Q. B. 319; 1 G. & D. 237; 6 Jur. 889, questioned.

Harvey v. Towers (1851) 15 Jur. 544; 6 Ex. 656; 20 L. J. Ex. 318.

ALDERSON, B.—The first proposition laid down by Lord Denman, that the affirmative of the issue determines the burthen of proof is notoriously not true.—p. 545.

Faterson v. Hardacre (1811) 4 Taunt. 114, overruled.

Bailey v. Bidwell (1844) 13 M. & W. 73.—EX.

PARKER, B.—That decision is clearly wrong.—p. 76.

Brown v. Philpot (1840) 2 M. & Rob 285; and **Heath v. Sansom** (1831) 2 B. & Ad. 291; 9 L. J. (O.S.) K. B. 246, *questioned*.
Bailey v. Bidwell, *followed*.
Smith v. Branne (1851) 15 Jur. 287; 16 Q. B. 244; 20 L. J. Q. B. 201.

CAMPBELL, C.J. (for the Court).—In *Brown v. Philpot* there was a plea that the bill had been accepted by the defendant without consideration and had been fraudulently endorsed without consideration to a person who endorsed it to the plaintiff without consideration. And Lord Denman is reported to have ruled that after the defendant had proved that the bill was accepted by him without consideration, and that it had been fraudulently endorsed without consideration to the person who endorsed it to the plaintiff, the defendant was farther bound to prove, in support of the plea, by express evidence, that the bill had been endorsed to the plaintiff without consideration. But with the most sincere respect for the judge who is said to have so ruled, I must observe that it was at most a *nisi prius* decision, and that the point does not seem to have been pressed or much argued, the defendant's counsel having contented himself with stating what he could and what he could not prove, and no authority being cited except *Heath v. Sansom*, which had been before considerably shaken. The case of *Bailey v. Bidwell*, in which a contrary rule is laid down, was solemnly decided by the Court of Exchequer *in banc* for years after, and has been frequently acted upon since. We are therefore, of opinion, that *Brown v. Philpot* cannot now be considered as an authority by which we ought to be governed.—p. 289.

Weedon v. Medley (1834) 2 D. P. C. 689; and **Irring v. Heaton** (1836) 4 D. P. C. 638; 2 Scott 798, *not followed*.

Crosby v. Clarke (1836) 1 M. & W. 296; 5 D. P. C. 62; 2 Gale 77; 5 L. J. Ex. 189.

PARKE, B.—The only authorities in support of the present affidavit are *Weedon v. Medley* and *Irring v. Heaton*. The former case was clearly decided on the mere ground that the want of an averment of presentment was not a sufficient objection, and the Court did not look into the affidavit to say whether there was an averment of refusal. Then *Irring v. Heaton*, as appears from the report, went on the authority of *Weedon v. Medley*. The weight of authority, therefore, is decidedly against the sufficiency of the affidavit.—p. 299.

12. STAMPS.

Gregory v. Fraser (1813) 3 Camp. 454. See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4).

13. CHEQUES.

Lloyd v. Sandilands (1818) Gow 15, *explained*.

Mountford v. Harper (1847) 16 L. J. Ex. 184; 13 M. & W. 825.

ALDERSON, B.—In the judgment of Dallas, C.J. in this case, where he states that the circumstances of a cheque being made payable to the defendant, and the defendant having received payment of it, "is not proof of payment, the word 'payment' is incorrectly used for 'debt.'"—p. 185.

Keene v. Beard (1860) 8 C. B. (N.S.) 372; 29 L. J. C. P. 287; 6 Jur. (N.S.) 1248; 2 L. T. 240; 8 W. R. 469, *dicta commented on*.
Hopkinson v. Forster (1874) L. R. 19 Eq. 74; 23 W. R. 301.

JESSEL, M.R.—I do not understand the expressions attributed to Hyles, J. in the case of *Keene v. Beard*; but I am quite sure that learned judge never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder.—p. 76.

Hopkinson v. Forster, *approved*.
Schroder v. Central Bank of London (1876) 34 L. T. 735; 24 W. R. 710.—C.P.D.

Currie v. Misa (1875) 44 L. J. Ex. 94; L. R. 10 Ex. 153; 23 W. R. 450.—EX. CH.; *affirmed*, *nom.* **Misa v. Currie** (1876) 45 L. J. Q. B. 852; 1 App. Cas. 551; 35 L. T. 414; 24 W. R. 1049.—H.L., *followed*.
Stott v. Fairlamb (1883) 53 L. J. Q. B. 47; 49 L. T. 525; 32 W. R. 354.—C.A.

Currie v. Misa, *commented on*.
De la Chaumette v. Bank of England (1829) 9 B. & C. 208; 7 L. J. (O.S.) K. B. 179; and *see further* S. C. (1831) 2 B. & Ad. 385; 9 L. J. (O.S.) K. B. 239, *explained*.

Macdonald v. Union Bank (1864) 2 Ct. of Sess. Cas. 3rd Ser. 963, *dicta approved*.

M'Lean v. Clydesdale Banking Co. (1883) 9 App. Cas. 95; 50 L. T. 457.—H.L. (SC.). LORDS SELBORNE, L.C., BLACKBURN and WATSON.

LORD WATSON.—I have no doubt that, according to the law of Scotland, a cheque in the form of that which was given by the appellant Cotton is a negotiable instrument, in other words, is substantially a bill, attended with many, though not all, of the privileges of a bill. The law upon this point appears to me to be stated with great accuracy by the late Lord Cowan in the case of *Macdonald v. Union Bank*. His lordship there said, "A banker's draft or cheque according to all the authorities, and according to the practice of bankers, is a negotiable instrument; and such documents are as negotiable as bills of exchange or promissory notes."—p. 113.

The learned counsel who opened the case rested his argument upon *De la Chaumette v. Bank of England*. But it is impossible to accept that decision as an authority according to the interpretation which the appellant's counsel put upon it. I prefer the explanation of the ground of judgment given by the late Lord Hatherley in the case of *Misa v. Currie* in this House. His lordship said [at p. 870], "It appeared from the circumstances of that case, that the party suing was suing simply as an agent of a person who was bound to show that he had given good and valuable consideration." If that be taken to be (what in my opinion it is) a correct representation of the ground of judgment in *De la Chaumette v. Bank of England*, how is it possible to regard that case as an authority for the proposition that a third party taking a cheque in payment of an account, and not taking or holding it as agent for the person who gave it him, does not hold it for value? But the *rationes* upon which, apart from all authority on the point, I should proceed as a matter of principle, are fully expressed in the opinion of the majority of the judges in the Court of Exchequer Chamber

in the case of *Moss v. Currie*. It is true that another ground of judgment was adopted by the House of Lords when that case came before them on appeal; but I cannot find anything in the "observations" made by the noble and learned lords who decided *Moss v. Currie* in this House, calculated to throw the least discredit upon the doctrine laid down by the majority of the Court of Exchequer Chamber, whilst, on the contrary, I find a great deal which tends to support the view taken by the majority.—p. 114.

Currie v. Misa, applied.

Fleming v. Bank of New Zealand (1900) 69 L. J. P. C. 120; [1900] A. C. 577; 83 L. T. 1.—P.C. LORDS DAVEY, ROBERTSON AND LINDLEY, SIR HENRY DE VILLIERS AND SIR FORD NORTH.

Gill v. Cubitt (1824) 3 B. & C. 466; 5 D. & R. 324; 3 L. J. (O.S.) K. R. 48; and **Down v. Halling** (1825) 4 B. & C. 330; 6 D. & R. 455; 2 Car. & P. 11; 3 L. J. (O.S.) K. B. 234, *held overruled*.

Bank of Bengal v. Pagan (1849) 7 Moore P. C. 61; 5 Moore Ind. App. 27.—P.C.

LORD BROUGHAM (for J. C.).—It is admitted on all hands that if Macleod & Co., having the bills in their possession, had no power to endorse them, their act of endorsement would convey no title to the party taking and discounting them, any more than a forgery would do. It is equally admitted, on the other hand, that if they had the authority to endorse, their endorsement passed the property. It may be taken as also established that whatever may have been the law laid down in *Gill v. Cubitt* and *Down v. Halling*, and one or two other cases, and not abandoned, at least as far as the language went which the Court used in some subsequent cases, is now no longer law; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him.—p. 71.

Gill v. Cubitt, held overruled.

Down v. Halling and Rothschild v. Corney (1829) 9 B. & C. 388; 4 M. & R. 411, *considered*.

London and County Banking Co. v. Groome (1881) 51 L. J. Q. B. 224; 8 Q. B. D. 288; 46 L. T. 60; 30 W. R. 382; 46 J. P. 614.—FIELD, J.

Clarke v. London and County Banking Co. (1897) 66 L. J. Q. B. 354; [1897] 1 Q. B. 552; 76 L. T. 293; 45 W. R. 383.—CAVE and LAWRENCE, JJ.; and **Matthiessen v. London and County Bank** (1879) 48 L. J. Q. P. 529; 5 C. P. D. 7; 41 L. T. 35; 27 W. R. 838, *referred to*.

G. W. Ry. v. London and County Banking Co. (1901) 70 L. J. K. B. 915; [1901] A. C. 414; 85 L. T. 152; 50 W. R. 50; 6 Com. Cas. 275.—H.L. (E.). LORDS HALSBURY, L.C., SHAND, DAVEY, BRAMPTON AND LINDLEY; *reversing* (1900) 69 L. J. Q. B. 741; [1900] 2 Q. B. 464; 82 L. T. 746; 48 W. R. 662; 5 Com. Cas. 282.—C.A. SMITH, M.R., WILLIAMS AND ROMER, L.J.J., *which affirmed* (1899) 68 L. J. Q. B. 395; [1899] 2 Q. B. 172; 81 L. T. 54; 48 W. R. 144.—BIGHAM, J.

LORD LINDLEY.—Section 82 of the Act is a mere reproduction of the previous Act of 1876,

and the construction put upon that Act in the case of *Matthiessen v. London and County Bank* was, in my opinion, correct. In *Clarke v. London and County Banking Co.*, the cheque was paid in for collection, and this was the *ratio decidendi*.

Matthiessen v. London and County Bank; Clarke v. London and County Banking Co. and G. W. Ry. v. London and County Banking Co., considered.

Gordon v. London City and Midland Bank (1902) 71 L. J. K. B. 215; [1902] 1 K. B. 242; 86 L. T. 98; 50 W. R. 276; 7 Com. Cas. 37.—C.A.

Williams v. Jarrett (1833) 5 B. & Ad. 32; 2 N. & M. 49; 2 L. J. K. B. 156; and **Whistler v. Forster** (1868) 14 C. B. (N.S.) 248; 32 L. J. C. P. 161; 8 L. T. 817; 11 W. R. 648, *followed*.

Austin v. Bunyard (1865) 6 B. & S. 687; 34 L. J. Q. B. 217; 11 Jur. (N.S.) 874; 12 L. T. 452; 13 W. R. 773.—Q.B.; *reversing* 1 F. & F. 253.

Austin v. Bunyard, dictum overruled.

Gatty v. Fry (1877) 25 W. R. 305; 46 L. J. Ex. 605; 2 Ex. D. 265; 36 L. T. 182.—EX. D.

CLEASBY, B.—The only reason for reversing our judgment in a case otherwise clear was the concluding sentence in the judgment of Mr. Justice Blackburn in *Austin v. Bunyard*, in which he intimates an opinion that probably the knowledge of the person that the cheque was post-dated when he took it might make a difference. But this would not show that the instrument itself was improperly stamped, but that a different instrument ought to have been drawn with a different stamp. The consideration that the revenue might be defeated by what was done has nothing to do with the admissibility of the instrument. Legislation might prevent this, but such legislation, if directed to the admissibility of the instrument, would cause great inconvenience. The authorities are also decisive upon this view of the case.—p. 306.

Gatty v. Fry, approved.

Royal Bank of Scotland v. Tottenham (1894) 64 L. J. Q. B. 99; [1894] 2 Q. B. 715; 9 R. 569; 71 L. T. 168; 43 W. R. 22.—C.A. ESHER, M.R., KAY AND SMITH, L.J.J.

M'Lean v. Clydesdale Banking Co. (1883) 9 App. Cas. 95; 50 L. T. 457.—H.L. (SC.). **Robinson v. Hawksford** (1846) 9 Q. B. 52; 15 L. J. Q. B. 377; 10 Jur. 964; **Wirth v. Austin** (1873) L. R. 10 C. P. 689; 32 L. T. 669; and **Terry v. Parker** (1837) 1 N. & P. 752; 6 A. & E. 502; W. W. & D. 303; 6 L. J. K. B. 249, *referred to*. *Bethell, In re, Bethell v. Bethell* (1837) 56 L. J. Ch. 334; 34 Ch. D. 561; 56 L. T. 92; 35 W. R. 330.—STIRLING, J.

M'Lean v. Clydesdale Banking Co. and Royal Bank of Scotland v. Tottenham (supra), considered.

Gordon v. London City and Midland Bank (1902) 71 L. J. K. B. 215; [1902] 1 K. B. 242; 86 L. T. 98; 50 W. R. 276; 7 Com. Cas. 37.—C.A.

Hare v. Henty (1861) 10 C. B. (N.S.) 65; 30 L. J. C. P. 302; 7 Jur. (N.S.) 523; 4 L. T. 363; 9 W. R. 738, *followed*.
Prideaux v. Criddle (1869) 38 L. J. Q. B. 232; 1 L. R. 4 Q. B. 455; 20 L. T. 695; 10 B. & S. 515.—Q.B.

Palmer, In re, Armstead, Ex parte (1881) 51 L. J. Ch. 61; 45 L. T. 557; 30 W. R. 124; *reversed, sub nom. Palmer, In re, Richdale, Ex parte* (1882) 51 L. J. Ch. 462; 19 Ch. D. 409; 46 L. T. 116; 30 W. R. 262.—C.A. JESSEL, M.R., BRETT and HOLKER, L.JJ.

Young v. Grote (1827) 4 Bing. 253; 12 Moore 484; 5 L. J. (O.S.) C. P. 165; 29 R. R. 552, *commented on*.
Société Générale v. Metropolitan Bank (1873) 27 L. T. 849; 21 W. R. 335.

KEATING, J.—*Young v. Grote* was much discussed in *Ex parte Swan* (30 L. J. C. P. 113; 7 C. B. (N.S.) 400). But I think you will find that *Young v. Grote* is there treated as an exceptional case.—p. 853.

Young v. Grote and Ingham v. Primrose (1859) 28 L. J. C. P. 294; 7 C. B. (N.S.) 82; 5 Jur. (N.S.) 710, *questioned*.

Baxendale v. Bennett (1878) 47 L. J. Q. B. 624; 8 Q. B. D. 525; 26 W. R. 899.

BRETT, L.J.—In *Ingham v. Primrose* the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street; they were picked up by the endorser, joined together, and put into circulation. The acceptor was held liable, because, said the Court, though he did intend to cancel it, he did not cancel it. I cannot support that case on such a ground; and the honest way of dealing with it is to say we do not agree with it. In *Young v. Grote*, Young left a blank cheque with his wife, and in filling up the cheque for 50*l.*, the word "fifty" was written in the middle of the line, ample space being left for the insertion of other words by a forgery before the word "fifty." The words "three hundred and" were inserted. Notwithstanding the forgery, the Court held Young liable because he had been negligent in giving a blank cheque to his wife to fill up, and they also held that his wife was negligent in filling up the cheque by writing in the middle of the line. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care; but that case does not govern the present, it only applies where the persons defrauded are the defendant's own bankers (p. 627). . . . I think the observations made by the lords in *The Bank of Ireland v. Evans' Trustees* (5 H. L. Cas. 389) have shaken *Young v. Grote* and *Coles v. Bank of England* (10 A. & E. 437) as authorities.—p. 628.

Arnold v. Cheque Bank, Arnold v. City Bank (1876) 45 L. J. C. P. 562; 1 C. P. D. 578; 34 L. T. 729; 24 W. R. 759.—C.F.D., *followed*.

Fine Art Society v. Union Bank of London (1886) 56 L. J. Q. R. 70; 17 Q. B. D. 705; 55 L. T. 636; 35 W. R. 114; 51 J. P. 69.—C.A. ESHER, M.R., FRY and BOWEN, L.JJ.

Young v. Grote; Arnold v. Cheque Bank; and Arnold v. City Bank, considered.
Bank of England v. Vagliano (1891) 60 L. J. Q. B. 145; [1891] A. C. 107; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.—H.L. (E.). LORDS HALSBURY, L.C., SELBORNE, WATSON, BRAMWELL, HERSCHELL, MACNAGHTEN, MORRIS and FIELD.

Halifax Union v. Wheelwright (1875) 44 L. J. Ex. 121; L. R. 10 Ex. 183; 32 L. T. 802; 23 W. R. 704, *followed*.
Colchester Union v. Moy (1893) 5 R. 304; 68 L. T. 564; 57 J. P. 265.—CHARLES, J.

Arnold v. Cheque Bank and Fine Art Society v. Union Bank of London, considered.

Kleinwort v. Comptoir National d'Escompte de Paris (1894) 63 L. J. Q. B. 674; [1894] 2 Q. B. 157; 10 R. 269.—CAVE, J.

Young v. Grote, limited.

Adelphi Bank v. Edwards (1882) 26 S. J. 360.—CHITTY, J.; and *Société Générale v. Metropolitan Bank* (1873) 27 L. T. 849; 21 W. R. 335, *approved*.

Ingham v. Primrose; Arnold v. Cheque Bank; Baxendale v. Bennett; and London and South Western Bank v. Wentworth (1880) 49 L. J. Q. B. 657; 5 Ex. D. 96; 42 L. T. 188; 28 W. R. 516.—POLLOCK, B. and HAWKINS, J., *distinguished*.

Halifax Union v. Wheelwright, referred to.
Scholfield v. Londesborough (Earl) (1896) 65 L. J. Q. B. 593; [1896] A. C. 514; 75 L. T. 254; 45 W. R. 124.—H.L. (E.). LORDS HALSBURY, L.C., WATSON, MACNAGHTEN, MORRIS, SHAND and DAVEY.

[*Headnote*.—There is no duty incumbent upon the acceptor of a bill of exchange towards the public or subsequent holders of the bill to see that the bill is in such a form as to prevent the possibility of fraudulent alteration after it has left his hands. Censorship over the form of the instrument is no part of his duty.]

The relation of an acceptor to subsequent holders is not the same as that of a customer to a banker, as the duty of a customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the acceptor and possible future indorsees of a bill of exchange.

Young v. Grote and the passage from Pothier (*Traité du Contrat de Change*, Pt. I. c. 4, s. 99), on which that decision was founded, are only applicable to cases of mandate generally, and particularly that of banker and customer.] See judgments.

Young v. Grote, considered.

Union Credit Bank v. Mersey Docks and Harbour Board (1899) 68 L. J. Q. B. 842; [1899] 2 Q. B. 205; 81 L. T. 44.

BIGHAM, J.—*Young v. Grote* still appears to me to be an authority for the proposition that where a customer of a bank entrusts another with a signed cheque, and at the same time authorises that other to fill it up, the amount which the banker is entitled to debit the customer's account with is the amount which

may be filled in on the cheque, although the fact be that the customer limited the authority of the person to whom he entrusted the cheque to an authority to fill it up for a less sum than that appearing on the face of the cheque; and I am unable to find any sufficient reason for distinguishing between an order for the payment of money and an order for the delivery of goods.—p. 845.

Ingham v. Primrose (*supra*, col. 219), *approved*.

Nash v. De Preville (1900) 69 L. J. Q. B. 484; [1900] 2 Q. B. 72; 82 L. T. 642; 48 W. R. 434.

—C.A. SMITH, COLLINS and ROMER, L.J.

COLLINS, L.J.—As to estoppel being the foundation of rights arising upon unauthorised transfers of negotiable instruments, see Lord Mansfield in *Russell v. Langstaffe* (1780) 2 Doug. 514; Chief Justice Tindal in *Schultz v. Astley* (1836) 5 L. J. Q. P. 130; 2 Bing. (N.C.) 544; 2 Scott 815, and *Ingham v. Primrose*, impugned by Lord Justice Brett in *Bazendale v. Bennett* (1878) 47 L. J. Q. B. 624; 3 Q. B. D. 525, but decided in a considered judgment by a very strong Court, not questioned, so far as I know, elsewhere, and at all events sound in principle if wrong on the facts.—p. 493.

Fine Art Society v. Union Bank of London

(*supra*, col. 219); **Bissell v. Fox** (1885) 53 L. T. 193.—C.A. BRETT, M.R., BAGGALLAY

and BOWEN, L.J.; **Arnold v. Cheque Bank**

(*supra*, col. 219), *considered*.

Gordon v. London City and Midland Bank

(1902) 71 L. J. K. B. 215; [1902] 1 K. B. 242;

86 L. T. 98, 50 W. R. 276; 7 Com. Cas. 37.—

C.A. COLLINS, M.R., STIRLING and MATHEW,

L.J.

Schofield v. Londesborough (Earl) (*supra*), *distinguished*.

Herdman v. Wheeler (1901) 71 L. J. K. B.

270; [1902] 1 K. B. 361; 86 L. T. 48; 50 W. R.

300.—LORD ALVERSTONE, C.J., DARLING and

CHANNELL, JJ.

Kleinwort v. Comptoir National d'Escompte

de Paris (1894) 63 L. J. Q. B. 674; [1894]

2 Q. B. 157; 10 R. 259, *followed*.

La Cave & Co. v. Crédit Lyonnais (1896) 66

L. J. Q. B. 226; [1897] 1 Q. B. 148; 75 L. T.

514.—COLLINS, J.

14. APPROPRIATION OF SECURITIES.

Cox v. Harden (1803) 4 East 211; 1 Smith

20; **Moakes v. Nicholson** (1865) 19 C. B.

(N.S.) 290; 34 L. J. Q. P. 273; 12 L. T.

573; and **Shepherd v. Harrison** (1871) 40

L. J. Q. B. 148; L. R. 5 H. L. 116; 24

L. T. 857; 20 W. R. 1, *approved*.

Trimingham v. Maud (1868) 38 L. J. Cl.

207; L. R. 7 Eq. 201; 19 L. T. 554; 17

W. R. 313, *questioned*.

Yglesias, In re, Gomez, Ex parte (1875) 45

L. J. Bk. 54; L. R. 10 Ch. 639; 32 L. T. 677;

23 W. R. 780.—L.J.

JAMES, L.J.—But it is to be observed that

that decision (*Trimingham v. Maud*) was pro-

nounced some years before the case in the House

of Lords, and further that, as a matter of fact,

the Vice-Chancellor came to the conclusion that there was only one general account, and that the remittances were made on that general account. It is not necessary for any present purpose critically to examine that decision, but we are not sure that we can reconcile the premises and the conclusion in the judgment.—p. 680.

Shepherd v. Harrison, distinguished

Tappenbeck, In re, Banner, Ex parte (1876)

2 Ch. D. 278; 45 L. J. Bk. 78; 34 L. T. 199; 24

W. R. 476.—C.A.

MELLISH, L.J.—*Shepherd v. Harrison* is a

direct illustration of the distinction we have

been pointing out. In that case the consignor

did take the precaution of making the goods

deliverable to his own order, and of forwarding

the indorsed bill of lading together with the bill

of exchange to an agent of his own. The agent

forwarded the bill of lading and the bill of

exchange in the same letter to the consignee,

and requested him to accept the bill of exchange,

and return it. Under these circumstances it was

held by the House of Lords that the consignee

had no right to keep the bill of lading

without accepting the bill of exchange. This

case is no authority for holding that if the prop-

erty in the goods had already passed, the prop-

erty would revert on the bills of exchange being

refused acceptance.—p. 288.

Shepherd v. Harrison, discussed and distinguished.

Cahn v. Pockett's Bristol Channel Steam

Packet Co. (1899) 68 L. J. Q. B. 515; [1899]

1 Q. B. 649; 80 L. T. 269; 47 W. R. 422; 8

Asp. M. C. 516.—C.A.; *reversing* (1895) 67

L. J. Q. B. 625; [1898] 2 Q. B. 61; 79 L. T. 55.

—MATHEW, J.

A. L. SMITH, L.J.—It was however argued that

what Lord Westbury and Lord Cairns said in

Shepherd v. Harrison shows that I am wrong,

but I do not think so. What those noble and

learned lords were dealing with was the passing

of property in goods contained in a bill of lading

to a purchaser, he not accepting the draft accom-

panying the bill of lading. . . . The noble and

learned lords were not dealing with the effect

of the Factors Acts, which was not before them,

and with which they had nothing to do. . . .

The Legislature, when it passed the Sale of

Goods Act, 1893, by sect. 19, sub-sect. 3, enacted

what had been held by the House of Lords in

Shepherd v. Harrison, and nothing more, the

Act being an Act to codify the law.—p. 519.

COLLINS, L.J.—The whole point (in *Shepherd*

v. Harrison) was whether the true owner had

shown that he intended to reserve to himself the

ius disponendi in the goods so as to negative the

inference that the property in them had passed

to the person to whom a bill of lading indorsed

in blank had been handed by the owner's agent

together with a bill of exchange for the price of

the acceptance. The handing over the bill of

lading under such conditions clearly did not rebut

the conclusive evidence from the transaction

itself that the seller intended to preserve his

ius disponendi until the acceptance of the bill of

exchange, and that therefore no property in the

goods passed to the plaintiff by the delivery of

the bill of lading. It was not a question what

title the buyer, having no title himself, could

pass to a *bond fide* purchaser, but whether he

could make title against the seller himself, a point wholly outside the special legislation of these Acts, which are based, as I have shown, on a constructive misleading of third persons. The decision and the *dicta* are addressed to this point only.—p. 528.

ROMER, L.J. to the same effect.

Tappenbeck, In re, Banner, Ex parte, considered.

Phelps v. Comber (1884) 26 Ch. D. 755; 51 L. T. 16.—BACON, V.-C.: *affirmed*, (1885) 54 L. J. Ch. 1017; 29 Ch. D. 813; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. C. 428.—C.A. COTTON, LINDLEY and FRY, L.JJ. See judgments.

Thompson, In re, Copeland, Ex parte (1883) 2 Mont. & Arr. 177; 3 Deac. & C. 199; 3 L. J. Bk. 15, *followed*.

Leggatt, In re, Dewhurst, Ex parte (1878) 42 L. J. Bk. 87; L. R. 8 Ch. 965; 29 L. T. 125; 21 W. R. 874.—L.JJ.

Ranken v. Alfaro, 35 L. T. 664; 24 W. R. 54.—V.-C.; reversed, (1877) 46 L. J. Ch. 832; 5 Ch. D. 786; 36 L. T. 529.—C.A.

Frith v. Forbes (1862) 32 L. J. Ch. 10; 8 Jur. (N.S.) 1115; 7 L. T. 261; 11 W. R. 4; 4 De G. F. & J. 409; reversing 31 L. J. Ch. 798; 6 L. T. 847; 10 W. R. 638, discussed.

Robey & Co's Perseverance Ironworks v. Ollier (1872) L. R. 7 Ch. 695; 27 L. T. 362; 20 W. R. 956. JAMES, L.J.—I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo it carries a lien on that cargo into the hands of every holder of the bill. In *Frith v. Forbes* there were grounds for saying that the intention was to give Frith, Sands & Co. an equitable interest in the cargo, for the letters of the consignor to the consignees referred to bills of exchange which the consignor had drawn in favour of Frith, Sands & Co. . . . The decision in *Frith v. Forbes* turned upon special circumstances and can hardly be treated as governing any other case.—p. 698

Frith v. Forbes, distinguished.

Robey & Co's Perseverance Ironworks v. Ollier, followed.

Ranken v. Alfaro (1876) 35 L. T. 664; 24 W. R. 54.—HALL, V.-C.; reversed, supra. HALL, V.-C.—[*Frith v. Forbes* was distinguished on the ground that the bills in that case showed on the face of them that they were appropriated to the cargo.]

Frith v. Forbes, explained.

Entwistle, In re, Arbutnot, Ex parte (1876) 3 Ch. D. 477; 25 W. R. 238.—C.A.

JAMES, L.J.—The case of *Frith v. Forbes* must not be misunderstood. The Court there held, that in a transaction between principal and agent a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods was binding on the agent, and that he could not set up against it his own general lien. But that decision has nothing whatever to do with a transaction between vendor and purchaser.—p. 480.

Frith v. Forbes, distinguished.

Suse, In re, Deyer, Ex parte (1884) 13 Q. B. D. 766; 51 L. T. 437; 33 W. R. 290.—C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ.

Frith v. Forbes, discussed.

Robey & Co's Perseverance Ironworks v. Ollier, approved.

Phelps, Stokes & Co. v. Comber (1885) 29 Ch. D. 813; 54 L. J. Ch. 1017; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. C. 428.—C.A. COTTON, LINDLEY and FRY, L.JJ.

COTTON, L.J.—I should also mention that in another case referred to—*Ex parte Deyer (supra)*—not only did I say that *Frith v. Forbes* was decided under special circumstances, but Lord Justice Lindley expressed himself in the same way, as not considering that it laid down the general principle which was there contended for.—p. 819.

Frith v. Forbes, impugned.

Brown, Shipley & Co. v. Kough (1885) 29 Ch. D. 848; 54 L. J. Ch. 1024; 52 L. T. 878; 34 W. R. 2; 5 Asp. M. C. 438.—C.A. COTTON, LINDLEY and FRY, L.JJ.

COTTON, L.J.—That is a case which has been constantly mentioned, but never, I think, followed in any other case. Possibly there has never been a case so much like *Frith v. Forbes* as the present; but we cannot disregard what has been said by Lord Justice James, that *Frith v. Forbes* "turned upon special circumstances, and can hardly be treated as governing any other case." Now, if that case is to govern the present, the lord justice, when he said it turned on special circumstances, must really have spoken in disregard of what, I suppose, is a most common practice between merchants abroad and merchants in England, viz., that goods are remitted with a letter stating that they are remitted, and that certain bills have been drawn against them, and that the bills of exchange do also refer on their face to the consignments in the same way. He must have considered that there was something special in the circumstances of that case showing that there was an appropriation in favour of the consignor, and showing that there was a transfer of that appropriation to the bill-holders, which we cannot gather distinctly from the report. . . . Unfortunately, we cannot find in the report of *Frith v. Forbes* what was the ground upon which the judges decided that there was an appropriation in favour of the consignors. It may be that there were letters or circumstances which tended to support the judges in that conclusion, and Begbie & Co. did not in fact dispute it, because, although, as pointed out by Mr. Carson, it is evident that both below and in the Court of Appeal, Begbie & Co. were represented, yet they seem to have taken in neither Court any strong part in arguing against the rights of the bill-holders. If the lords justices did in that case lay down that a letter, such as this is, without anything more, constitutes an appropriation in favour of the consignor, so that the goods must be kept as a specifically appropriated fund, in his favour, I should say they drew a conclusion which is not justified, and the sooner this Court says that, in my opinion, the better. It may be that there was other evidence, but, in my opinion, it is not the correct conclusion from letters of advice, such as this is, that there was an appropriation in favour of the consignor, that the proceeds of the goods shall be kept as a specific fund appropriated for the payment of bills. That, in my opinion, would be a wrong conclusion, and, as far as one can see (and this was pressed upon

us by Mr. Carson), that was all the evidence that the judges had in *Frith v. Forbes*.—p. 865.

Thomson v. Simpson, L. R. 9 Eq. 497; 22 L. T. 898; 18 W. R. 964, *reversed*, (1870) 39 L. J. Ch. 857; L. R. 5 Ch. 659; 18 W. R. 1090.—L.C. and L.J.

Gothenburg Commercial Co., In re (1881) 44 L. T. 166; 29 W. R. 358.—C.A. **JESSELL, M.R., BRETT and COTTON, L.J.**; *reversing* 42 L. T. 174; 28 W. R. 456.—v.-c.; *approved and followed*.
Neck, In re, Broad, Ex parte (1884) 54 L. J. Q. B. 79; 13 Q. B. D. 740; 51 L. T. 888; 32 W. R. 912.—C.A. **BAGGALLAY, COTTON and LINDLEY, L.J.**

Inman v. Clare (1858) Johns. 769; 5 Jur. (N.S.) 89; 32 L. T. (o.s.) 353; and **Agra and Masterman's Bank, In re, Asiatic Banking Corporation, Ex parte** (1867) 36 L. J. Ch. 222; L. R. 2 Ch. 391; 16 L. T. 162; 15 W. R. 414.—L.J., *distinguished*.
Barned's Banking Co., In re, Stephens, Ex parte (1868) L. R. 3 Ch. 753; 19 L. T. 198; 16 W. R. 1162.—L.J.

PAGE-WOOD, L.J.—The Agra Bank gave a letter of credit in which they said: "You may draw to a certain extent, and whatever bills you draw to that extent we will honour." I found a difficulty in that case in arriving at a contract between the acceptor of a bill upon the faith of the letter of credit and the person who gave the letter. The lords justices held, and I was very glad they did so, that the letter was given for the express purpose of being exhibited to all the world, and that all the world was invited to trust the representations of the persons who had given the letter, and therefore those persons were held bound. But there is nothing of the kind here. There is nothing on the face of the bills to show that any such guarantee as that existed.—p. 756.

Waring, Ex parte (1815) 19 Ves. 345; 13 R. R. 217, *applied*.

Manning, In re, Smith, Ex parte (1834) 4 Deac. & C. 579; 4 L. J. Bk. 14.

Waring, Ex parte, explained.

Laycock v. Johnson (1847) 6 Hare 199; 16 L. J. Ch. 350; 11 Jur. 688.—v.-c.

Waring, Ex parte, explained and applied.

Powles v. Hargreaves (1858) 3 De G. M. & G. 430; 2 Eq. R. 162; 23 L. J. Ch. 1; 17 Jur. 1083; 2 W. R. 21.—L.C. and L.J.

Waring, Ex parte, applied.

Ackroyd, Ex parte (1861) 3 De G. F. & J. 726.—L.J.

Waring, Ex parte, explained and held inapplicable.

New Zealand Banking Corporation, In re, Hickie's Case (1867) 36 L. J. Ch. 809; L. R. 4 Eq. 226; 16 L. T. 654.—M.R.

Waring, Ex parte, considered.

Joint Stock Discount Co., In re, Loder's Case (1868) L. R. 6 Eq. 491; 16 W. R. 1076.—M.R.

Waring, Ex parte, referred to.

Barned's Banking Co., In re, Stephens, Ex parte (1868) L. R. 3 Ch. 753; 19 L. T. 198; 16 W. R. 1162.—L.J.

O.C.

Waring, Ex parte, and Powles v. Hargreaves, applied.

Trimingham v. Maud (1868) (*ante*, col. 221).

Waring, Ex parte, inapplicable.

New Zealand Banking Corporation, In re, Levy, Ex parte (1869) L. R. 7 Eq. 449; 20 L. T. 296; 17 W. R. 565.—M.R.

Waring, Ex parte, inapplicable.

General Rolling Stock Co., In re, Alliance Bank, Ex parte (1869) 38 L. J. Ch. 714; L. R. 4 Ch. 423; 20 L. T. 685; 17 W. R. 631.—L.J.

Waring, Ex parte, applied.

City Bank v. Luckie (1870) L. R. 5 Ch. 773; 23 L. T. 376; 18 W. R. 1181.—C.A.

Waring, Ex parte, commented on.

Barned's Banking Co., In re, Banner v. Johnston (1871) 40 L. J. Ch. 730; L. R. 5 H. L. 157; 24 L. T. 542.—H.L.

Waring, Ex parte, applied.

Richardson, In re, Smart, Ex parte (1872) 42 L. J. Bk. 22; L. R. 8 Ch. 220; 28 L. T. 146; 21 W. R. 237.—C.A.

Waring, Ex parte, applied.

Leggatt, In re; Gledstanes, In re, Dewhurst, Ex parte (1873) 42 L. J. Bk. 87; L. R. 8 Ch. 965; 29 L. T. 125; 21 W. R. 874.—L.J.

Waring, Ex parte, and Richardson, In re, Smart, Ex parte, 42 L. J. Bk. 22; L. R. 8 Ch. 220; 28 L. T. 146; 21 W. R. 237.—C.A., observed upon.

Vaughan v. Halliday (1874) L. R. 9 Ch. 561; 30 L. T. 741; 22 W. R. 886.—L.J.; *reversing* 30 L. T. 249; 22 W. R. 503.—v.-c.

Waring, Ex parte, explained and applied.

Barned's Banking Co., In re, Joint-Stock Discount Co., Ex parte (1875) 44 L. J. Ch. 494; L. R. 10 Ch. 198; 31 L. T. 862; 23 W. R. 381.—L.J.

Waring, Ex parte, inapplicable.

Lindsay, In re, Lambton, Ex parte (1875) 44 L. J. Bk. 81; L. R. 10 Ch. 405; 32 L. T. 380; 23 W. R. 662.—L.J.

Waring, Ex parte, inapplicable.

Yglesias, In re, General South American Co., Ex parte (1875) 45 L. J. Bk. 54; L. R. 10 Ch. 635; 33 L. T. 112; 23 W. R. 843.—C.A.

Waring, Ex parte, inapplicable.

Tappenbeck, In re, Banner, Ex parte (1876) 45 L. J. Bk. 73; 2 Ch. D. 278; 34 L. T. 199; 24 W. R. 476.—C.A.

Waring, Ex parte, and Powles v. Hargreaves (supra, col. 225), considered.

Royal Bank of Scotland v. Commercial Bank of Scotland (1882) 7 App. Cas. 366; 47 L. T. 360; 31 W. R. 49.—H.L. (sc.).

Waring, Ex parte, applied and explained.

Suse, In re, Dever, Ex parte (1885) 54 L. J. Q. B. 390; 14 Q. B. D. 611; 53 L. T. 131; 39 W. R. 625.—C.A.

BILLS OF SALE.

1. PARTIES.
2. ATTESTATION.
3. REGISTRATION.
4. POSSESSION.
5. STATUTORY FORM.
6. STATEMENT OF CONSIDERATION.
7. PROPERTY PASSING BY.
8. SUCCESSIVE BILLS OF SALE.
9. PRIORITY.
10. PUTTING IN FORCE.
11. TRUE OWNER.
12. WHEN FRAUDULENT AND VOID.

1. PARTIES.

Shears v. Jacob (1866) 35 L. J. C. P. 241; L. R. 1 C. P. 513; 12 Jur. (N.S.) 785; 14 L. T. 286; 14 W. R. 609; 1 H. & R. 492, *approved*.
Deffell v. White (1866) 36 L. J. C. P. 25; L. R. 2 C. P. 144; 12 Jur. (N.S.) 902; 15 L. T. 211; 15 W. R. 68.—C.F.

Chapman v. Knight (1880) 5 C. P. D. 308; 49 L. J. C. P. 425; 42 L. T. 538; 28 W. R. 919; 44 J. P. 491, *discussed*.

Walrand v. Goldmann (1885) 55 L. J. Q. B. 323; 16 Q. B. D. 121; 53 L. T. 963; 34 W. R. 272.

WILLES, J.—The case of *Chapman v. Knight* was decided on sections of the Bills of Sale Act, 1878, which have since been repealed; and I do not think that case is any guide with regard to the present case.

2. ATTESTATION.

Davis v. Goodman (1879) 49 L. J. C. P. 101; 5 C. P. D. 20; 41 L. T. 625; 28 W. R. 150.—C.P.D.; *reversed*. (1880) 49 L. J. C. P. 344; 5 C. P. D. 128; 42 L. T. 258; 28 W. R. 559.—C.A.

Davis v. Goodman, in C.P.D., *followed*.
Baghott v. Norman (1880) 41 L. T. 787.—V.C.

Parsons v. Brand, Coulson v. Dickson (1890) 59 L. J. Q. B. 189; 25 Q. B. D. 110; 62 L. T. 470; 38 W. R. 388.—C.A. **COTTON, LINDLEY and LOPES, L.J.J.**, *distinguished*.
Bird v. Davey (1890) 60 L. J. Q. B. 8; [1891] 1 Q. B. 20; 63 L. T. 741; 39 W. R. 40.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.J.J.**

Parsons v. Brand, Coulson v. Dickson, *followed*.

Sims v. Trollope (1896) 66 L. J. Q. B. 11; [1897] 1 Q. B. 24; 75 L. T. 351; 45 W. R. 97.—C.A. **ESHER, M.R., LOPES and RIGBY, L.J.J.**

Bird v. Davey, *distinguished*.
Haseltine, In re, Woodward v. Haseltine (1891) 60 L. J. Ch. 357; [1891] 1 Ch. 464; 64 L. T. 303; 39 W. R. 405.—C.A. **LINDLEY, LOPES and KAY, L.J.J.**

KAY, L.J.—Here the description of the grantee is "the Discount Bank of London, of which bank L. Simmons is the sole proprietor." The Discount Bank of London might be the name of a corporation, and is there any irresistible inference from what appears on the bill of sale that it was not? Unless there is such inference, *Bird v. Davey* does not apply, and the bill of sale is bad. . . . To say that there is any irresistible inference

that the Discount Bank of London was the trade name of Simmons is going too far.

3. REGISTRATION.

What Documents Require.

Allsopp v. Day (1861) 7 H. & N. 457; 31 L. J. Ex. 105; 8 Jur. (N.S.) 41; 5 L. T. 320; 10 W. R. 135; and **Byerley v. Prevost** (1871) L. R. 6 C. P. 144, *questioned*.
Thomson v. Barrett (1880) 1 L. T. 268, *distinguished*.

Walden, In re, Odell, Ex parte (1878) 10 Ch. D. 76; 48 L. J. Bk. 1; 39 L. T. 333; 27 W. R. 274.—C.A.

THESIGER, L.J.—But it is said, on the other hand, that there have been two or three cases decided which are contrary to the views expressed by Mr. Justice Lindley, and to the decision at which we are arriving. I do not think it necessary to decide or discuss whether or not those cases were properly decided, because in my view they are fairly distinguishable from the present case, looking at the facts to which I have already adverted. The first case is *Thomson v. Barrett*. . . . The jury found that it was a mere receipt, and Cockburn, C.J., in his judgment, comments upon that fact, and makes it a portion of the argument which leads him to the conclusion at which he arrives. **Crompton, J.** also says, "The jury having found that this document was not a record of the transaction, it does not require to be registered. Therefore you have two circumstances distinguishing that case from the present, namely, first, that there was a verbal arrangement, a complete agreement, apart from the document in the form of a receipt, and which was found by the jury to be a mere receipt; and secondly, that the whole of the transaction was not reduced to writing, but only a receipt for a portion of the purchase-money." The next case referred to was *Allsopp v. Day*. . . . The third case is *Byerley v. Prevost*, and it partakes of the circumstances of the other two. There was first a verbal arrangement for a purchase, then a verbal arrangement for the reletting of the goods, and then there was a simple receipt for the purchase-money. As I have already observed, it is not absolutely necessary to say whether those cases were rightly decided; but I must add that, if on any future occasion circumstances should arise identical with those in *Allsopp v. Day*, *Byerley v. Prevost*, and *Thomson v. Barrett*—at all events the first two—I think it would be very desirable that those cases should receive further discussion and consideration.—p. 90.

Allsopp v. Day, *distinguished*.

Byerley v. Prevost, *disapproved*.

Walden, In re, Odell, Ex parte, *followed*.
Baum, In re, Cooper, Ex parte (1875) 10 Ch. D. 318; 48 L. J. Bk. 40; 39 L. T. 521; 27 W. R. 298.—C.A.

JAMES, L.J. (for the Court).—In the recent case of *Ex parte Odell* (*supra*) two members of this Court expressed doubts as to the correctness of the decision in *Allsopp v. Day*. We do not, however, on the present occasion, think it necessary to go into any minute examination of *Allsopp v. Day*. There was this apparent distinction between that case and the present, that there the two documents, the inventory and the receipt, were not written on the same piece of paper, and

did not together form the title to the property. The title was made out by means of a parcel evidence connecting the receipt with the inventory which was referred to in a letter containing the receipt. Nor is it necessary to criticise the other cases that followed *Allsopp v. Day* (*Dyerley v. Preece*) because so far as regards the general law, those cases have been entirely swept away by the new Bills of Sale Act (41 & 42 Vict. c. 81). . . . Though I do not think it necessary to go further into those cases, yet if, as has been pressed upon us in argument, the logical sequence of them is that such a document as the one before us is not an "assurance" requiring registration, we should be compelled to express our dissent from them or at least our inability to follow the logical sequence with regard to this particular document.—p. 321.

Baum, In re, Cooper, Ex parte, commented on and distinguished.

Woodgate v. Godfrey (1879) 5 Ex. D. 24; 49 L. J. Ex. 1; 42 L. T. 84; 28 W. R. 88.—C.A.

JESSEL, M.R.—The difficulty in this case is occasioned by the decision in *Ex parte Cooper, In re Baum*; it is not easy to discover the principle upon which the judgment proceeded; but we have had the benefit of some remarks made by Thesiger, L.J. as to that case, and those remarks show that the decision may be explained upon an intelligible principle. That principle is, that independently of the document there was no sale of the goods, that there was one transaction constituted by the inventory and the receipt thereto attached, and that if there had been no document there would have been no transaction. Accordingly, the lords justices held that the document was an "assurance" within the Bills of Sale Act, 1854, and required registration. But we have now to deal with a case where the facts are of a different nature.—p. 26.

Allsopp v. Day, approved.

Woodgate v. Godfrey, followed.

Marsden v. Meadows (1881) 50 L. J. Q. B. 536; 7 Q. B. D. 80; 45 L. T. 301; 29 W. R. 816.—C.A. BRAMWELL, COTTON and BRETT, L.JJ.

Woodgate v. Godfrey and Marsden v. Meadows, approved.

Cochrane v. Matthews (1878) 10 Ch. D. 80, n.; Walden, In re, Odell, Ex parte, and Baum, In re, Cooper, Ex parte, distinguished.

North Central Wagon Co. v. Manchester, Sheffield and Lincolnshire Ry. (1886).—C.A. (*infra*, col. 235).

Walden, In re, Odell, Ex parte, and Baum, In re, Cooper, Ex parte, considered.

Manchester, Sheffield and Lincolnshire Ry. v. North Central Wagon Co. (1888).—H.L. (*infra*, col. 235).

Haydon v. Brown, 59 L. T. 330: reversed, (1888) 59 L. T. 810.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

Brown v. Bateman (1867) 36 L. J. C. P. 134; L. R. 2 C. P. 272; 15 L. T. 658; 15 W. R. 350, distinguished.

Harrison, In re, Jay, Ex parte (1880) 14 Ch. D. 19; 42 L. T. 600; 28 W. R. 449; 44 J. P. 409.—C.A.

Brown v. Bateman and Blake v. Izard (1867) 16 W. R. 108.—Q.B. followed.

Reeve v. Whitmore (1863) 4 De G. J. & S. 1; 33 L. J. Ch. 68; 9 Jur. (N.S.) 1214; 9 L. T. 811; 12 W. R. 113; 3 N. R. 15, distinguished.

Reeves v. Barlow (1884) 12 Q. B. D. 436; 53 L. J. Q. B. 192; 50 L. T. 782; 32 W. R. 672.—C.A.

BOWEN, L.J. (for self, COLERIDGE, G.J. and BRETT, M.R.).—The learned counsel for the appellant contended that the previously-exempted case of such building agreements was directly met by the new words which the Act of 1878 for the first time introduced into the interpretation clause, and that the present agreement must be registered as being an agreement by which a right in equity to personal chattels is conferred. On the part of the respondent it was urged that a right to after-acquired property was not a right to personal chattels within the meaning of the Act of 1878. It is not necessary to pronounce an authoritative decision on this very grave point (as to which, see per Lord Chelmsford, *Holroyd v. Marshall*), because in our judgment whatever right is conferred by the clause of the building agreement now under discussion, is not a right in equity at all, but a right at law. Down to the time when the building materials were brought upon the landlord's premises, there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises, and until this happened, there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity as distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that, upon the happening of a particular event, the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before. *Reeve v. Whitmore* and *Holroyd v. Marshall* have, therefore, no immediate bearing on the present case. If the present agreement does not fall within the Bills of Sale Act, 1878, as conferring a right in equity, it is still governed by the decisions in *Brown v. Bateman* and *Blake v. Izard*, authorities which, for the reasons we have mentioned, we are not prepared to review.—p. 442.

Brown v. Bateman; Blake v. Izard; Garrud, In re, Newitt, Ex parte (1881) 51 L. J. Ch. 381; 16 Ch. D. 522; 44 L. T. 6; 29 W. R. 544.—C.A.; Reeves v. Barlow; and Yates, In re, Batchelor v. Yates (1888) 57 L. J. Ch. 697; 38 Ch. D. 112; 59 L. T. 47; 36 W. R. 563.—C.A. COTTON, LINDLEY and BOWEN, L.JJ., distinguished.

Burdett, In re, Byrne, Ex parte (1888) 57 L. J. Q. B. 263; 20 Q. B. D. 810; 58 L. T. 708; 36 W. R. 345; 5 Morrell 32.—C.A., commented on.

Climpson v. Coles (1889) 58 L. J. Q. B. 316;

23 Q. B. D. 463; 61 L. T. 116; 38 W. R. 110.—DENMAN and STEPHEN, JJ.

DENMAN, J.—It was . . . argued that inasmuch as in this case there was a power to sell any part of the materials upon the land separately upon default in the performance of any part of the mortgagor's agreements, including that to repay the 6½, which was advanced upon the execution of the deed, the case fell within the requirements of the Bills of Sale Act, according to the tests given by the C. A., especially in *Burdett*, *In re*, and in *Yates*, *In re*. We do not think that *Burdett*, *In re*, goes at all further than to decide that where a deed is executed which mortgages both personal chattels and other property, such deed is valid as regards the other property if it is possible to sever the provisions of the deed into two parts, so as to apply its provisions to each species of property independently of the other. . . . *Yates*, *In re*, the other case relied upon by the plaintiffs, lays down a test which seems to us applicable to the present case. . . . The decision . . . was against the application of the Bills of Sale Act to such a case [as was there considered]. But the ground of that decision was one which cannot apply to a case like the present in which the "chattels" seized are pure chattels, and in which the power to deal with them is not a power to be derived from an Act of Parliament, but from the agreement of the parties themselves.—pp. 350, 351.

Reeves v. Barlow, followed.

Morris v. Dolobbel-Filipo (1892) 61 L. J. Ch. 518; [1892] 2 Ch. 352; 66 L. T. 320; 40 W. R. 492.—STIRLING, J.

Brown v. Bateman (*supra*), *Blake v. Izard* (*supra*), *Garrud*, *In re*, *Newitt*, *Ex parte*, and *Reeves v. Barlow*, referred to.

Climpson v. Coles, distinguished.

Church v. Sage (1892) 5 R. 140; 67 L. T. 800; 41 W. R. 175.

WRIGHT, J.—It has long been settled that an ordinary building agreement between a landowner and a builder is not brought within the Bills of Sale Acts as regards plant and materials merely by reason of a provision in it that the plant and materials, when brought upon the land, are to be considered as annexed to the land or are to become the property of the lessor: *Brown v. Bateman*; *Blake v. Izard*; *Newitt*, *Ex parte*; *Reeves v. Barlow*. . . . The document, however, which is now in question is not of that kind. It is not an agreement between landlord and builder, but is a mere mortgage by a builder of his interest in a building agreement to a stranger, to secure money advanced by the stranger to enable the builder to carry out the building agreement, and is subject to all the ordinary incidents of a mortgage. It purports to assign the plant and materials now or hereafter to be brought on the ground, or adjoining thereto, to the lender absolutely, subject to redemption, and authorises him, in case the builder impairs the security by delay in building, &c., "to enter on the land and complete the buildings, and for that purpose to take possession of the land and of all plant and materials thereon." . . . Apart from other authority, I should be of opinion that this mortgage requires registration as a bill of sale in respect of the plant and materials. But *Climpson v. Coles*, which was decided subsequently to all the other cases cited, raises a

difficulty. In that case the document in question was a mortgage, and the Court, no doubt, appear to have expressed the opinion that the same considerations applied to that mortgage as in the case of an ordinary building agreement. But they did not decide the case on that ground, and there are two circumstances which appear to me to distinguish that case from this. In the first place, so far as can be gathered from the reports, the mortgage appears to have been the owner of the land. In the second place, his covenant was that the plant and materials to be brought upon the premises should be considered as immediately attached to, and forming part of, the fee-simple of the premises. This provision seems to bring the case directly within the principle of *Brown v. Bateman* and the cases which followed it, and was probably the ground of the expressions to which I have referred in *Climpson v. Coles*. That case, therefore, is not an authority against the view I have taken.—pp. 141, 142, 143.

Yates, *In re*, *Batchelder v. Yates* (*supra*, col. 230), *limited*.

Small v. National Provincial Bank of England (1894) 63 L. J. Ch. 270; [1894] 1 Ch. 686; 8 R. 163; 70 L. T. 492; 42 W. R. 378.—STIRLING, J.

[Held that the above case does not apply where there is an express assignment of personal chattels *quid* chattels, and not as incident to the land.]

Pulbrook v. Ashby (1887) 56 L. J. Q. B. 376; 35 W. R. 779, *approved*.

Stevens v. Marston (1890) 60 L. J. Q. B. 192; 64 L. T. 274; 39 W. R. 129; 55 J. P. 404.—C.A. Esher, M.R., LOPES and KAY, L.JJ.

Pulbrook v. Ashby, explained and approved. Roundwood Colliery Co., *In re*, *Lec v. Roundwood Colliery Co.* (1897) 66 L. J. Ch. 186; [1897] 1 Ch. 373; 75 L. T. 641; 45 W. R. 324.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.; reversing 66 L. J. Ch. 186; [1897] 1 Ch. 373; 75 L. T. 508; 45 W. R. 217.—STIRLING, J.

Beckett v. Tower Assets Co., 60 L. J. Q. B. 56; [1891] 1 Q. B. 1.—CAVE, J., reversed, (1891) 60 L. J. Q. B. 493; [1891] 1 Q. B. 638; 64 L. T. 497; 39 W. R. 438; 55 J. P. 438.—C.A. Esher, M.R., FRY and BOWEN, L.JJ.

Beckett v. Tower Assets Co. (*supra*), in C.A., followed.

Mellor's Trustee v. Maas (1901) 71 L. J. K. B. 26; [1902] 1 K. B. 137; 85 L. T. 490; 50 W. R. 111; 8 Manson 341.—WRIGHT, J.

Coburn v. Collins (1887) 56 L. J. Ch. 504; 55 Ch. D. 373; 66 L. T. 431; 35 W. R. 610.—KEKEWICH, J., distinguished.

McIntire v. Crossley (1895) 64 L. J. P. C. 129; [1895] A. C. 437; 11 R. 207; 72 L. T. 731; 2 Manson 334.—H.L. (TR.). LORDS HERSCHELL, L.C., ASHBORNE and SHAND.

HERSCHELL, L.C.—With regard to *Coburn v. Collins*, upon which reliance was placed, that seems to me to be a very different case from the present one. That was an agreement for the sale of a business, the price of which no doubt was to be paid at a future time. There was no agreement between the parties in that case that the property should not pass at once. There were none of these stipulations

such as one finds here as to the use of that which was the subject of the agreement to sell. In this case the intending purchaser cannot sell, assign, sublet, or even remove from one building to another this gas engine, the property of which is supposed to be in him; in *Cibery v. Collier* it was the sale of a business in the case where the purchaser was intending to continue the business and to sell the stock-in-trade—two contracts of a very different nature. In the next place there, in terms, the vendors were to have a lien or charge until the full price was paid—a lien or charge implying that the property had passed to others, for a man does not have a lien on his own property or a charge either. Therefore, in that case there were provisions in the agreement which pointed to the intention being that the substance of the transaction was a sale, in which the property passed with a security, *eo instanti*, given by the purchaser to the vendor. That decision does not seem to me to be in the slightest degree inconsistent with the conclusion at which your lordships have arrived in the present case.—p. 134.

Yorkshire Ry. Wagon Co. v. Maclure (1881) 19 Ch. D. 478; 51 L. J. Ch. 253; 45 L. T. 747; 30 W. R. 288.—KAY, J.; *reversed*, (1882) 21 Ch. D. 309; 51 L. J. Ch. 857; 47 L. T. 290; 30 W. R. 761.—C.A. JESSEL, M.R., LINDLEY and HOLKER, L.JJ.

North Central Wagon Co. v. Manchester, Sheffield and Lincolnshire Ry. (1886) 55 L. J. Ch. 780; 32 Ch. D. 477; 54 L. T. 487; 34 W. R. 430; 50 J. P. 630.—V.-C.; *reversed*, (1887) 56 L. J. Ch. 609; 35 Ch. D. 191; 56 L. T. 755; 35 W. R. 443.—C.A. COTTON, BOWEN and FRY, L.JJ.; the latter decision *affirmed*, *nom. Manchester, Sheffield and Lincolnshire Ry. v. North Central Wagon Co.* (1888) 58 L. J. Ch. 219; 13 App. Cas. 554; 59 L. T. 730; 37 W. R. 305.—H. L. (E.). LORDS HERSCHELL, WATSON, FITZGERALD and MACNAGHTEN.

Yarrow, In re, Collins, Ex parte, Collins v. Weymouth (1889) 59 L. J. Q. B. 18; 61 L. T. 642; 38 W. R. 175.—CAVE, J., *not followed*.

Yorkshire Ry. Wagon Co. v. Maclure (1882) 51 L. J. Ch. 857; 21 Ch. D. 309; 47 L. T. 290; 30 W. R. 761.—C.A. JESSEL, M.R., LINDLEY and HOLKER, L.JJ.; and **M. S. & L. Ry. v. North Central Wagon Co.** (*supra*), *explained*.

Redhead v. Westwood (1888) 59 L. T. 293.—KAY, J., *considered*.

Watson, In re, Official Receiver, Ex parte (1890) 59 L. J. Q. B. 394; 25 Q. B. D. 27; 63 L. T. 209; 38 W. R. 567; 7 Morrell 155.—C.A. ESHER, M.R., COTTON, LINDLEY, FRY and LOPES, L.JJ.

Watson, In re, Official Receiver, Ex parte, followed.

Madell v. Thomas (1890) 60 L. J. Q. B. 227; [1891] 1 Q. B. 230; 64 L. T. 9; 39 W. B. 280.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Watson, In re, Official Receiver, Ex parte, and Madell v. Thomas, referred to. Beckett v. Tower Assets Co. (1891) 60 L. J. Q. B. 493; [1891] 1 Q. B. 638; 64 L. T. 497; 39 W. R. 438; 55 J. P. 438.—C.A.; *reversing* 60 L. J. Q. B. 56; [1891] 1 Q. B. 1.—CAVE, J.

Hall, In re, Close, Ex parte (1894) 54 L. J. Q. B. 43; 14 Q. B. D. 386; 51 L. T. 795; 33 W. R. 228.—CAVE, J., *followed*. **Cunningham & Co. In re Attenborough's Case** (1886) 54 L. J. Ch. 445; 23 Ch. D. 682; 52 L. T. 214; 33 W. R. 337.—PEARSON, J.

Hall, In re, Close, Ex parte, and Cunningham & Co., In re, ratio decidendi disapproved.

Townsend, In re, Parsons, Ex parte (1886) 16 Q. B. D. 532; 55 L. J. Q. B. 137; 34 W. R. 329; 53 L. T. 897; 3 Morrell 86.—C.A.

ESHER, M.R.—It seems to me that the words of sect. 9 [of Bills of Sale Act, 1882] strike at all documents which give a security upon goods for the payment of money, and I take it that the legislature intended to say, if you cannot make your agreement by a document in the form specified in the schedule, you shall not be able to make it by any document at all. I cannot, therefore, agree with the *ratio decidendi* of either of the two cases which have been relied upon. But I think that *Ex parte Close* was obviously rightly decided, because the document there in question was one of those which are excepted by the proviso at the end of sect. 4 of the Act of 1878, and for that reason it was not within the Act. In *In re Cunningham*, Pearson, J. did not follow the actual decision in *Ex parte Close*, but he applied the doctrine which was not necessary to the decision of that case, and I think he intended to agree with that doctrine. If his decision required the application of that doctrine I cannot agree with the decision; if it did not, still I cannot agree with the doctrine.—p. 345.

Hall, In re, Close, Ex parte; Cunningham & Co., In re, and Townsend, In re, Parsons, Ex parte, explained.

Hardwick, In re, Hubbard, Ex parte (1886) 55 L. J. Q. B. 490; 17 Q. B. D. 690; 59 L. T. 172, n.; 35 W. R. 2; 3 Morrell 246.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.; *reversing* 34 W. R. 790.

ESHER, M.R.—It appears that the only difficulty which was felt by the Divisional Court arose out of the interpretation which they put on some of the language which was used by this Court in *Ex parte Parsons*. With great deference to the learned judges, I think that, if they had examined the judgments delivered in *Ex parte Parsons* as a whole, they would have seen that they have been attributing to us that which we never intended to say. In coming to the conclusion at which they did arrive, they must have thought that we intended in *Ex parte Parsons* to overrule several recent cases in this Court, to the decision of which some of us had been parties. All that we then intended to say about *Ex parte Close* and *In re Cunningham & Co.* was with reference to what we supposed (whether rightly or wrongly) to have been the *ratio decidendi* of those cases. In my judgment in *Ex parte Parsons*, I said: "Then this difficulty arises, that two learned judges, for whose opinion we have the greatest respect, have in substance held this—that, when there is such an ordinary transaction as an advance of money upon the security of goods, the arrangement being that the possession of the goods is to be given to the lender immediately, you cannot by any possibility express the transaction in the statutory form, and therefore the legislature could not have intended

to deal with such a transaction at all. The true conclusion must, therefore, be that sect. 9 does not apply to a document by which the right to immediate possession of goods is given. The legislature could not have intended to prevent such transactions altogether?" That shows what we supposed to have been the *ratio decidendi* in *Ex parte Close* and *In re Cunningham & Co.* I went on to say, "Is that a process of reasoning which the Court ought to allow?" But Cave, J. in his judgment in *Ex parte Parsons*, explains that he did not intend to say what he was supposed to have said in *Ex parte Close*. It is strange, however, that Lindley, L.J., in *Ex parte Parsons*, had exactly the same idea about the *ratio decidendi* of *Ex parte Close* and *In re Cunningham & Co.* as I had, for he said, "It appears to me that the reasoning of the judges in the two cases which have been cited—that, because you cannot express a transaction in the form given in the schedule to the Act of 1882, therefore, the Act does not apply to it—is erroneous." Perhaps we ought now to set the matter right by saying that if the learned judges in those two cases had used that process of reasoning, we could not have agreed with them; and, if that word "if" had been inserted, the learned judges in the present case could hardly have come to the conclusion at which they arrived as to the meaning of *Ex parte Parsons*. The ground, therefore, of their judgment cannot be supported. . . . The decision of the Divisional Court was wrong, but it was wrong only by reason of their wrongly interpreting the language used in *Ex parte Parsons*, and giving to it a meaning which it will not properly bear.—p. 695.

Hardwick, In re, Hubbard, Ex parte,
dictum applied.

Reeves v. Capper (1838) 5 Bing. (N.C.) 136;
6 Scott 877; 1 Arn. 427; 8 L. J. C. P.
44; 2 Jur. 1067, *followed*.

Hilton v. Tucker (1888) 57 L. J. Ch. 973; 29
Ch. D. 669; 59 L. T. 172; 36 W. R. 762.—
KEKEWICH, J.

Hardwick, In re, Hubbard, Ex parte,
approved.

Charlesworth v. Mills (1892) 61 L. J. Q. B.
830; [1892] A. C. 231; 66 L. T. 690; 41 W. R.
129; 56 J. P. 628.—H.L. (E.); *reversing* S. C. *nom.*
Mills v. Charlesworth (1890) 59 L. J. Q. B.
530; 25 Q. B. D. 421; 63 L. T. 508; 39 W. R. 1.
—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Hardwick, In re, Hubbard, Ex parte,
followed.

Morris v. Delobel-Flipo (1892) 61 L. J. Ch.
518; [1892] 2 Ch. 352; 66 L. T. 320; 40 W. R.
492.—STIRLING, J.

Charlesworth v. Mills, applied.

Ramsay v. Margrett (1894) 63 L. J. Q. B. 513;
[1894] 2 Q. B. 18; 9 R. 407; 70 L. T. 788;
1 Manson 184.—C.A. ESHER, M.R., LOPES and
DAVEY, L.JJ.

Hall v. Comfort (1886) 56 L. J. Q. B. 185;
18 Q. B. D. 11; 55 L. T. 550; 35 W. R.
48.—COLERIDGE, C.J., MANISTY and
STEPHEN, JJ., *disapproved*.

Willis, In re, Kennedy, Ex parte (1888) 57
L. J. O. R. 334; 21 O. R. D. 324; 59 L. T. 240.

36 W. R. 793; 5 Morrell 189.—C.A. ESHER, M.R.,
LINDLEY and LOPES, L.JJ.

LINDLEY, L.J.—The 6th section of the Bills of
Sale Act, 1878, applies to assignments whereby a
power of distress is given by way of security for
a debt. It does not extend to ordinary leases,
as was suggested in *Hall v. Comfort*.—p. 637.

Willis, In re, Kennedy, Ex parte, considered.

Green v. Marsh (1892) 61 L. J. Q. B. 442;
[1892] 2 Q. B. 330; 66 L. T. 480; 40 W. R. 449;
56 J. P. 839.—C.A. LORD HALSBURY, LINDLEY
and KAY, L.JJ.

Union Bank v. Lenanton (1878) 47 L. J. C. P.

409; 3 C. P. D. 243; 38 L. T. 698.—C.A.,
followed.

Gapp v. Bond (1887) 56 L. J. Q. B. 438; 19
Q. B. D. 200; 57 L. T. 437; 35 W. R. 683.—C.A.
ESHER, M.R., FRY and LOPES, L.JJ.

Boyd v. Shorrook (1867) 37 L. J. Ch. 144;
1 R. 5 Eq. 72; 17 L. T. 197; 16 W. R.
102, *dissented from*.

Begbie v. Fenwick (1871) 24 L. T. 58; 19
W. R. 402; *see also* L. R. 8 Ch. 1075, n. (1);
S. C. on appeal (decided on another ground)
L. R. 6 Ch. 869; 25 L. T. 441; 20 W. R.
67.—L.JJ., *followed*.

Hawtry v. Butlin (1873) L. R. 8 Q. B. 290; 42
L. J. Q. B. 163; 28 L. T. 532; 21 W. R. 633.

BLACKBURN, J.—If the mortgagee intended
an additional security to convey his right to
sever the fixtures, I should think, if the matter
were *res integra*, that the conveyance of the
fixtures must be treated as a bill of sale of
personal chattels, and would require registra-
tion. There is, however, a decision to the
contrary; for in *Boyd v. Shorrook*, certain
persons were tenants for years of a mill, and
owners of certain trade fixtures therein; they
mortgaged the mill and the trade fixtures, but
the assignment was not registered as a bill of
sale; and Wood, V.-C. held that the fixtures
passed to the mortgagee without registration. I
agree with Malins, V.-C. in *Begbie v. Fenwick*,
that it is difficult to understand the grounds on
which Wood, V.-C. arrived at that conclusion.
If *Boyd v. Shorrook* stood alone, I should wish
to take time to consider this case, but *Begbie v.*
Fenwick is a conflicting authority, and was
decided by a Court of co-ordinate jurisdiction.
We have therefore two authorities of equal
weight opposed to each other, and I prefer to
follow the later decision.—p. 293.

MELLOR and LUSH, JJ. to the same effect.

Boyd v. Shorrook, dissented from.

Begbie v. Fenwick and Hawtry v. Butlin,
followed.

Wilde, In re, Daglish, Ex parte (1873) L. R. 8
Ch. 1072; 42 L. J. Ch. 102; 29 L. T. 168; 21
W. R. 893.

MELLISH, L.J.—The only authority at all
against this construction is the case of *Boyd v.*
Shorrook. That case has been dissented from
by Malins, V.-C., in *Begbie v. Fenwick*, and also
in substance by Blackburn, J. and Mellor, J. in
the case of *Hawtry v. Butlin*, and I agree with
the dissent so expressed.—p. 1083.

Begbie v. Fenwick, commented on.

Meux v. Jacob (1875) 44 L. J. Ch. 481; L. R.
7 Ch. 181; 23 L. J. Ch. 123; 23 W. R. 522.

LORD SELBORNE—It is very frankly admitted that, in a case in the Court of Queen's Bench, in which a decision, which your lordships are not in any way called upon to review or express an opinion upon, as to the effect of the Registration Act, was given, in the case of *Richards v. James*, decided in the year 1867, it was expressly laid down, apart from the events of bankruptcy or execution, the Bills of Sale Act would have no operation whatever as against an unregistered assignment of fixtures. The circumstances of that case were these. There were two persons who had assignments of certain trade fixtures of a person who afterwards had an execution issued against his goods. The first assignee, Spark, had not registered his assignment; the second, Hollingsworth, had; the fixtures were taken in execution and recovered by Hollingsworth, the registered assignee, second in order of time from the execution creditor. The Court of Queen's Bench held that as the first assignee could not have set up any title against the execution creditor, the title of Hollingsworth, which had prevailed by reason of registry against the execution creditor, was not to give way to the title of Spark; in other words, that Hollingsworth could retain against Spark what he had recovered, and that Spark could not have recovered from the execution creditor. And what the Court said as to the position in which things would have stood, had there been an execution, was this: "Had it not been for Hollingsworth's subsequent registered bill of sale, the execution creditor would have been entitled to the proceeds of the goods seized. It is equally clear, on the other hand, that had there been no execution, and had the question been merely which of the two claimants was entitled to priority against the other, Spark's claim would have prevailed, because there is nothing in the Act which makes it necessary to register a bill of sale against the holder of a subsequent bill of sale, whether the latter be registered or not." According to my recollection, which is imperfect and possibly may be erroneous, in *Begbie v. Fenwick*, also the mortgagor had become bankrupt before the question arose; and there being in that case a competition between a *prior* unregistered assignee and a subsequent registered assignee, if I am right in thinking that the additional fact occurred of bankruptcy by the mortgagor, the case might be brought within the reach of the same principle with *Richards v. James*.—p. 486.

Hawtry v. Butlin (*supra*, col. 236), *explained*.
Southport Banking Co. v. Thompson (1887) 57 L. J. Ch. 114; 37 Ch. D. 64; 58 L. T. 143; 36 W. R. 113.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

LINDLEY, L.J.—Undoubtedly there are expressions which at first sight appear to warrant the notion that Mr. Justice Blackburn was of opinion that where a mortgagor was demising land of which he was tenant for a term of years, and fixtures of which he was absolute owner, a mortgage in ordinary form would not pass the fixtures. But I do not think Lord Blackburn really meant that. What he meant to say, as I understand it, was that *prima facie* such a mortgagor must not be taken to grant the fixtures as chattels separately assigned or to do more than include them with the land in the sub-demise. And this view of his meaning is

fortified by his language in *Holland v. Hodgson*, where he again adverts to the same point.

Wilde, In re, Daglish, Ex parte, distinguished.

Joyce, In re, Barclay, Ex parte (1874) 43 L. J. Bk. 137; L. R. 9 Ch. 576; 30 L. T. 479; 22 W. R. 608.—L.JJ.

Joyce, In re, Barclay, Ex parte, explained.

Reed, In re, Brown, Ex parte (1878) L. R. 9 Ch. 389; 48 L. J. Bk. 10; 39 L. T. 338; 27 W. R. 219.—C.A.

Submitted by counsel that: "The case is governed by *Ex parte Barclay*, where Lord Justice Mellish said, that in the case of a mortgage of household property with fixtures, the test whether the mortgage required registration was whether power was given to the mortgagee to sever the fixtures from the premises, and to deal with them and sell them separately."

JAMES, L.J.—That is the test only where the question depends upon the language of the power of sale; not where there is a separate assignment of the fixtures.—p. 393.

Wilde, In re, Daglish, Ex parte, distinguished.

Joyce, In re, Barclay, Ex parte, approved.

Yates, In re, Batchelder v. Yates (1888) 57 L. J. Ch. 697; 38 Ch. D. 112; 59 L. T. 47; 36 W. R. 563.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

Joyce, In re, Barclay, Ex parte, and Wilde, In re, Daglish, Ex parte, considered.

Johns v. Ware (1898) 68 L. J. Ch. 155; [1899] 1 Ch. 359; 80 L. T. 112; 47 W. R. 202; 6 Mansour 38.—ROMER, J.

Turner, In re, Attwater, Ex parte (1877)

46 L. J. Bk. 41; 5 Ch. D. 27; 35 L. T. 682; 25 W. R. 206.—C.A.; and **Brantom v. Griffiths (1877)** 46 L. J. C. P. 408; 2 C. P. D. 212; 36 L. T. 4; 25 W. R. 318.—C.A., *followed*.

Cross, In re, Payne, Ex parte (1879) 11 Ch. D. 539; 40 L. T. 563; 27 W. R. 808.—C.A.

Brantom v. Griffiths, distinguished.

Phillips, In re, National, Mercantile Bank, Ex parte (1880) 50 L. J. Ch. 231; 16 Ch. D. 104; 44 L. T. 265; 29 W. R. 227.

[This case was relied upon by the appellants, but Jessel, M.R., in his judgment in the respondent's favour did not refer to the case.]

Brantom v. Griffiths, adopted.

Thomas v. Kelly (1888) 58 L. J. Q. B. 66; 13 App. Cas. 506; 60 L. T. 114; 37 W. R. 853.—H.L. (R.).

Jeavons, In re, Mackay, Ex parte, Brown, Ex parte (1873) 42 L. J. Bk. 68; L. R. 8 Ch. 643; 28 L. T. 828; 21 W. R. 664.—

L.JJ., *followed*.

Steele, In re, Conning, Ex parte (1873) 42 L. J. Bk. 74; L. R. 16 Eq. 414; 21 W. R. 784.

Simpson v. Charing Cross Bank (1886) 34

W. R. 568.—D., *followed*.
Sharp v. McHenry (1887) 57 L. J. Ch. 961; 38 Ch. D. 427; 57 L. T. 606.—KAY, J.

Time for.

Crew v. Cummings (Wood, Claimant) (1888)

57 L. J. Q. B. 641; 21 Q. B. D. 420; 59 L. T. 886; 36 W. R. 908.—C.A. **ESHER**, M.R. and **BOWEN**, L.J., *followed*.

Dobbin's Settlement, In re (1887) 56 L. J. Q. B. 295; 57 L. T. 277.—D., not followed.

Parsons and Furber, In re (1893) 62 L. J. Q. B. 365; [1893] 2 Q. B. 122; 4 R. 374; 68 L. T. 777; 41 W. R. 468.—C.A. LINDLEY, KAY and SMITH, L.J.J.

SMITH, L.J.—I am clear myself that *Crew v. Cummings* overrules *Dobbin's Settlement, In re*, in which I and my brother **Huddleston** took part. I am also clear that the decision in *Crew v. Cummings* binds me.—p. 369.

Crew v. Cummings and Parsons and Furber, In re, extended.

Spiral Globe, Ltd., In re (1901) 71 L. J. Ch. 128; [1902] 1 Ch. 396; 85 L. T. 778; 50 W. R. 187; 9 Manson 52.—EADY, J.

Crew v. Cummings and Parsons and Furber, In re, applied.

Abrahams & Sons, In re (1902) 71 L. J. Ch. 807; [1902] 1 Ch. 695; 86 L. T. 290; 50 W. R. 284; 9 Manson 176.—BUCKLEY, J.

Crew v. Cummings, explained.

Johnson & Co., Ltd., In re (1902) 71 L. J. Ch. 576; [1902] 2 Ch. 101; 86 L. T. 791; 50 W. R. 482.—C.A. COLLINS, M.R., STIRLING and HARDY, L.J.J.

Affidavit.

Sutton v. Bath (1858) 3 H. & N. 382; 27 L. J. Ex. 888; 1 F. & F. 152, headnote incorrect.

Castle v. Downton (1879) 49 L. J. C. P. 6; 5 C. P. D. 56; 41 L. T. 528; 28 W. R. 257

Per curiam (**LORD COLERIDGE, C.J.**, and **LINDLEY, J.**)—The headnote of that report (*Sutton v. Bath*) seems to be unsupported by the judgment.

Feast v. Robinson (1894) 63 L. J. Ch. 321; 8 R. 531; 70 L. T. 168.—ROMER, J., approved.

Kemble v. Addison (1900) 69 L. J. Q. B. 299; [1900] 1 Q. B. 430; 82 L. T. 91; 48 W. R. 331; 7 Manson 156.—CHANNELL and BUCKNILL, JJ.

Briggs v. Boss (1868) 37 L. J. Q. B. 101; L. R. 3 Q. B. 268; 17 L. T. 599; 16 W. R. 480, commented on.

Larchin v. North Western Deposit Bank (1873) 44 L. J. Ex. 71; L. R. 10 Ex. 64; 33 L. T. 124; 23 W. R. 325.—EX. CH.

BLACKBURN, J.—The case of *Briggs v. Boss*, on which the plaintiff relies, went quite as far as was reasonable. But there anyone who knew that the attesting witness, **Moston**, was living where he did live would be more likely to know him as **Moston**, "accountant," than as **Moston**, "clerk," that was the idea expressed in the decision.—p. 72.

[The other judges of the Exchequer Chamber agreed.]

See also *Murray v. Mackenzie, infra*.

Hewer v. Cox (1860) 3 El. & El. 428; 30 L. J. Q. B. 73; 6 Jur. (N.S.) 1839; 3 L. T. 508; 9 W. R. 103, followed.

Murray v. Mackenzie (1857) 44 L. J. C. P. 313; L. R. 10 C. P. 625; 32 L. T. 777; 23 W. R. 595, distinguished.

Wood, In re. M'Hattie, Ex parte (1878) 48 L. J. Bk. 26; 10 Ch. D. 399; 39 L. T. 373; 27 W. R. 327.—C.A.

Murray v. Mackenzie, followed.

Marks v. Derrick (1899) 80 L. T. 60; 6 Manson 176.—LAWRANCE and CHANNELL, JJ.

London and Westminster Loan and Discount Co. v. Chace (1862) 12 C. B. (N.S.) 730; 31 L. J. C. P. 314; 9 Jur. (N.S.) 412; 6 L. T. 781; 10 W. R. 698, distinguished.

Button v. O'Neill (1879) 48 L. J. C. P. 368; 4 C. P. D. 354; 27 W. R. 592; 40 L. T. 799.—C.A.

Button v. O'Neill, distinguished.

Hewer, In re. Kaben, Ex parte (1882) 51 L. J. Ch. 904; 21 Ch. D. 871; 46 L. T. 856; 30 W. R. 954.—BACON, C.J.

Maughan v. Sharpe (1864) 17 C. B. (N.S.) 443; 34 L. J. C. P. 19; 10 Jur. (N.S.) 989; 10 L. T. 870; 12 W. R. 1057, applied.

Simmons v. Woodward (1892) 61 L. J. Ch. 252; [1892] A. C. 100; 66 L. T. 534; 40 W. R. 641.—H.L. (E.). LORDS HALSBURY, L.C., WATSON, MORRIS and FIELD; reversing in part, S. C. *nom.* Haseltine, In re, Woodward v. Haseltine (1891) 60 L. J. Ch. 357; [1891] 1 Ch. 464; 64 L. T. 303; 39 W. R. 405.—C.A. LINDLEY, LOPES and KAY, L.J.J.

Simmons v. Woodward, inapplicable.

Haseltine v. Simmons (1892) 62 L. J. Q. B. 5; [1892] 2 Q. B. 547; 4 R. 52; 67 L. T. 611; 41 W. R. 67; 57 J. P. 53.—C.A. **ESHER, M.R., **BOWEN** and **KAY**, L.J.J.**

Routh v. Roublet (1859) 28 L. J. Q. B. 240; 1 El. & El. 850; 2 Jur. (N.S.) 548; 7 W. R. 444, followed.

Blaiberg v. Parke (1882) 52 L. J. Q. B. 110; 10 Q. B. D. 90; 48 L. T. 311; 31 W. R. 246. NORTH, MANISTY and DENMAN, JJ.—[The judges differed as to the grounds on which *Routh v. Roublet* applied.]

Sharpe v. Birch (1881) 51 L. J. Q. B. 64; 8 Q. B. D. 111; 45 L. T. 760; 30 W. R. 428; 46 J. P. 246, followed.

Ford v. Kettle (1882) 51 L. J. Q. B. 558; 9 Q. B. D. 139; 46 L. T. 666; 30 W. R. 741.—C.A. JESSEL, M.R. and LINDLEY, L.J.

Ford v. Kettle, followed.

Moulson, In re. Knightly, Ex parte (1882) 51 L. J. Ch. 823; 46 L. T. 776; 30 W. R. 844.—BACON, C.J.

Sharpe v. Birch and Ford v. Kettle, distinguished.

Cooper v. Zeffert (1883) 32 W. R. 402.—C.A. BRETT, M.R.—It is being present and seeing a person do the thing which is attested. It is a

fair and reasonable inference that when the deponent swears that Lewis attested it, he means to say that Lewis was present, and saw the execution which he attested. It was said that there are cases to the contrary. In *Sharpe v. Birch* there was no averment that the witness had attested, but only that his signature as a witness was in his own handwriting. In *Ford v. Kettle*, the affidavit only stated that the signature of the alleged attesting witnesses were in their proper handwritings. I cannot help thinking that what was stated by the late Master of the Rolls and Lindley, L.J., shows that, in their opinion, that if the affidavit had stated that which is stated in the one now in question, it would have been sufficient. Thus, Lindley, L.J. said: "He does not say that he saw the solicitor attest the execution." This affidavit positively states that, and therefore I think it is sufficient. In those cases the Court was extremely reluctant to give way to such objections, and I am not inclined myself to go further than they did. Therefore, the affidavit being sufficient, the bill was properly registered.—p. 402.

Howard v. Brown (1827) 1 M. & P. 22; 4 Bing. 393; 6 L. J. (O.S.) C. P. 9. *questioned*.

Cheney v. Curteis (1863) 13 C. B. (N.S.) 634; 32 L. J. C. P. 116; 9 Jur. (N.S.) 1057; 7 L. T. 680, *followed*.

Chapman, In re, Johnson, Ex parte (1884) 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 32 W. R. 693; 48 J. P. 648.—C.A.

COTTON, L.J.—An affidavit has to be filed with the bill of sale when it is registered, and it is said that as the document which was filed, and which purports to be an affidavit, was sworn before a person about whom nothing is known but his name and his place of business, there being no statement that he was a commissioner for administering oaths, the affidavit cannot be accepted. In support of this contention *Howard v. Brown* was cited, in which it was held that where an affidavit did not state that it was sworn before a commissioner who was entitled to administer oaths, it could not be read. That was in some technical proceedings at common law, to which Lord Justice Bowen may perhaps refer, but I do not think I need, because fortunately we have another case which shows that, however that may be as to technical proceedings, yet in the present state of the law under the Bills of Sale Act, we can arrive at something like common sense. . . . Lord Justice Bowen has furnished me with another case [*Cheney v. Curteis*] actually under the Bills of Sale Act, 1854, where this very point was decided. There the affidavit was entitled in the Queen's Bench, but the person before whom it was sworn was stated to be a commissioner of the Exchequer, and the objection was taken that the affidavit was bad, because it was not stated in it that he was a commissioner of the Queen's Bench. The Court (composed of Erie, C.J., Williams, Willes and Keating, J.J.) overruled that objection. The question was put, "could the deponent be convicted of perjury if it is false?" and the Court said, "He can, if it is shown that the man before whom the oath was made was competent to administer an oath in these proceedings." That objection, a highly technical one, was overruled. In the absence of authority, I should have come

to the same conclusion; but there being authority, I think the objection is answered by the decision which I have mentioned.—p. 345.

Vernon v. Cooke (1880) 49 L. J. Q. B. 767. —C.A. BRAMWELL, BAGGALLAY and THESIGER, L.J.J., *impuigned*.

Baker v. Ambrose (1896) 65 L. J. Q. B. 589; [1896] 2 Q. B. 372.—WRIGHT, J.

Held.—That an affidavit of the execution of a bill of sale is within Ord. XXXVIII., r. 16, of R. S. C., 1883, and is insufficient if sworn before a commissioner of oaths who has acted in the matter as solicitor for the grantee.

Condition or Disavowance.

Lees, In re, Collins, Ex parte, 31 L. T. 622; *reversed*, (1875) 44 L. J. Bk. 78; L. R. 10 Ch. 367; 32 L. T. 108; 23 W. R. 862.—L.J.J.

Counsell v. London and Westminster Loan Co. (1887) 56 L. J. Q. B. 622; 19 Q. B. D. 512; 36 W. R. 53.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J.J., *distinguished*.
Monetary Advance Co. v. Carter (1888) 57 L. J. Q. B. 463; 20 Q. B. D. 785; 59 L. T. 311. —CAVE and SMITH, J.J.

Lees, In re, Collins, Ex parte, disapproved.
Counsell v. London and Westminster Loan and Discount Co., followed.
Edwards v. Marcus (Townsend, Claimant) (1894) 63 L. J. Q. B. 363; [1894] 1 Q. B. 587; 9 R. 337; 70 L. T. 182; 1 Manson 70.—C.A. LINDLEY, KAY and SMITH, L.J.J.

SMITH, L.J.—But it was argued that the sub-section [sub-sect. 3 of sect. 10 of the Bills of Sale Act, 1878] relied on, only applied when the condition was one which prejudicially affected the donee, and that this was the opinion of James, L.J., in *Ex parte Collins*, on the construction of the Act. It is true that that case was not cited in *Counsell v. London and Westminster Loan and Discount Co.*; but in the last-mentioned case the C. A. held a condition to be within the Act which, I think, cannot be distinguished from the condition in the present case. When, therefore, I am faced with the difficulty of the judgment given by James and Mellish, L.J.J., I have, on the other hand, the decision of this Court, which came to the conclusion that a condition similar to that which we have in this case is within the meaning of the Act, and which judgment I prefer; and what is more, I have the decision of Cotton, L.J., in *Carpenter v. Deane*, in which that learned L.J. took no exception to the decision in *Counsell's Case*.

Renewal and Rectification.

Swire v. Cookson, 48 L. T. 877.—CAVE, J.; *reversed*, (1883) 49 L. T. 367.—BRETT, M.R. and BOWEN, L.J.; *affirmed* in H.L., *infra*.

Cookson v. Swire (1884) 54 L. J. Q. B. 249; 9 App. Cas. 653; 52 L. T. 90; 33 W. R. 181.—H.L. (H.). LORDS SELBORNE, L.C., BLACKBURN, WATSON and FITZGERALD, *applied*.

Antonidji v. Smith (1901) 70 L. J. K. B. 869; [1901] 2 K. B. 589; 49 W. R. 693; 85 L. T. 200;

8 Manson 335.—C.A. SMITH, M.R., WILLIAMS and STIRLING, J.J.

Askew v. Lewis (1883) 1 Cab. & E. 34; 10 Q. B. D. 477; 48 L. T. 534; 31 W. R. 567; 47 J. P. 312.—CAVE, J. *approved*.

Emery, In re, Official Receiver, Ex parte (1888) 57 L. J. Q. B. 629; 21 Q. B. D. 405; 37 W. R. 21.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

4. POSSESSION.

Ashton v. Blackshaw (1870) 39 L. J. Ch. 205; L. R. 9 Eq. 510; 22 L. T. 197; 18 W. R. 307; and **Broadbent, In re, Homan, Ex parte** (1871) L. R. 12 Eq. 598; 19 W. R. 1078, *considered*.

Fairbrother, In re, Harding, Ex parte (1873) 42 L. J. Bk. 30; L. R. 15 Eq. 223; 28 L. T. 241.—BK.

Aeona (or Acona) v. Rogers, 33 L. T. 749; *reversed*, (1876) 46 L. J. Ex. 121; 1 Ex. D. 285; 35 L. T. 115; 24 W. R. 1000.—C.A.

Cole, In re, Matton, Ex parte (1872) 41 L. J. Bk. 57; L. R. 14 Eq. 178; 26 L. T. 916; 20 W. R. 882, *not followed*.
Brenner, In re, Saffrey, Ex parte (1881) 16 Ch. D. 668; 44 L. T. 324; 29 W. R. 749.—C.A. JESSIL, M.R., JAMES and LUSH, L.JJ.

Swift v. Pannell (1883) 53 L. J. Ch. 341; 24 Ch. D. 210; 48 L. T. 351; 31 W. R. 543.—FRY, J. *followed*.

Casson v. Churchley (1884) 53 L. J. Q. B. 335; 50 L. T. 368.—GROVE, J. and HUDDLESTON, B.

Gough v. Everard (1868) 32 L. J. Ex. 210; 8 L. T. 363; 11 W. R. 702; and **Henderson, In re, Lewis, Ex parte** (1871) L. R. 6 Ch. 626; 24 L. T. 785; 19 W. R. 835.—L.JJ., *commented on*.

Robinson v. Tucker (1888) 1 Cab. & E. 173.—WILLIAMS, J.; *affirmed*, (1884) 53 L. J. Q. B. 317; 14 Q. B. D. 371; 50 L. T. 380; 32 W. R. 697.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

Pickard v. Marriage (1876) 45 L. J. Ex. 594; 1 Ex. D. 364; 35 L. T. 343; 24 W. R. 886, *distinguished*.

Gibbons v. Hickson (1885) 55 L. J. Q. B. 119; 34 W. R. 140; 53 L. T. 910.—HUDDLESTON, B. and CAVE, J.

HUDDLESTON, B.—Mr. Muir has relied on the case of *Pickard v. Marriage*, but the facts in that case were very different, for however genuine the arrangement might have been that the goods should belong to the grantee, the arrangement was one which was not made known to the public.—p. 121.

Furber v. Finlayson (1876) 24 W. R. 370; 34 L. T. 323, *questioned*.

Henley, In re, Fletcher, Ex parte (1877) 5 Ch. D. 809; 46 L. J. Bk. 93; 25 W. R. 573; 37 L. T. 758.—C.A.

MELLISH, L.J.—*Furber v. Finlayson* seems to be opposed to the current of authority.—p. 813.

National Mercantile Bank v. Hampson (1880) 49 L. J. Q. B. 480; 5 Q. B. D. 177; 28 W. R. 424, *followed*.

Walker v. Clay (1880) 49 L. J. C. P. 560; 42 L. T. 369; 44 J. P. 396.—GROVE and LINDLEY, JJ.

National Mercantile Bank v. Hampson, *report in L. R. corrected*.

Taylor v. McKean (1880) 49 L. J. C. P. 563; 5 Q. B. D. 358; 42 L. T. 833; 28 W. R. 628; 44 J. P. 784.

COLERIDGE, C.J.—The business must be carried on *bona fide*, and the disposition and sale of the goods must be *bona fide* and in the ordinary course of such business. I am aware that those last words do not occur in the report of the *National Mercantile Bank v. Hampson* in the Law Reports, but the report of that case in the Weekly Reporter (28 W. R. 421) is more accurate, because in the pleadings which are not set out in the Weekly Reporter, but are in the Law Reports, there is a statement that Seaman, the grantor, sold the goods to the defendants, who bought them in the ordinary course of his business, and that it was the ordinary course of Seaman in such business to make such sales; and, therefore, when Lush, J. is reported, in the Weekly Reporter, to have said, "There must be an implied licence to sell where the person who gives the bill of sale sells in the ordinary course of his trade," I have no doubt the report is correct, for it follows the statement in the pleadings.—p. 565. DENMAN, J. concurred.

5. STATUTORY FORM.

Hughes v. Little (1886) 17 Q. B. D. 204; 34 W. R. 708; *reversed*, 56 L. J. Q. B. 96; 18 Q. B. D. 32; 55 L. T. 476; 35 W. R. 36.—C.A.

Hetherington v. Groome (1884) 53 L. J. Q. B. 576; 13 Q. B. 789; 51 L. T. 112; 33 W. R. 103, *distinguished*.

Barber, In re, Stanford, Ex parte (1885) 55 L. J. Q. B. 389; 17 Q. B. D. 259; 34 W. R. 168.—CAVE and HAWKINS, JJ.; *affirmed*, (1886) 55 L. J. Q. B. 341; 17 Q. B. D. 259; 54 L. T. 894; 34 W. R. 237, 287, 507.—C.A. ESHER, M.R., OOTON, LINDLEY, BOWEN and LOPES, L.JJ.; FRY, L.J. *dissenting in part*.

Hetherington v. Groome, followed.

Sibley v. Higgs (1885) 54 L. J. Q. B. 525; 15 Q. B. D. 619; 33 W. R. 748.—FIELD and MANISTY, JJ.

Hetherington v. Groome, followed.

Furnivall v. Hudson (1892) 62 L. J. Ch. 178; [1893] 1 Ch. 335; 3 R. 230; 68 L. T. 378; 41 W. R. 358.—NORTH, J.

Davis v. Burton (1883) 52 L. J. Q. B. 636;

11 Q. B. D. 537; 32 W. R. 423.—C.A. BRETT, M.R., LINDLEY and FRY, L.JJ., *discussed*.

Williams, In re, Pearce, Ex parte (1883) 53 L. J. Ch. 500; 25 Ch. D. 656; 49 L. T. 475; 32 W. R. 187.—BACON, C.J.

Davis v. Burton, upheld.

Melville v. Stringer (1884) 53 L. J. Q. B. 482; 13 Q. B. D. 302; 50 L. T. 774; 32 W. R. 890.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.; *reversing* 53 L. J. Q. B. 175; 12 Q. B. D. 132; 50 L. T. 531; 32 W. R. 888.

Davis v. Burton, followed.

Roberts v. Roberts (1884) 53 L. J. Q. B. 313; 13 Q. B. D. 794; 50 L. T. 851; 32 W. R. 605.—C.A. BRETT, M.R. and LINDLEY, L.J.

Melville v. Stringer, *dictum observed upon*.
Saunders v. White (1900) 70 L. J. Q. B. 34;
 [1901] 1 Q. B. 70; 49 W. R. 127.—**ALVENSTONE**,
 G.J. and **KENNEDY**, J.

Roberts v. Roberts, *discussed*.

Witt v. Bahner (1887) 57 L. J. Q. B. 141;
 20 Q. B. D. 114; 58 L. T. 34; 36 W. R.
 115.—**C.A.** **ESHER**, **M.R.**, **BOWEN** and **FRY**,
L.J.J., *distinguished*.

Carpenter v. Deen (1889) 23 Q. B. D. 566; 61
 L. T. 860.—**C.A.** **COTTON** and **FRY**, **L.J.J.**; **LOPES**,
L.J. *dissenting*.

Witt v. Banner and Carpenter v. Deen,
distinguished.

Hickley v. Grouwood (1890) 59 L. J. Q. B.
 413; 25 Q. B. D. 277; 63 L. T. 288; 38 W. R.
 686.—**CAVE** and **SMITH**, **J.J.**

CAVE, J.—In the first case [*Witt v. Banner*] . . .
 the description was altogether illusory, and was,
 no doubt, intended to include any pictures which
 might at any time be on the grantor's premises;
 for it is impossible to suppose that the grantor
 could have had in his possession exactly the
 same number of articles of each description
 mentioned in the schedule. *Carpenter v. Deen* is,
 no doubt, a case of some difficulty, and there

LOPES, L.J. differed from the other **L.J.J.** There
 the grantor was a dairyman, and the other **L.J.J.**
 drew the conclusion from that fact that it was
 intended to allow the grantee to seize any
 similar cows which at any hour might be on the
 grantor's premises. Here the state of things is
 quite different, for the grantor was a beer-house
 keeper and a carman, and it cannot be said that
 the goods were described in such a way that they
 could not possibly be identified. [They were
 described as "Roan horse, Drummer; brown
 mare and foal: three rade carts."]—p. 414.

Carpenter v. Deen (*supra*), *referred to*.

Edwards v. Marcus (1894) 63 L. J. Q. B. 363;
 [1894] 1 Q. B. 587; 9 R. 337; 70 L. T. 182;
 1 **Manson** 70.—**C.A.** **LINDLEY**, **KAY** and **SMITH**,
L.J.J. (*see extract, ante*, col. 242).

Carpenter v. Deen, *followed*.

Davies v. Jenkins (1899) 69 L. J. Q. B. 187;
 [1900] 1 Q. B. 133; 81 L. T. 788; 48 W. R. 236;
 7 **Manson** 149.—**DARLING** and **CHANNELL**, **J.J.**

Thorpe v. Cregeen (1885) 55 L. J. Q. B. 80;
 33 W. R. 844, *questioned*.

Myers v. Elliott (1886) 55 L. J. Q. B. 233; 16
 Q. B. D. 626; 54 L. T. 552; 34 W. R. 338.—
C.A. **ESHER**, **M.R.**, **LINDLEY** and **LOPES**, **L.J.J.**,
reversing **MATHEW**, **J.**

ESHER, M.R.—If a lump sum for interest
 could be put into a bill of sale, the borrower
 would be borrowing money on a bill of sale with-
 out knowing the rate of interest which he is to
 pay. That, it seems to me, would be contrary to
 the form. The bill of sale must be made so plain
 that the borrower may have a fair opportunity
 of knowing what he is doing, not merely what
 sum, but what rate of interest he is to pay, so
 that if he is asked to pay 70 per cent. he may
 at least know what he is paying. . . . As at
 present advised, I am unable to agree with the
 decision in *Thorpe v. Cregeen*.—p. 285.

Myers v. Elliott, *explained and distinguished*.

Lumley v. Simmons (1887) 56 L. J. Ch. 329;

34 Ch. D. 698; 56 L. T. 134; 35 W. R. 422.—

C.A. **COTTON**, **LINDLEY** and **LOPES**, **L.J.J.**

LOPES, L.J.—There the sum of 15*l* was described
 as being bonus and interest, without defining how
 much was to be attributed to one, and how much
 to the other. . . . But in the present case the
 rate of interest is, in my opinion, sufficiently
 stated. The rate per month is given clearly, and
 the rate per annum can be easily calculated.

Myers v. Elliott, *followed*.

**Thorpe v. Cregeen and Wilson v. Kirk-
 wood** (1883) 48 L. T. 821.—**CHITTY**, **J.**,
disapproved.

Blankenstein v. Robertson (1890) 59 L. J.
 Q. B. 315; 24 Q. B. D. 543; 62 L. T. 732.—
DENMAN and **WILLS**, **J.J.**

WILLS, J.—But there is the more recent case
 of *Myers v. Elliott*, in the **C.A.**, in which, though
 the point was not actually raised, the Court
 expressed a very strong opinion that a specified
 rate of interest was essential. I cannot, after
 this strong expression of opinion by the **C.A.**,
 regard *Thorpe v. Cregeen* and *Wilson v. Kirkwood*
 as any longer of authority.

Myers v. Elliott, *distinguished*.

Lumley v. Simmons, *explained*.

Wood, *in re*, **Woolfe**, *Ex parte* (1894) 63 L. J.
 Q. B. 352; [1894] 1 Q. B. 605; 10 R. 157; 70 L.
 T. 232; 1 **Manson** 87.—**D.** **WILLIAMS** and
WRIGHT, **J.J.**

Blaiberg v. Parsons (or **Parsons v. Har-
 greaves**) (1886) 55 L. J. Q. B. 408; 17
 Q. B. D. 336; 34 W. R. 717, *approved*.

Blaiberg v. Beckett (1886) 55 L. J. Q. B. 35;
 18 Q. B. D. 96; 55 L. T. 876; 35 W. R. 84.—
C.A. **ESHER**, **M.R.**, **LINDLEY** and **LOPES**, **L.J.J.**

Barber, in re, **Stanford, Ex parte** (1886) 55
 L. J. Q. B. 341; 17 Q. B. D. 259; 54 L. T.
 894; 34 W. R. 507.—**C.A.** (*see cols. 246–*
250), *distinguished*.

Morritt, in re, **Bentley, Ex parte** (1886) 34 W.
 R. 579.—**CAVE** and **MANISTY**, **J.J.**; *affirmed, nom.*
Morritt, in re, **Official Receiver, Ex parte** (1886)
 56 L. J. Q. B. 139; 18 Q. B. D. 222; 56 L. T.
 42; 35 W. R. 277.—**C.A.** **ESHER**, **M.R.**, **COTTON**,
LINDLEY, **BOWEN** and **LOPES**, **L.J.J.**; **FRY**, **L.J.**,
dissenting.

Davies v. Rees (1886) 55 L. J. Q. B. 363;
 17 Q. B. D. 408; 54 L. T. 813; 34 W. R.
 573.—**C.A.** **ESHER**, **M.R.**, **BOWEN** and
FRY, **L.J.J.** (*and see post*, col. 248),
distinguished.

O'Dwyer, in re (1886) 19 L. R. Ir. 19.

Barber, in re, **Stanford, Ex parte** (*see*
cols. 246–250), *followed*.

Goldstrom v. Tallerman (1886) 56 L. J. Q. B.
 22; 18 Q. B. D. 1; 55 L. T. 866; 35 W. R. 68.
 —**C.A.** **ESHER**, **M.R.**, **BOWEN** and **FRY**, **L.J.J.**;
reversing 17 Q. B. D. 80.

Morritt, in re, **Official Receiver, Ex parte**
 (1886) 56 L. J. Q. B. 139; 18 Q. B. D.
 222; 56 L. T. 42; 35 W. R. 277.—**C.A.**
ESHER, **M.R.**, **COTTON**, **LINDLEY**, **BOWEN**
 and **LOPES**, **L.J.J.**; **FRY**, **L.J.** *dissenting*,
followed.

Lumley v. Simmons (1887) 56 L. J. Ch. 329;
 34 Ch. D. 698; 56 L. T. 134; 35 W. R. 422.—
C.A. **COTTON**, **LINDLEY** and **LOPES**, **L.J.J.**

Morritt, In re, Official Receiver, Ex parte, and Watkins v. Evans (1887) 56 L. J. Q. B. 200; 18 Q. B. D. 386; 56 L. T. 177; 35 W. R. 318.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ., discussed.**
Calvert v. Thomas (1887) 56 L. J. Q. B. 470; 19 Q. B. D. 204; 57 L. T. 441; 35 W. R. 616.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**

Bianchi v. Offord (1886) 55 L. J. Q. B. 486; 17 Q. B. D. 484.—**BOWEN, L.J., followed.**
Barber, In re, Stanford, Ex parte (see cols. 246—250), and **Goldstrom v. Tallerman** (see cols. 246—250), *distinguished.*
Real and Personal Advance Co. v. Clears (1888) 57 L. J. Q. B. 164; 20 Q. B. D. 304; 58 L. T. 610; 36 W. R. 256.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**

ESHER, M.R.—In this case it is admitted that the bill of sale is the same in terms as the bill of sale which was in question in *Bianchi v. Offord*. It is also admitted that there are words in this bill of sale in addition to the words in the bills of sale which were before the Court in *Barber, In re, Stanford, Ex parte*, and *Goldstrom v. Tallerman*; and if those added words are material, as I think they are, it is clear that *Barber, In re, Stanford, Ex parte*, and *Goldstrom v. Tallerman* do not govern this case. The only question, therefore, is, whether we are prepared to overrule *Bianchi v. Offord*. I am not prepared to overrule that case. There **BOWEN, L.J.** says: "It does not appear to me that in the case before us there was anything to show that the provision that the mortgagees might pay sums of money for rent, rates, taxes, and other outgoings, and that if the same were not repaid the goods might be immediately seized, was necessary to the maintenance of the security." There were, therefore, words in the bill of sale which were not in the form, and which could not be brought into the bill of sale under the direction in the form as to the insertion of terms which the parties may agree to for the maintenance of the security. The lord justice says: "I do not think that such further sums could be sums secured by the bill of sale within the meaning of sect. 7, sub-sect. 1." I am not prepared to overrule that decision.—p. 166.

Burdett, In re, Byrne, Ex parte (1887) 36 W. R. 128.—**CAVE and SMITH, JJ., reversed.** (1888) 57 L. J. Q. B. 263; 20 Q. B. D. 310; 58 L. T. 708; 36 W. R. 345; 5 Morrell 32.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ. (see cols. 248, 249).**

Kelly v. Kellond (1888) 57 L. J. Q. B. 330; 20 Q. B. D. 569; 58 L. T. 263; 36 W. R. 363.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ., affirmed, non.** **Thomas v. Kelly** (1888) 58 L. J. Q. B. 66; 13 App. Cas. 506; 60 L. T. 114; 37 W. R. 353.—**H.L. (R.). LORDS HALSBURY, L.C., FITZGERALD and MACNAGHTEN (see cols. 247—250).**

Barber, In re, Stanford, Ex parte (see cols. 246—250), *proposition not adopted.*
Thomas v. Kelly, supra.

Barber, In re, Stanford, Ex parte (see cols. 246—250), *observations explained.*
Parsons v. Brand (1890) 49 L. J. Q. B. 189; 25

Q. B. D. 110; 62 L. T. 479; 38 W. R. 388.—C.A. **COTTON, LINDLEY and LOPES, L.JJ.**

Barber, In re, Stanford, Ex parte (see cols. 246—250), *applied.*
Davies v. Rees (ante, col. 248); and **Burdett, In re, Byrne, Ex parte** (see cols. 247, 249), *inapplicable.*

Cochrane v. Entwistle (1890) 59 L. J. Q. B. 418; 25 Q. B. D. 116; 62 L. T. 852; 38 W. R. 587.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**
ESHER, M.R.—But then it was said that according to *Burdett, In re*, you may divide the bill of sale into parts, and hold that it is in accordance with the form as to the chattels personal, striking out for this purpose the chattels real. *Burdett, In re*, however, is not an authority for that proposition. The question in that case was whether a bill of sale which comprised chattels personal and also a chattel real, and which was not in accordance with the statutory form, was valid as to the chattel real, and it was held that it was. Chattels real are not within the Act, and the provisions of sect. 9 as to the form of a bill of sale do not apply to them. That case, I think, was rightly decided, but it has nothing to do with a case like the present, where the dispute is as to chattels personal.—pp. 419, 420.

Goldstrom v. Tallerman (see cols. 246—250), *followed.*

Haslewood v. Consolidated Credit Co. (1890) 60 L. J. Q. B. 12; 25 Q. B. D. 555; 63 L. T. 71; 39 W. R. 54.—C.A. **COTTON, LINDLEY and BOWEN, L.JJ.**

Goldstrom v. Tallerman (see cols. 246—250), *distinguished.*

Edwards v. Marston (1890) 60 L. J. Q. B. 202; [1891] 1 Q. B. 225; 64 L. T. 97; 39 W. R. 165.—C.A. **ESHER, M.R., LOPES and KAY, L.JJ.**

ESHER, M.R.—I am not prepared to say that the judgment of **FRY, L.J.**, in *Goldstrom v. Tallerman* may not be taken to be a general description of what this form [the form in the schedule to the Bills of Sale Act, 1882] is intended to be; but his remarks as to the instalments being in respect of principal only, and not of interest, were applicable to the particular case then before the Court, and were not of general application.—p. 208.

LOPES, L.J.—With regard to *Goldstrom v. Tallerman*, all I desire to say is that it is a different case to the present one, because here the sums to be paid exactly cover the amount of the interest, whereas in that case the periodical payments were larger than the periodical interest.—p. 204.

Barber, In re, Stanford, Ex parte (see cols. 246—250), *observations adopted.*

Thomas v. Kelly (see cols. 247—250), *applied.*
Haseltine, In re, Woodward v. Haseltine (1891) 60 L. J. Ch. 357; [1891] 1 Ch. 464; 64 L. T. 303; 39 W. R. 405.—C.A. **LINDLEY, LOPES and KAY, L.JJ.**

Real and Personal Advance Co. v. Clears (1888) 57 L. J. Q. B. 164; 20 Q. B. D. 304; 58 L. T. 610; 36 W. R. 256.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ., distinguished.**
Briggs v. Pike (1892) 61 L. J. Q. B. 418; 66 L. T. 637.—C.A.

Goldstrom v. Tallerman (*see* cols. 246—250), *discussed*.

Bargen, In re, Hasluck, Ex parte (1893) 63 L. J. Q. B. 209; [1894] 1 Q. B. 444; 10 R. 74; 69 L. T. 763; 10 Morrell 301.—WILLIAMS, J.

Thomas v. Kelly (*see* cols. 247—250), *distinguished*.

Consolidated Credit Corporation v. Gosney (1885) 55 L. J. Q. B. 61; 16 Q. B. D. 24; 54 L. T. 21; 34 W. R. 106.—DAY and SMITH, JJ.; and **Furber v. Cobb** (1887) 56 L. J. Q. B. 273; 18 Q. B. D. 494; 56 L. T. 689; 35 W. R. 398.—C.A. ESHER, M.R., SIR J. HANNEN and FRY, L.J., *followed*.

Seed v. Bradley (1894) 63 L. J. Q. B. 387; [1894] 1 Q. B. 319; 9 R. 171; 70 L. T. 214; 42 W. R. 257; 1 Manson 157.—C.A. LOPES and KAY, L.J.

LOPES, L.J.—The scheduled form of a bill of sale, annexed to the Act of 1882, permits the introduction into the body of the bill of sale of "terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defence of the security." Clauses, therefore, for the maintenance or defence of the security are unobjectionable and do not vitiate the bill of sale. In *Consolidated Credit Corporation v. Gosney*, a bill of sale was supported containing an agreement that the grantor should replace any chattels or things which should be worn out, with others of equal value, and in *Furber v. Cobb* an agreement by the grantor not to permit or suffer the chattels to be destroyed or injured, or to deteriorate in a greater degree than by reasonable wear and tear, and forthwith to replace, repair, and make good the same, was said to be in accordance with the form. . . . This bill of sale, therefore, does not sin against the statutable form unless the cases to which I have referred are altered or qualified by *Thomas v. Kelly* in the H. L. *Consolidated Credit Co. v. Gosney* is not cited in *Thomas v. Kelly*. If the bill of sale in *Thomas v. Kelly* is looked at, it will be found to be altogether different from the bill of sale in *Consolidated Credit Co. v. Gosney*. . . . Such terms [the terms of the bill of sale in *Thomas v. Kelly*] go far beyond any terms necessary for the maintenance or defence of the security.—pp. 388, 389.

Cochrane v. Entwistle (*ante*, col. 248), and **Burdett, In re, Byrne, Ex parte** (*ante*, col. 247, 248), *followed*.

Isaacson, In re, Mason, Ex parte (1894) 64 L. J. Q. B. 191; [1895] 1 Q. B. 333; 14 R. 41; 71 L. T. 512; 43 W. R. 278; 2 Manson 11.—C.A. ESHER, M.R., LOPES and RIGBY, L.J.

Barber, In re, Stanford, Ex parte (*see* cols. 246—250), *applied*.

Barr v. Kingsford (1888) 56 L. T. 861.—COLERIDGE, C.J. and POLLOCK, B., *distinguished and explained*.

Cartwright v. Regan (1895) 64 L. J. Q. B. 507; [1895] 1 Q. B. 900; 15 R. 385; 43 W. R. 600.—WRIGHT and KENNEDY, JJ.

WRIGHT, J.—*Barr v. Kingsford* was cited to show that the mere existence of a covenant to produce receipts on demand only avoided a bill of sale, on the ground that such a covenant to produce was not necessary for the security, as the Act only gives a power to seize on default of the production of the receipts on a demand in

writing; but on looking at the judgment of Lord Coleridge more carefully it is clear that the grounds of the decision rested on the fact that the clause in the bill of sale empowering the grantee to seize was not limited to the extent of sect. 7 of the Bills of Sale Act, 1882, but was to operate on any breach of any of the covenants, one of which was to produce the receipts on demand. The Court held that, inasmuch as the only statutory power to seize was, *inter alia*, on failure to comply with such a demand when made in writing, it was contrary to the statute to add a provision for seizure for default of compliance with a mere demand. The bill of sale in that case was inconsistent with the statutory form inasmuch as there was to be power to seize in an event other than those mentioned in sect. 7 of the Bills of Sale Act, 1882.—pp. 507, 508.

Goldstrom v. Tallerman (*see* cols. 246—250), *revisited*.

Bargen, In re, Hasluck, Ex parte (1893) 63 L. J. Q. B. 209; [1894] 1 Q. B. 444; 10 R. 74; 69 L. T. 763, 10 Morrell 301.—WILLIAMS, J., *followed*.

Linfoot v. Pockett (1895) 64 L. J. Ch. 752; [1895] 2 Ch. 835; 12 R. 504; 73 L. T. 197; 44 W. R. 66, 2 Manson 482.—C.A. LINDLEY, LOPES and RIGBY, L.J.

Thomas v. Kelly (*see* cols. 247—250), *dictum relied upon*.

Barber, In re, Stanford, Ex parte (1886) 55 L. J. Q. B. 341; 17 Q. B. D. 259; 54 L. T. 894; 34 W. R. 287, 507.—C.A. (*see* cols. 246—250), *approved*.

De Brann v. Ford (1899) 69 L. J. Ch. 82; [1900] 1 Ch. 142; 81 L. T. 568; 7 Manson 28.—C.A. LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.J.

6. STATEMENT OF CONSIDERATION.

Haynes, In re, National Mercantile Bank, Ex parte, 42 L. T. 64; 28 W. R. 399; *reversed*, (1880) 49 L. J. Bk. 62; 15 Ch. D. 42; 43 L. T. 36; 28 W. R. 848.—C.A.

Thresappellon, In re, Carter, Ex parte (1879) 12 Ch. D. 908; 41 L. T. 37; 27 W. R. 943, *questioned*.

Haynes, In re, National Mercantile Bank, Ex parte, (1880) 15 Ch. D. 42; 49 L. J. Bk. 62; 43 L. T. 36; 28 W. R. 848.—C.A.

BAGGALLAY, L.J.—*Ex parte Carter*, on which Mr. Hemming relied, was a very different case from the present, though I think it right to say that, as at present advised, I am by no means satisfied that I should have agreed with the decision in that case.—p. 55.

Haynes, In re, National Mercantile Bank, Ex parte, distinguished.

Parker, In re, Charing Cross Advance and Deposit Bank, Ex parte (1880) 16 Ch. D. 85; 50 L. J. Ch. 157; 44 L. T. 113; 29 W. R. 204.—C.A.

JAMES, L.J.—In *Ex parte National Mercantile Bank*, the consideration was stated to be a loan of 2,050*l.* by the grantees to the grantor, and it was not the less a loan of that amount, because by a collateral agreement 550*l.* part of it was to be applied in the payment of a real bond *vide* debt from the grantor to the grantees existing at the time, and not arising out of the then

transaction between the parties. For the present case there was really an evasion of the provisions of the Act, and it is not at all like *Ex parte National Mercantile Bank*.—p. 88.

Parker, In re, Charing Cross Advance and Deposit Bank, Ex parte, distinguished.

Rogers, In re, Challinor, Ex parte (1880) 16 Ch. D. 269; 44 L. T. 122; 29 W. R. 205.—C.A. JAMES, COTTON and LUSH, L.J.; reversing S. C. *nom.* Beetonson, Ex parte, Rogers, In re, 42 L. T. 808.—BACON, C.J.

LUSH, L.J.—In that case something was kept back by the grantee out of the nominal consideration as interest on the advance, though nothing could be then due for interest. In the present case there is nothing like fraud, and for the reasons which have been given by my learned colleagues, though my mind has fluctuated during the argument, I am now clearly of opinion that the provisions of the Act have been complied with, and that the consideration has been truly stated.—p. 269.

Haynes, In re, National Mercantile Bank, Ex parte (supra); and Rogers, In re, Challinor, Ex parte, explained.

Spindler, In re, Rolph, Ex parte (1881) 19 Ch. D. 98; 51 L. J. Ch. 88; 45 L. T. 482; 30 W. R. 52; 46 J. P. 181.—C.A. JESSEL, M.R., LUSH and LINDLEY, L.J.; reversing S. C. *nom.* Spindler, In re, Nicholson, Ex parte, 44 L. T. 828.—BACON, C.J.

JESSEL, M.R.—In *Ex parte National Mercantile Bank*, the money stated as the consideration was actually handed to the borrower in bank-notes and gold, and the question was whether that was the real consideration. The Court of Appeal held that it was the real consideration; that the money stated to have been paid to the borrower was actually paid to him, and that the bargain as to the application of the money was a merely collateral bargain. Whether they were right or wrong in that conclusion is immaterial; the question was one of fact, and, that being their conclusion of fact, they decided that there was nothing in the Act requiring that a collateral bargain should be stated in the deed. That case has no application to the present. *Ex parte Challinor* is no doubt more difficult to distinguish from the present case. But there, again, the question decided was really only one of fact. The lender, who was the borrower's solicitor, retained out of the sum stated as the consideration the expenses of preparing the deed and some costs which were due to him by the borrower for business previously transacted, and also a sum of 20*l.*, which he paid to an auctioneer for valuing the property. The Court came to the conclusion that the deduction was made in pursuance of a prior agreement that these sums should be paid out of the loan, and consequently the handing of the money to the borrower and the handing of it back by him to the lender was immaterial. This was a conclusion of fact. It only came to this, that if the consideration which was stated had been handed in notes and cash to the borrower, and then handed back by him, the consideration would have been truly stated in the deed, and would have been paid to him, and that the handing over of the money, and the handing of it back again, was a mere

matter of form. Moreover, the sum retained was but small in proportion to the amount secured by the deed. I agree that the decision in *Ex parte Challinor* was right under the particular circumstances of the case. But neither of these cases, when carefully considered, supports the proposition that anything in the shape of a *bona fide* loan, of which the borrower gets the benefit, is sufficiently stated as the consideration for a bill of sale, if it is described as a cash payment.—p. 103.

Haynes, In re, National Mercantile Bank, Ex parte, and Rogers, In re, Challinor, Ex parte, explained.

Cowburn, In re, Frith, Ex parte (1882) 19 Ch. D. 419; 51 L. J. Ch. 473; 45 L. T. 120; 30 W. R. 529.—C.A. JESSEL, M.R., BRETT and HOLKER, L.J.

JESSEL, M.R.—That would finish what I have to say on this part of the case, were it not that our attention has been called, or rather re-called, to the two decisions of *Ex parte National Mercantile Bank* and *Ex parte Challinor*. Now I am quite satisfied to take these decisions as they are explained in *Ex parte Challinor* by Lord Justice James, who was then presiding in this Court. After stating what he thought the Act meant, he said (p. 266): "But when a man borrows money, he generally does so for the purpose of paying his debts, at any rate he ought to employ it in paying them; and if by his direction the money stated as the consideration is applied by the lender in the honest discharge of the borrower's debts, there is no reason for saying that that is not a payment of the money to him. That was the principle of our decision in *Ex parte National Mercantile Bank*, and in that case, besides the promissory notes of the borrower which were taken up, there were deducted some charges for the preparation of the security. It appears to me quite right to deduct the costs of preparing the bill of sale, and the auctioneer's charges for valuing the property, for that is what happens on every mortgage transaction." Then he goes on: "and it does not seem to me that the money was the less paid to the borrower because part of it was with his consent applied in payment of a debt for costs to his solicitor, which was not indeed strictly payable, because a bill of costs had not been delivered, but which was really owing to the solicitor." It is plain, therefore, that Lord Justice James, in dealing with this small sum for costs, thought it was a debt. He treats it on the principle that you can only apply the consideration in the payment of a debt. The fact that the costs of the preparation of the deed did not become a debt due from the grantee until after the transaction was completed, was not present to his mind, and all he intended to decide was, that a debt strictly so called, a debt existing at the time, might be deducted. I think that this reconciles the case with the subsequent decisions. But if it cannot be reconciled, all I can say is that, though I am bound by the decision in a precisely similar case, I do not feel inclined to extend it any further.—p. 428.

Cowburn, In re, Frith, Ex parte, distinguished.

Cann, In re, Hunt, Ex parte (1884) 13 Q. B. D. 36.—CAVE, J.

Haynes, In re, National Mercantile Bank, Ex parte, discussed.

Richardson v. Harris (1889) 22 Q. B. D. 268; 37 W. R. 426.—C.A. *ESHER, M.R., BOWEN and FRY, L.JJ.*

ESHER, M.R.—The consideration is stated to be 500*l.* paid by the assignee to the assignor on or immediately before the execution of the bill of sale. The meaning of that statement *prima facie* is, that the sum of 500*l.* was actually paid, which clearly was not the case. If the sum in question had been actually paid over to the assignor without any binding undertaking by him to pay any part of it back, as appears to have been the case in *National Mercantile Bank, Ex parte*, I think the consideration would have been in strictness accurately stated, although the assignor had chosen voluntarily to pay part of it back again in respect of some other debt either due or becoming payable in the future.—p. 272.

Credit Co. v. Pott (1880) 50 L. J. Q. B. 106; 6 Q. B. D. 295; 44 L. T. 506; 29 W. R. 326.—C.A., *followed*.
Hockaday, In re, Nelson, Ex parte (1866) 55 L. T. 819; 35 J. P. 264; 4 Morrell 12.—CAVE and WILLS, JJ.

Credit Co. v. Pott, applied.

Chapman, In re, Johnson, Ex parte (1884) 53 L. J. Ch. 762; 26 Ch. D. 338; 50 L. T. 214; 32 W. R. 639; 35 J. P. 648.—C.A. *COTTON, BOWEN and FRY, L.JJ.*

Credit Co. v. Pott and Chapman, In re, Johnson, Ex parte, commented on.
Richardson v. Harris (*supra*).

Chapman, In re, Johnson, Ex parte, followed.

Administrator-General of Jamaica v. Lascelles (1893) 63 L. J. P. C. 70; [1894] A. C. 135; 6 R. 445; 70 L. T. 179; 42 W. R. 416; 1 Manson 163.—P.C. *LORDS WATSON, HOBHOUSE and MACNAGHTEN and SIR R. COUCH.*

Richardson v. Harris (1889) 22 Q. B. D. 268; 37 W. R. 426.—C.A. *ESHER, M.R., BOWEN and FRY, L.JJ., distinguished.*

Wiltshire, In re, Eynon, Ex parte (1899) 69 L. J. Q. B. 143; [1900] 1 Q. B. 96; 81 L. T. 616; 48 W. R. 256; 7 Manson 145.—*WRIGHT and CHANNELL, JJ.*

WRIGHT, J.—Here, as there, the promissory note had not matured; but the distinction is that the money here was not retained by the grantee, but was in fact paid to the grantor; it was paid, that is to say, to his account at Lloyd's Bank for the purpose of discharging a liability of the grantor and grantee on the promissory note. The cheque being drawn payable to Lloyd's Bank did not prevent its being a payment to the grantor, as on his paying the cheque into the bank it would go to the credit of his account.—p. 146.

Simpson v. Charing Cross Bank (1886) 34 W. R. 568.—DENMAN and WILLS, JJ., *followed*.

Sharp v. McHenry (1887) 57 L. J. Ch. 961; 38 Ch. D. 428; 57 L. T. 606.—KAY, J.

7. PROPERTY PASSING BY.

Ringer v. Cann (1838) 3 M. & W. 343; 7 L. J. Ex. 108; 1 H. & H. 67; 2 Jur. 256, *distinguished*.

Harrison v. Blackburn (1864) 17 C. B. (N.S.) 678; 34 L. J. C. P. 109; 10 Jur. (N.S.) 1131; 11 L. T. 453; 13 W. R. 135.—C.P.

ERLE, C.J.—The case *Ringer v. Cann* is in terms very much like this case; but there are two very important distinctions between them. There, the assignment was for the benefit of all the creditors of the assignor, and would therefore naturally be an assignment of all the debtor possessed; and further, it was there provided that the rent should be paid out of the proceeds of the sale.—p. 690.

BYLES, J. to the same effect.—p. 692.

Harrison v. Blackburn, distinguished.

Debenham v. Digby (1873) 28 L. T. 170; 21 W. R. 359.—EX.

Holroyd v. Marshall, 2 Giff. 582; 29 L. J. Ch. 655; 6 Jur. (N.S.) 931; 3 L. T. 14; *reversed*, (1860) 30 L. J. Ch. 385; 7 Jur. (N.S.) 319; 2 De G. F. & J. 696.—L.C.; the latter decision *reversed*, (1862) 10 H. L. Cas. 191; 33 L. J. Ch. 193; 9 Jur. (N.S.) 213; 7 L. T. 172; 11 W. R. 171.—H.L. (B.).

Mogg v. Baker (1838) 3 M. & W. 195, 198; 7 L. J. Ex. 94, *commented on*.

Holroyd v. Marshall (1862) (*supra*), *in H.L.*

WESTBURY, L.C.—Some use was made at the bar and in the Court below of the language attributed to Parke, B., in the case of *Mogg v. Baker*. The learned judge appears to have given, not his own opinion, but what he understood would have been the decision of a Court of equity upon the case. He is represented as speaking upon the authority of one of the judges of the Court of Chancery. Any communication so made was of course extra-judicial, and there is much danger in making communications of such a nature the ground of judicial decision; but I entirely concur in what appears to have been the principle intended to be stated; for Parke, B., speaking of the agreement, says: "It would cover no specific furniture and would confer no right in equity." I have already explained that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest. If, therefore, the contract in *Mogg v. Baker* related to no specific furniture, it is true that it would not, at the time of its execution, confer any right in equity; but it is equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition.—p. 212.

Holroyd v. Marshall (*supra*), *in H.L., applied*.

Belding v. Read (1865) 3 H. & C. 955; 34 L. J. Ex. 212; 11 Jur. (N.S.) 647; 13 L. T. 66; 13 W. R. 867.—EX.

Holroyd v. Marshall (*supra*), *in H.L., followed*.

Leatham v. Amor (1878) 47 L. J. Q. B. 581; 38 L. T. 785; 26 W. R. 789.—Q.B.

Holroyd v. Marshall (*supra*), in H.L., *distinguished*.
D'Epineuil, In re, Tadmam v. D'Epineuil (1882) 20 Ch. D. 758; 47 L. T. 157; 30 W. R. 702.—FRY, J.

Holroyd v. Marshall, applied.
Clements v. Matthews (1868) 11 Q. B. D. 808; 52 L. J. Q. B. 772.—C.A.

Holroyd v. Marshall, distinguished.
Reeves v. Barlow (1884) 53 L. J. Q. B. 192; 12 Q. B. D. 436; 60 L. T. 782; 32 W. R. 672.—C.A. (*see extract, ante*, col. 230).

Browne v. Fryer, 45 L. T. 521; *reversed*, (1882) 46 L. T. 636.—C.A.

Official Receiver v. Talby (1886) 56 L. J. Q. B. 30; 18 Q. B. D. 25; 55 L. T. 626; 35 W. R. 91.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.J.J.; reversed, non. Talby v. Official Receiver** (1888) 58 L. J. Q. B. 75; 13 App. Cas. 523; 60 L. T. 162; 37 W. R. 513.—H.L. (E.). **LORDS HERSCHELL, WATSON, FITZGERALD and MACNAGHTEN.**

Lazarus v. Andrade (1880) 49 L. J. C. P. 847; 5 C. P. D. 318; 43 L. T. 30; 29 W. R. 15; 44 J. P. 697, *followed*.

Belding v. Read (1865) 34 L. J. Ex. 212; 3 H. & C. 955; 11 Jur. (S.S.) 547; 13 L. T. 66; 13 W. R. 867, *distinguished*.
Clements v. Matthews (1882) 47 L. T. 251; 47 J. P. 21.—**LOPES, J. (see infra).**

Clements v. Matthews, 47 L. T. 251; 47 J. P. 21.—**LOPES, J.; partly reversed**, (1883) 11 Q. B. D. 808; 52 L. J. Q. B. 772.—C.A. **BRETT, M.R., COTTON and BOWEN, L.J.J.**

Belding v. Read and D'Epineuil, In re, Tadmam v. D'Epineuil (1882) 20 Ch. D. 758; 47 L. T. 157; 30 W. R. 702.—FRY, J., *overruled*.

Clements v. Matthews, referred to.
Clarke, In re, Coombe v. Carter (1887) 56 L. J. Ch. 981; 36 Ch. D. 348; 57 L. T. 823; 36 W. R. 293.—C.A. **COTTON, BOWEN and FRY, L.J.J., approved.**

Talby v. Official Receiver (*supra*), in H.L.
LORD MACNAGHTEN.—The contention of the learned counsel for the respondent was this: They asserted as a proposition of law that an assignment of future book debts not limited to any specified business is too vague to have any effect. . . . The origin of the doctrine, modern though it be, is lost in obscurity. Before *Holroyd v. Marshall* (32 L. J. C. P. 258; 14 C. B. (S.S.) 566) no support for it can be found. Possibly it may be evolved from *Holroyd v. Marshall*. **LOPES, L.J.** seems to think so. It assumed a definite form in *Belding v. Read*. It was recognised by FRY, J. in *D'Epineuil, In re*, and it received the stamp of authority from what was said or implied by two of the learned judges who decided *Clements v. Matthews*. No other authority or semblance of authority was produced. I have read *Holroyd v. Marshall* many times, and I can discover no trace of the doctrine there. *Belding v. Read*, as **BOWEN, L.J.** points out, was founded upon a misapprehension of Lord Westbury's judgment in *Holroyd v. Marshall*. In *D'Epineuil, In re*, the learned judge, as he stated in *Clarke, In re*,

thought himself bound by *Belding v. Read*, and simply followed the decision in that case. As for the order made in *D'Epineuil, In re*, it seems to me to have been only too favourable to the claimant. I much doubt whether a memorandum like that on which the claimant relied, could create a specific lien of any sort or kind. Finally, **COTTON, L.J.** has himself disclaimed the hidden meaning attributed to his judgment in *Clements v. Matthews*. . . . I need hardly say that I think the decision in *Clarke, In re*, unquestionably correct; and I should say nothing more about it, but that I find that some of the learned judges have drawn a distinction which I confess I am unable to appreciate. It was said that both in *Clements v. Matthews* and in *Clarke, In re*, the contract was divisible, but that in the present case the contract is indivisible. The contract is not, I think, divisible in the usual acceptance of the word. . . . To say that an assignment by a trader of all future book debts in his present business, and also of all future book debts in any other business which he may hereafter undertake, is divisible, but that an assignment of all his future book debts is not divisible, seems to me to be attributing substance and reality to the merest verbal distinction.—pp. 84, 85, 88.

8. SUCCESSIVE BILLS OF SALE.

Smale v. Burr (1782) 42 L. J. C. P. 20; L. R. 8 C. P. 64; 27 L. T. 555; 21 W. R. 193, *affirmed*.

Ramsden v. Lupton (1873) 43 L. J. Q. B. 17; L. R. 9 Q. B. 17; 29 L. T. 510; 22 W. R. 129.—EX. CH.

Smale v. Burr, distinguished.

Cooper v. Zeffert (1883) 32 W. R. 402.—C.A.
BRETT, M.R.—But it was said that the first bill of sale was cancelled by the second. The second was given to confirm what had been done by the first, so that the real intention was that, if the first was insufficient, it could be confirmed, but that, if it was sufficient, it should stand. There was no intention to do away with the legal effect of the first, if it had a legal effect. It was said that the case, *Smale v. Burr*, decides that, notwithstanding the intentions of the parties, the giving of the second bill of sale cancels the first, on the ground, as I understand it, that the grantee can only take the second bill of sale upon the theory that the grantor had taken back the property in the goods in order to grant the second bill of sale. That would be so if the intention of the parties was to do away with the first in order to make the second valid. In that case the parties were trying to evade the statute as to renewal of bills of sale, and to avoid registration, and therefore they gave successive bills of sale within the time when registration was to be made. The intention there was that the first bill of sale should be got rid of, so that it should not have to be registered, and that the second should be valid. Therefore the Court held that the last bill of sale was valid, and that it cancelled the first, because that was the obvious intention of the parties. Here it is obvious that the intention of the parties was exactly contrary, and that the second bill of sale was, in the circumstances, taken without any intention to cancel the first.—p. 402.

Ramsden v. Lupton, limited.

Sparke, In re, Cohen, Ex parte (1871) 41 L. J. Bk. 17; L. R. 7 Ch. 20; 25 L. T. 473; 20 W. R. 69.—*L.J.*, *followed*.
Stevens, In re and Ex parte (1875) L. R. 20 Eq. 786; 44 L. J. Bk. 136; 33 L. T. 135; 23 W. R. 908.

BACON, C.J.—*Ramsden v. Lupton* related only to the rights of an execution creditor; there was no bankruptcy. Coleridge, C.J. in the course of his judgment referred to *Stansfeld v. Cubitt* (2 De G. & J. 222) and *Ex parte Cohen*, and said: "From that kind of decision, upon such principles, no member of this Court is inclined to dissent."—p. 788

Stevens, In re and Ex parte; and Sparke, In re, Cohen, Ex parte, distinguished.
Jackson, In re, Hall, Ex parte (1877) 4 Ch. D. 682; 46 L. J. Bk. 39; 35 L. T. 947; 25 W. R. 382.—**BACON, C.J.**

Stevens, In re and Ex parte, approved and followed.

Baum, In re, Cooper, Ex parte (1878) 48 L. J. Bk. 54; 10 Ch. D. 313; 30 L. T. 523; 27 W. R. 299.—*C.A.*; and **Barraud, In re, Leman, Ex parte** (1876) 46 L. J. Bk. 38; 4 Ch. D. 23; 35 L. T. 422; 25 W. R. 65.—*C.A.*, *followed*.
Cross, In re, Payne, Ex parte (1879) 11 Ch. D. 539; 40 L. T. 296; 27 W. R. 368.—*C.A.*

9. PRIORITY.

Richards v. James (1867) 36 L. J. Q. B. 116; L. R. 2 Q. B. 285; 16 L. T. 174; 15 W. R. 580; 3 B. & S. 302, *announced on*.
Meux v. Jacob (1875) 44 L. J. Ch. 481; L. R. 7 H. L. 481; 32 L. T. 171; 23 W. R. 526.—*H.L. (C.)*.

Richards v. James and Cuthbertson, In re, Edey, Ex parte (1875) 44 L. J. Bk. 55; L. R. 19 Eq. 264; 31 L. T. 851; 23 W. R. 519, *distinguished*.
Payne v. Cales (1878) 38 L. T. 355.—**GROVE and LINDLEY, JJ.**

[*Richards v. James* was distinguished on the ground that there the holder of the second and registered bill of sale had done no wrongful act. Here the party occupying the same position had seized the goods when there was no bankruptcy or execution, *i.e.*, had committed a tortious act as against the holder of the first and unregistered bill, whose title was perfectly good against all persons except assignees under the bankruptcy laws, or for the benefit of creditors, sheriff's officers seizing under an execution, and execution creditors. *Ex parte Edey, In re Cuthbertson* turned on the right of the trustee in bankruptcy to the goods.]

Richards v. James, questioned.

Artistic Colour Printing Co., In re, Fourdrinier, Ex parte (1882) 21 Ch. D. 510.—*C.A.*

JESSEL, M.R.—I give no opinion on the position in *Richards v. James* as to the effect of an execution on an unregistered bill of sale. I am not prepared to say that it avoids it altogether. Suppose a bill of sale, given for 1,000*l.* and not registered, and then a judgment creditor for 10*l.* takes out execution and seizes the goods while still in the possession of the debtor. The execution is good against the bill of sale, but I am disposed to think that the holder of the bill of sale can claim the residue.—p. 512.

O.C.

Richards v. James, distinguished.

Toomer, In re, Blumberg, Ex parte (1883) 52 L. J. Ch. 461; 23 Ch. D. 254; 49 L. T. 16; 31 W. R. 906.—*C.A.*

Lyons v. Tucker (1881) 50 L. J. Q. B. 322; 6 Q. B. D. 660; 44 L. T. 312, *dissented from*.

Connelly v. Steer (1881) 50 L. J. Q. B. 326; 7 Q. B. D. 520; 45 L. T. 402; 29 W. R. 529.—*C.A.* **SELBORNE, L.C., BRAMWELL and BAGGALLAY, L.JJ.**

Lyons v. Tucker, 50 L. J. Q. B. 322; 6 Q. B. D. 660; 44 L. T. 312; *reversed* (1881) 50 L. J. Q. B. 661; 7 Q. B. D. 523; 45 L. T. 403.—*C.A.* **BRAMWELL, BRETT and COTTON, L.JJ.**

Joseph v. Lyons (1884) 54 L. J. Q. B. 1; 15 Q. B. D. 280; 51 L. T. 740; 33 W. R. 145.—*C.A.* **BRETT, M.R., COTTON and LINDLEY, L.J.**, *followed*.

Hallas v. Robinson (1885) 54 L. J. Q. B. 364; 15 Q. B. D. 288; 33 W. R. 426.—*C.A.* **BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.**

10. PUTTING IN FORCE.

Albert v. Grosvenor Investment Co. (1890) 8 B. & S. 664; 37 L. J. Q. B. 24; L. R. 3 Q. B. 123, *questioned*.

Williams v. Stern (1879) 5 Q. B. D. 409; 49 L. J. Q. B. 663; 42 L. T. 719; 28 W. R. 901.—*C.A.* **BRAMWELL, L.J.**—I cannot accede to the decision in that case, because I entertain great doubts whether it was correct.—p. 412.

BRETT, L.J.—I cannot agree with that decision.—p. 413.

Cotton, Ex parte (1883) 11 Q. B. D. 301; 49 L. T. 52; 32 W. R. 58; 47 J. P. 599, *approved*.

Wickens, Ex parte (1898) 67 L. J. Q. B. 397; [1898] 1 Q. B. 543; 78 L. T. 213; 46 W. R. 385; 5 Manson 55.—*C.A.* **SMITH, CHITTY, and COLLINS, L.JJ.**

Wickens, Ex parte, approved and distinguished.

Ellis, Ex parte (1898) 67 L. J. Q. B. 734; [1898] 2 Q. B. 79; 78 L. T. 733; 46 W. R. 531; 5 Manson 231.—*C.A.* **SMITH and WILLIAMS, L.JJ.**

Hill v. Kirkwood (1880) 28 W. R. 358; 42 L. T. 145.—*C.A.*, *considered*.

Hickson v. Darlow (1833) 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 417.—*C.A.* **JESSEL, M.R., LINDLEY and BOWEN, L.JJ.**

JESSEL, M.R.—As to the other point, the case of *Hill v. Kirkwood* does not bear out the proposition for which it was cited. All that the Court there decided was, that the ordinary practice in cases between mortgagor and mortgagee was to be followed, namely, that on an application by a mortgagor to stay a sale, if the mortgagee swears that an amount which, consistently with the terms of the mortgage, may be due to him, is due, that is the amount which the mortgagor must bring into Court.—p. 694.

Loneragan, In re, Shiel, Ex parte (1877) 46 L. J. Bk. 62; 4 Ch. D. 789; 36 L. T. 270; 25 W. R. 420.—*C.A.*, *approved*.

Hart, In re, Bayly, Ex parte (1880) 15 Ch. D. 223; 43 L. T. 181; 29 W. R. 28.—*C.A.* **JAMES, BRETT and COTTON, L.JJ.**

Ree v. Mutual Loan Fund Association, 56 L. T. 631.—**POLLOCK**, B.: *reversed on one point*, (1887) 56 L. J. Q. B. 541; 19 Q. B. D. 347; 35 W. R. 723.—**C.A.** **ESHER**, M.R., **LINDLEY** and **LOPES**, L.J.J.

Smith v. Baker (1873) 42 L. J. C. P. 155; L. R. 8 C. P. 350; 28 L. T. 637, *approved*.
Ree v. Mutual Loan Fund (1887) 56 L. J. Q. B. 541; 19 Q. B. D. 347; 35 W. R. 723.—**C.A.** **ESHER**, M.R., **LINDLEY** and **LOPES**, L.J.J.; *reversing* 56 L. T. 631.—**POLLOCK**, B.

11. TRUE OWNER.

Tuck v. Southern Counties Deposit Bank (1889) 58 L. J. Ch. 699; 42 Ch. D. 471; 61 L. T. 348; 37 W. R. 769.—**C.A.** **COTTON** and **FRY**, L.J.J.; **LOPES**, L.J. *dissenting in part, distinguished*.

Thomas v. Searles (1891) [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; 65 L. T. 39; 39 W. R. 692.—**C.A.** **LINDLEY**, **FRY** and **LOPES**, L.J.J.

FRY, L.J. (during the argument).—In that case the first bill of sale was an absolute assignment of the goods. Here the grantor had an equity of redemption. The Bills of Sale Act, 1878, s. 10, recognises the fact that there may be several bills of sale of the same chattels, and regulates their priority.—pp. 409, 410.

LINDLEY, L.J.—But what is the position of a man who gives a bill of sale, not by way of absolute assignment, as in *Tuck v. Southern Counties Deposit Bank*, but by way of mortgage to secure an advance? He still has the equity of redemption in the goods. What is there to show that he is not the true owner to the extent of that interest for the purpose of giving a fresh bill of sale as security for a further advance of money? It would be going too far to stretch the language of the section to make that impossible. I certainly am not prepared for the first time to put such an interpretation on the statute as would prevent a man from giving a second bill of sale on the same goods.—p. 412.

Tuck v. Southern Counties Deposit Bank, *discussed*.

Thomas v. Roberts (Smith, Claimant) (1898) 67 L. J. Q. B. 478; [1898] 1 Q. B. 657; 78 L. T. 712; 5 Manson 70.—**WRIGHT** and **DARLING**, J.J.

12. WHEN FRAUDULENT AND VOID.

Wordall v. Smith (1808) 1 Camp. 332, *disapproved*.

Eastwood v. Browne (1825) Ry. & M. 312; 27 R. R. 754.

BUILDING SOCIETY.

And see "COMPANY," "FRIENDLY SOCIETY," and "USURY."

RULES.

Reg. v. Banatyne (1851) 20 L. J. Q. B. 210; 2 L. M. & P. 213.—**ERLE**, J., *overruled*.
Reg. v. Aldham and United Parishes Insurance Society (1851) 21 L. J. Q. B. 1; 17 Q. B. 524; 16 J. P. 149.—**Q.B.**

Norfolk and Norwich Permanent Building Society, Smith's Case, In re (1875) 45 L. J. Ch. 143; 1 Ch. D. 481; 24 W. R. 103.—**HALL**, V.-C., *approved but distinguished*.

Wilson v. Miles *Platting Building Society* (1887) 22 Q. B. D. 381, n.; 60 L. T. 558; 37 W. R. 369, n.—**C.A.** **COTTON**, L.J., **SIR J. HANNEN** and **LINDLEY**, L.J. *See judgment of COTTON, L.J.*

Dewhurst v. Clarkson (1854) 23 L. J. Q. B. 247; 3 E. & B. 194; 2 C. L. R. 1143; 18 Jur. 693; 18 J. P. 534.—**CAMPBELL**, C.J. for the majority; **ERLE**, J. *differing*; and **Wilson v. Miles** *Platting Building Society*, *followed*.

Rosenberg v. Northumberland Building Society (1889) 22 Q. B. D. 373; 60 L. T. 538; 37 W. R. 363.—**C.A.** **ESHER**, M.R., **BOWEN** and **FRY**, L.J.J.

Wilson v. Miles *Platting Building Society* and **Rosenberg v. Northumberland Building Society**, *considered and applied*.

Bradbury v. Wild (1892) 62 L. J. Ch. 503; [1893] 1 Ch. 377; 3 R. 195; 68 L. T. 50; 41 W. R. 361; 57 J. P. 68.—**KEKEWICH**, J.

Rosenberg v. Northumberland Building Society and **Wilson v. Miles** *Platting Building Society*, *distinguished*.

Davies v. Second Chatham Building Society (*post*, col. 273), *followed*.

Pepe v. City and Suburban Building Society (1893) 62 L. J. Ch. 501; [1893] 2 Ch. 311; 3 R. 471; 68 L. T. 846; 41 W. R. 548.

CHITTY, J.—They [the two latter cases] turned on the effect of a covenant in a mortgage deed binding the mortgagor not merely by the then existing rules, but by the rules for the time being of the society.—p. 502. *And see post*, col. 279.

BORROWING POWERS.

Blackburn Building Society v. Cunliffe Brooks & Co. (1882) 52 L. J. Ch. 92; 22 Ch. D. 61; 48 L. T. 33; 31 W. R. 98.

—**C.A.** **SELBORNE**, L.C., **JESSEL**, M.R. and **COTTON**, L.J. (*affirmed, post*, col. 263), *discussed and followed*.

Wenlock (Baroness) v. River Dee Co. (1887) 56 L. J. Q. B. 589; 19 Q. B. D. 155; 57 L. T. 820; 35 W. R. 822.—**C.A.** **ESHER**, M.R., **FRY** and **LOPES**, L.J.J.

Blackburn Building Society v. Cunliffe Brooks & Co., *referred to*.

Neath Building Society v. Luce (*post*, col. 264).

Wenlock (Baroness) v. River Dee Co., *followed*.

Redman v. Rymer (1889) 60 L. T. 385.—**KEKEWICH**, J.; *reversed*, [1891] 65 L. T. 270.—**C.A.** **LINDLEY**, **BOWEN** and **KAY**, L.J.J.

Wenlock (Baroness) v. River Dee Co., *remarks of FRY, L.J., dissented from*.

Wrexham, Mold and Connah's Quay Ry., In re (1899) 68 L. J. Ch. 270; [1899] 1 Ch. 440; 80 L. T. 130; 47 W. R. 172, 464; 6 Manson 218.—**C.A.**; *affirming* (1898) 68 L. J. Ch. 28; [1898] 2 Ch. 663; 79 L. T. 463; and 68 L. J. Ch. 115; [1899] 1 Ch. 205; 79 L. T. 692.—**ROMER**, J.

LINDLEY, M.R.—Agreeing as I do with **Romer**, J., and with the judgments which my brothers

have prepared and which I have read, I should say nothing more if it were not that I think I ought to express my dissent from the observations of Fry, L.J., on which the appellants base their contention. The decision of the Court in *Wentlock (Baroness) v. River Dye Co.* was quite right, and the judgment in it is very valuable. Fry, L.J., who delivered it, was the last person to shut his eyes and not get at the real facts and substance of any case before him. But in dealing with that case, the L.J. says that "the Court closes its eyes to the true facts of the case." I cannot help thinking that this is incorrect. A prohibition against borrowing more than a given sum is only in reality and substance disobeyed when an obligation to pay more than that sum is contracted. Courts of equity have always looked into the facts to see whether the prohibition has been really disobeyed or not. If it is disobeyed, and to the extent to which it is disobeyed, the prohibition is enforced . . . so far as such money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the Courts have so decided. The subrogation theory has been had recourse to in order to account for the decisions ultimately arrived at; but the theory was really not wanted in order to justify them. It was, however, adequate for the purposes for which it was used, and as applied to the cases before the Courts it led to just results.

—p. 272.

RIGBY and V. WILLIAMS, L.J.J. to the same effect. See the judgments at length.

Laing v. Reed (1869) L. R. 5 Ch. 4.—**HATHERLEY, L.C. and GIFFARD, L.J.**, referred to. *And see post*, col. 264.

National Building Society, *In re*, **Williamson, Ex parte** (1869) L. R. 5 Ch. 309; 22 L. T. 284; 18 W. R. 388; 34 J. P. 41.—**GIFFARD, L.J.** *And see* "COMPANY."

Laing v. Reed, discussed.

Victoria Building Society, *In re*, **Hill's Case**, **James's Case** [1870] 39 L. J. Ch. 628; L. R. 9 Eq. 605; 22 L. T. 777; 18 W. R. 967.—**MALINS, V.-C.**

Laing v. Reed, dictum of LORD HATHERLEY overruled.

National Building Society, *In re*; **Victoria Building Society, In re**, and **Professional Commercial and Industrial Building Society, In re** (1871) L. R. 6 Ch. 856; 25 L. T. 397; 19 W. R. 1153.—**JAMES and MELLISH, L.J.J., discussed.**

Murray v. Scott, Agnew v. Murray, Brimelow v. Murray (1884) 9 App. Cas. 519; 53 L. J. Ch. 745; 51 L. T. 462; 33 W. R. 173.—**H.L. (R.)**; *varying* **S. C. nom.** **Guardian Building Society, In re**, **Calvert's Case** (1882) 52 L. J. Ch. 857; 23 Ch. D. 440; 48 L. T. 134; 32 W. R. 73.—**C.A.** **JESSEL, M.R., COTTON and BOWEN, L.J.J.**

SELBORNE, L.C.—The V.-C. of the Duchy of Lancaster and the C. A. considered it to have been settled, by authorities which they ought to follow, that any rule of such a society formed under the Act of 6 & 7 Will. 4, by which borrowing money without some limit of amount was authorised, was repugnant to, and inconsistent with, the provisions of that statute, and therefore incapable of being made legal by any

consent of members or allowance of the certifying barrister. But when the authorities which were supposed to establish this proposition are referred to, none of them are found to be really decisions upon that point: they all seem to depend upon a dictum of Lord Hatherley in *Laing v. Reed*, to the effect that although a limited borrowing power, if expressly given by a rule duly certified, would be good (as was decided in that case), a rule authorising the trustees "to raise an unlimited sum of money wholly regardless of the contributions which might be made by the members," would be "contrary to the intent and scope of the Act." I am not sure in what sense these words, "wholly regardless of the contributions," &c., were meant by Lord Hatherley to be understood; but I subscribe to the doctrine laid down in the same case by Giffard, L.J., that the test ought to be whether the rule (not being contrary to any express prohibition in the statute) was one which made the society "a thing different from a benefit building society." If not, and if it "merely provided a method of conducting business" (i.e., the proper business of a benefit building society), it could not be illegal or *ultra vires*; being made by the proper authority, and certified in the proper manner. Without disparagement to the weight justly due to those learned judges, who in several later cases have referred, with apparent approval and concurrence, to Lord Hatherley's dictum, I think that in this state of authority the point cannot be regarded as settled; and that your lordships ought to decide it according to your own view of the true effect of the statute.—p. 536.

LORD BLACKBURN.—What is here decided [*National Building Society, In re*] is that a society under this Act has no power to borrow unless its rules authorise it so to do, and that is, I think, as well as settled to be law as anything not yet decided by this House can be. I do not think that the actual decision in *Laing v. Reed* ought to be put higher than that a rule which authorised borrowing, but was so expressed as on its construction not to make the members as such liable for the money borrowed, and which also had a limit as to the sums to be borrowed, was valid. It left it open to any one to say that had not both these limits existed, *non constat* that the decision would not have been different. And I think also that the language of Lord Hatherley is such that it might fairly be argued that Lord Hatherley attached weight to the limit as to amount contained in the 5th subsection of the rule (p. 552). . . . Malins, V.-C. [*Victoria Building Society, In re*] assumes, without giving any reasons for it, that a rule giving a power to borrow, if valid at all, must give a power, so as to enable those who borrowed to pledge the credit of the members as individuals. Whether a rule which authorised the managers to pledge the members as individuals was ever certified or not I do not know; it certainly would be eminently inexpedient that there should be such a power. Whether, if such a rule existed, it would be valid is a question which has never, as far as I can find, been raised; it certainly was not raised in *Laing v. Reed*. . . . I am by no means prepared to decide that question either way until it arises, which it . . . does not in the present case (p. 554). . . . The language of James, L.J. [*Professional Commercial and Industrial Building Society, In re*] has been cited as showing that he was under the

impression that *Laing v. Reed* was to be understood in the limited sense put upon it by Malins, V.-C., in *Hill's Case*. . . . Now, though James, L.J., had not any need to decide this, and may not have put his mind to the point, he does, I think, intimate that his impression was that the rule, not limiting the amount of money to be borrowed, was, according to *Laing v. Reed*, not valid. I have already expressed my reasons for coming to a different conclusion, but I think James, L.J.'s expressions are an authority against me. But I do not think I can, in any possible view of it, be held to settle the law.—p. 554, 555.

LORD WATSON.—An examination of these cases, all of which have been already noticed by . . . Lord Blackburn, satisfies me that in none of them was the present question as to the validity or invalidity of that which has been termed an unlimited power to borrow raised and decided. The doctrine that such a power is *ultra vires* of the society, and therefore void, had its origin in the opinion expressed by Lord Hatherley in *Laing v. Reed*, an opinion which was referred to as authoritative in subsequent cases, although the point did not there arise for judicial determination. In *Laing v. Reed*, the sum authorised to be borrowed was restricted to two-thirds of the total amount for the time being secured to the society, by mortgage, so that there was no question before the Court as to the legality of an unlimited power. But it certainly appears to me that Lord Hatherley in that case sustained the power on the express ground that it was limited as to amount, and that the limit was proportioned to that part of its contributed capital, which the society had advanced to its members or lent on mortgage; and I think the noble and learned lord did intend to lay down the law to that effect, that without some limitation of that character the power would have been invalid. I prefer the test of its legality applied by Giffard, L.J., to the rule which he had to consider along with Lord Hatherley in *Laing v. Reed*.—“Does this rule merely provide a method of conducting business? Or is it a rule making the society a thing different from a benefit building society?”—p. 557.

Agnew v. Murray, explained.

Cunliffe Brooks & Co. v. Blackburn Building Society (1884) 54 L. J. Ch. 376; 9 App. Cas. 857; 52 L. T. 225; 33 W. R. 309.—H.L. (E.); affirming S. C. *nom.* Blackburn Building Society v. Cunliffe Brooks & Co. (*supra*, col. 260).

LORD BLACKBURN.—It was argued that in *Blackburn and District Building Society* (*post*, col. 273) the C. A. had decided that payments to withdrawing members were, or at least might be, liabilities of the society. I understand that this case is now under appeal—and if that is so, I would avoid prejudicing that appeal by expressing or even forming any opinion, unless it was required for the decision of the case now before the House. It appears from the account taken that even if all the payments to withdrawing members were allowed, the balance on the account would remain very much against the appellants. It is, therefore, as it seems to me, not necessary to form any opinion on this point.—p. 381.

LORD WATSON.—The House had occasion in a recent case [*Guardian Society, In re, Agnew v. Murray*] to consider the provisions of 6 & 7 Will. 4, with reference to the question of borrowing powers; and I understood the noble and

learned lords who decided that case to be of opinion that, whilst these provisions did not preclude the members of a benefit building society from authorising their managers to borrow for the legitimate purposes of the society's business, the managers could have no such authority unless it were given them by the rules.—p. 382. LORD FITZGERALD concurred.

Cunliffe Brooks & Co. v. Blackburn Building Society, distinguished, Walton v. Edge (*post*, col. 273); discussed, Wrexham, Mold and Connah's Quay Ry., *In re* (*supra*, col. 260).

Guardian Building Society, *In re* (*supra*, col. 261), distinguished.

Blackburn and District Building Society v. Cunliffe Brooks & Co. (1885) 54 L. J. Ch. 1091; 29 Ch. D. 902; 53 L. T. 741.—C.A.

COTTON, L.J. (for the Court, BRETT, M.R., COTTON and LINDLEY, L.J.J.).—The bankers, though dealing with the directors in matters which were not within the authority of the directors, were not acting fraudulently. *Guardian Building Society, In re*, was not in point. The money there in question was secured by mortgage on property of the society. The mortgagees here were on the property, not of the society, but of its members, and the society acquired their interest in the property by means of the money lent by the bankers.—p. 1096.

Blackburn and District Building Society v. Cunliffe Brooks & Co. (*supra*), discussed and applied.

Sheffield Building Society, *In re*, Watson, Ex parte (*or* Companies Acts, *In re*, Watson, Ex parte) (1888) 57 L. J. Q. B. 609; 21 Q. B. D. 301; 59 L. T. 401; 36 W. R. 829; 52 J. P. 742.—CAVE and WILLS, JJ.

MATTERSON v. Elderfield (1869) L. R. 4 Ch. 207; 20 L. T. 803; 17 W. R. 422; 38 J. P. 326.—HATHERLEY, L.C., explained.

Laing v. Reed (*supra*), dictum followed.

Blackburn and District Building Society v. Cunliffe Brooks & Co., 54 L. J. Ch. 1091, discussed and followed.

Neath Building Society v. Luce (1889) 59 L. J. Ch. 3; 43 Ch. D. 158; 61 L. T. 615; 38 W. R. 122. CHITTY, J.—Prior to 1874, when this Act [Building Societies Act, 1874] was passed, *Laing v. Reed* had decided that, under a limited borrowing power, a building society was entitled to borrow; and, curiously enough, the rule of the society in that case was expressed in very much the same language as that of the section (sect. 15), namely, “the amount for the time being secured by the mortgages to the society.” And Lord Hatherley, in the course of his judgment, translates this term into “the amount that may be outstanding upon mortgages.” I do not found my decision on this dictum; but, following it, I decide this case unfavourably to the plaintiffs. . . . *Matterson v. Elderfield* decided that a society is entitled to take at once the whole amount of the future instalments due, without allowing any discount whatever. . . . The second question arises in working out the equity of the person who has lent to the society sums in excess of their borrowing power. Such sums, it is clear, he cannot recover; but it is also established that he has an equity of subrogation which is expressed by Lord Selborne in *Blackburn Building Society v. Cunliffe Brooks & Co.* (*supra*, col. 260), as the

right to be repaid such portion of the amount lent as went to pay the legitimate debts of the society. To this extent the lender is entitled to stand in the shoes of the creditors. . . . In *Blackburn Building Society v. Cawcliffe Brooks & Co.* (54 L. J. Ch. 1091), the V.-C. of the Duchy of Lancaster gave the bankers the benefit of all sums received by the society from advanced members by way of bonus, &c., subject, however, to the costs of the winding up, and to mortgages and charges to the society in respect of advances out of its proper funds. This limitation was, however, struck out by the C. A. It is true the exact point as to the bonus does not appear to have been argued before them; but the ground on which they proceeded is stated to be that, "We treat the mortgages given to secure sums lent out of money advanced by the bankers as property which they are entitled to claim, that is, as their property"—that is to say, the security given by the advanced member is to be treated as the property of the *quasi* lender.—pp. 6, 7.

Guardian Building Society, In re, referred to.
Small v. Smith (1884) 10 App. Cas. 119.—H.L. (SC). SELBORNE, L.C., LORDS BLACKBURN and WATSON, and **Asiatic Banking Corporation, In re, Royal Bank of India's Case** (1869) L. R. 4 Ch. 252; 19 L. T. 444, 805; 17 W. R. 559.—SELWYN and GIFFARD, L.J.J., *explained*.
 Sheffield and South Yorkshire Building Society v. Aisleworth (1889) 59 L. J. Ch. 84; 44 Ch. D. 412; 62 L. T. 678.—STIRLING, J. *See* judgment at length.

REDEMPTION OF MORTGAGES.

Mosley v. Baker (1849) 18 L. J. Ch. 457; 3 De G. M. & G. 1032, n.; 13 Jur. 817; 1 Hall & Tw. 301.—COTTENHAM, L.C.; *affirming* 17 L. J. Ch. 257; 6 Harc 87, 106.—WIGRAM, V.-C., *distinguished*.
Fleming v. Self (1854) 24 L. J. Ch. 29; 3 De G. M. & G. 997; 3 Eq. R. 14; 1 Jur. (N.S.) 25; 3 W. R. 89; 18 J. P. 772.—CRANWORTH, L.C., *varying* Kay 518.—WOOD, V.-C.

Fleming v. Self, followed.

Archer v. Harrison (1857) 7 De G. M. & G. 404; 3 Jur. (N.S.) 194; 21 J. P. 515.—CRANWORTH, L.C.

Fleming v. Self, principle recognised.

Farmer v. Smith (1859) 28 L. J. Ex. 226; 4 H. N. 196; 5 Jur. (N.S.) 583, n.; 7 W. R. 362; 23 J. P. 280.

MARTIN, B. (for the Court).—Some cases were cited; but it is only necessary to refer to *Fleming v. Self*, in which Lord Cranworth lays down the principle on which we act—namely, that the real question is, what is the meaning of the rule? If the meaning of the rule be clear, it is our duty to give effect to it.—p. 284. *And see post*.

Fleming v. Self, followed.

Smith v. Pilkington (1859) 1 De G. F. & J. 120; 29 L. J. Ch. 227.—C.A.

CAMPBELL, L.C.—The decision appealed against is, *ipsa iuris* *verbis*, as in *Fleming v. Self*—is on the same rules—and is made under the same circumstances. I must suppose that the question about double payment of redemption money was brought under the consideration of the Court by counsel in that case; and was present to the mind of Lord Cranworth, who, after a long and careful consideration of every item of charge and

credit, pronounced the decree. There can be little doubt that the decree has been acted upon since by societies of this description. The fair inference is that it has been consequently acting down the law upon these loan building societies, and that it has been consequently acted upon. It may fairly be supposed that various transactions, by borrowing shareholders and others, have been settled on the foundation of that decision, and we ought, in my opinion at least, to consider ourselves bound by the terms of it. It is a decision which we ought not to disturb.—p. 134. KNIGHT BRUCE and TURNER, L.J.J. concurred.

Farmer v. Smith (supra), referred to.

Sparrow v. Farmer (1859) 28 L. J. Ch. 537; 26 Beav. 511; 5 Jur. (N.S.) 530; 23 J. P. 500.—ROMILLY, M.R.

Fleming v. Self (supra), principle adopted.

Mulkern v. Lord (1879) 48 L. J. Ch. 745; 4 App. Cas. 182; 40 L. T. 594; 27 W. R. 510.—H.L. (C.). CAIRNS, L.C. and LORDS HATHERLEY and O'HAGAN. *And see post*, col. 270.

Fleming v. Self, referred to.

Sheffield Building Society v. Aisleworth (supra, col. 265).

Sparrow v. Farmer, distinguished.

Harvey v. Municipal Permanent Investment Building Society (1884) 26 Ch. D. 273; 53 L. J. Ch. 1126; 51 L. T. 408; 32 W. R. 557.—C.A.

COTTON, L.J.—When we look at the facts of that case we find that all that was decided there was, that though the mortgage debt was so far gone that the shareholder was able to redeem his property, yet he still remained liable for payments in respect of shares still subsisting. But here all which was payable down to the time when the mortgage was satisfied is covered by the receipt, and there is no claim for payments accrued due since, but for sums due before the mortgage was vacated. Therefore that decision has no bearing on the present case.—p. 286. BOWEN and FRY, L.J.J. concurred.

ASSIGNMENT OF MORTGAGE.

Ulster Permanent Building Society v. Glenton (1888) 21 L. R. Ir. 124.—MONROE, J., *questioned*.

Rumney and Smith, In re (1897) 66 L. J. Ch. 641; [1897] 2 Ch. 351; 76 L. T. 800; 45 W. R. 678.—C.A.

LINDLEY, L.J.—When we look at the Irish case of *Ulster Permanent Building Society v. Glenton*, which appears to be an authority that an assignment is valid, I am struck by the observations of the learned judge, who treated the mortgagor as consenting and as bringing the whole thing about. Of course, if a mortgagor consents, there is no difficulty. I do not go so far as to say without further consideration that a mortgage debt owing to a building society cannot be assigned without the consent of the mortgagor. All I say is, that it is a matter which appears to be fraught with difficulty, and will require a great deal of consideration before it is held that it can be assigned. Of course, I mean to a stranger who has nothing to do with the rules of the society and cannot give the mortgagor the benefit which the building society can. I will, therefore, do what Stirling, J. did,

pass the question by, and then consider whether, if the debt was validly assigned, Mr. Rumney, the assignee, has power to sell. It appears from authorities which are plain that he has not.—p. 642. LOPES and CHITTY, L.JJ. concurred.

PRIORITY—STATUTORY RECEIPT.

Pease v. Jackson (1868) 37 L. J. Ch. 725. L. R. 3 Ch. 576. 17 W. R. 1; 32 J. P. 757.—CAIRNS, L.C.; reversing ROMILLY. M.R., who had followed his previous decision in *Prosser v. Rice* (1859) 28 Beav. 68, followed.

Lawrence v. Clements (1874) 31 L. T. 670.—HALL, V.-C.

Pease v. Jackson, considered.

Fourth City Mutual Building Society v. Williams; Marson v. Cox (1879) 49 L. J. Ch. 245; 14 Ch. D. 140; 42 L. T. 615; 28 W. R. 372.—JESSEL, M.R. *And see* col. 263.

Pease v. Jackson, followed.

Fourth City Mutual Building Society v. Williams, commented on.

Robinson v. Trevor (1883) 53 L. J. Q. B. 85. 12 Q. B. D. 423; 50 L. T. 190; 32 W. R. 374.—C.A. BRETT, M.R. and BAGGALLAY and BOWEN, L.JJ.

Pease v. Jackson, Fourth City Mutual Society v. Williams, and Robinson v. Trevor, discussed.

Sangster v. Cochrane (1884) 54 L. J. Ch. 301; 28 Ch. D. 298; 51 L. T. 889; 33 W. R. 221.—KAY, J.

Pease v. Jackson and Robinson v. Trevor, distinguished.

Carlisle Banking Co. v. Thompson (1884) 28 Ch. D. 398; 53 L. T. 115; 33 W. R. 119.

NORTH, J.—No doubt statutory receipts under the Act of Parliament relating to building societies have been decided to have certain legal effects, and I need hardly say that if these decisions applied to the present case I should follow *Pease v. Jackson* and *Robinson v. Trevor*. But in the present case there is no such receipt. There is what is called a statutory reconveyance, but that does not take effect under the Friendly Societies Act; and although the reconveyance does in the body of the deed contain a receipt, it is not executed in the way in which the Act requires that such a receipt should be executed in order to give it any peculiar statutory efficacy in transferring the legal estate.—p. 400.

Pease v. Jackson and Robinson v. Trevor, in part overruled.

Hosking v. Smith (1888) 58 L. J. Ch. 367; 13 App. Cas. 582; 59 L. T. 565; 37 W. R. 257.—H.L. (E.); reversing C.A. COTTON, LINDLEY and BOWEN, L.JJ.

HALSBURY, L.C.—The C. A. considered themselves bound by the authority of *Pease v. Jackson*. . . . I believe the true solution of the concluding words in Lord Cairns' judgment in *Pease v. Jackson* is, that it was some trifling sum, the consideration of which was quite outside the questions really argued before him, and which he summarily disposed of without meaning to lay down any principle at all. Sir G. Jessel, who was counsel in the case, protested that the question was never argued. At all events, the

universal consensus of judicial opinion has, I believe, ever since that time refused to acquiesce in the soundness of that judgment—if it can be called a judgment—though bowing to the authority of the Court that decided it. Your lordships, however, are free to pronounce a decision upon it; and, as it does not rest upon anything but the words so uttered at the end of a judgment dealing with the other and more important part of the argument, I think your lordships will do well to consider rather the current of judicial authority than the single opinion so given, and to overrule the judgment so far as that part of the judgment is concerned.—p. 368.

LORD WATSON.—The circumstances which gave rise to controversy in *Pease v. Jackson* were very similar to those which occur in the present case. The third mortgagee, who had no notice of the second charge, advanced 230*l.* 5*s.* 4*d.*, of which 223*l.* 1*s.* 5*d.* was applied in payment of the first mortgage, held by a building society, who, on receiving the money, indorsed a receipt on their mortgage, and handed it to him, along with the titles of the property. The M.R. (Lord Romilly) held that the original mortgage was vacated by the 5th section of the Building Societies Act of 1836; and that the third charge in point of date was an entirely new mortgage, which must be postponed to the second of the original securities. The L.C. reversed his judgment, and preferred the last mortgagee to the extent of 223*l.* 1*s.* 5*d.*, but postponed the balance, which only amounted to 7*l.* 3*s.*, to the incumbrance of the second mortgagee. The case turned, as the present does, upon the construction of sect. 5 of 6 & 7 Will. 4, c. 32, which makes it lawful for the trustees of a building society to indorse upon their mortgage a receipt for the moneys thereby secured, "which shall be sufficient to vacate the same, and vest the estate . . . in the person or persons for the time being entitled to the equity of redemption. . . . There is, no doubt, some obscurity in the words "person or persons for the time being entitled to the equity of redemption." Earl Cairns points out, in *Pease v. Jackson*, the two constructions of which he thought they were susceptible. . . . Of the two possible constructions propounded by the noble and learned lord, I prefer the second. I think the legislature, by the expression "person or persons entitled to the equity of redemption" meant to indicate that there might be persons other than the mortgagor who would be so entitled, and that its true interpretation must be reached, in cases like the present, by holding that the expression refers to the person or persons who, at the time of the indorsement, have the better equity to call for the legal estate. The appellants are admittedly in that position, so far as they stand in the place of the three societies who were originally first mortgagees; but *Pease v. Jackson* is a direct decision to the effect that, although the legal estate is now vested in them in respect of that part of their mortgage debt, they have no priority in respect of the remainder. All that Earl Cairns says with regard to the small balance of 7*l.* 3*s.* is, "the defendants will, however, only be entitled to be redeemed for the amount advanced by them to the Middlesbrough society (that is, to the original mortgagees); as to any charge beyond that, the Leeds society will be incumbrancers *pro tanto* to the plaintiffs, and there will

be an ultimate decree of foreclosure against them for that amount." For that conclusion the noble and learned lord assigns no reasons; and I am disposed to think that he had not considered the point. In *Marron v. Cox* (*supra*) the late M.R., who was one of the counsel engaged in *Pease v. Jackson*, strongly disapproved of that part of the decision, and stated expressly that the point was not argued. The decision in *Pease v. Jackson* has nevertheless been followed by the C. A. in *Robinson v. Trevor* and in the present case; but none of the learned judges who constituted the Court on these occasions have expressed their approval of it; whilst Lindley, L.J., in this case, referred to the opinion of Sir G. Jessel in *Marron v. Cox* as one "which, in point of reason, I am bound to say would commend itself to my mind." I am unable to agree with the decision in *Pease v. Jackson* in so far as it relates to the balance of the moneys advanced against the new mortgage which was not expended in paying off the original incumbrances, because it appears to me to be at variance with the true intendment of the 5th section of the Act of Will. 4, and the ordinary principles which govern the priority of mortgage debts.—pp. 369—371.

LORD FITZGERALD.—It is to be observed, too, that in *Robinson v. Trevor* the M.R. and Bowen, L.J., accept the conclusion arrived at by Baggallay, L.J., only on the ground that they feel bound by *Pease v. Jackson*. That decision is now so far overruled.—p. 372.

ARBITRATION.

Catbill v. Kingdom (1847) 17 L. J. Ex. 177;

1 Ex. 494, *distinguished*.

Payne, Ex parte (1849) 18 L. J. Q. B. 197;

5 D. & L. 679; 13 Jur. 634.—WIGHTMAN, J. (for ERLE, J.). *And see post*, col. 270.

Catbill v. Kingdom and *Crisp v. Bunbury*

(1892) 1 L. J. C. P. 112; 8 Bing. 394.—

TINDAL, C.J., *referred to*

Morrison v. Glover (1849) 19 L. J. Ex. 20; 4 Ex. 430; 14 J. P. 84.—EX.

Payne, Ex parte and *Crisp v. Bunbury*, *discussed*.

Reeves v. White (1852) 21 L. J. Q. B. 169; 17 Q. B. 995; 16 Jur. 637; 16 J. P. 118.—CAMPBELL, C.J. (for the Court). *And see post*.

Morrison v. Glover and *Catbill v. Kingdom*, *approved*.

Mulkern v. Lord (*supra*, col. 266).

Morrison v. Glover, explained, Municipal Building Society v. Richards (*post*, col. 273); *approved*, Pailiser v. Dale (1897) 66 L. J. Q. B. 236; [1897] 1 Q. B. 257; 76 L. T. 14; 45 W. R. 291.—C.A. See "FRIENDLY SOCIETY."

Grimes v. Harrison (1859) 28 L. J. Ch. 823; 26 Beav. 435; 5 Jur. (N.S.) 528; 23 J. P. 423.—ROMILLY, M.R., *distinguished*.

Smith v. Lloyd (1859) 26 Beav. 507.—ROMILLY, M.R.: and *Doubleday v. Hosking* (1867) L. R. 15 Eq. 344, n.—ROMILLY, M.R., *not followed*.

Thompson v. Planet Benefit Building Society (1873) 42 L. J. Ch. 364; L. R. 15 Eq. 333; 28 L. T. 549; 21 W. R. 474; 37 J. P. 468.—BACON, V.-C.

Wright v. Deeley (1866) 4 H. & C. 209; 30 J. P. 631.—MARTIN, CHANNELL and PIGOTT, BB., *followed*. *And see post*, col. 272.

Huckle v. Wilson (1877) 2 C. P. D. 410; 26 W. R. 98.

DENMAN, J.—*Payne, Ex parte* (*supra*, col. 269) was the case of a member who had withdrawn from the society, and afterwards brought an action in the county court against the trustees. Upon a *mandamus* to the county court judge to hear the case, it was held by ERLE, J., that no right of action existed; and in *Reeves v. White*, Campbell, C.J., delivering the considered judgment of himself and Patteson, Coleridge and Wightman, JJ., says: "The other authorities relied upon to show that in all cases the society" (that being an action by trustees) "has an option either to refer or bring an action, do not outweigh *Payne, Ex parte*, and *Crisp v. Bunbury*, and upon an attentive consideration of the words of the Act of Parliament, they appear to us to be not merely permissive, but to enact that where there may be there must be a reference to the arbitrators." *Thompson v. Planet Benefit Building Society* was decided . . . on the same principle; and though there have been some cases in which a contrary view was adopted, I think that the weight of authority greatly preponderates in favour of this view of the law.—p. 414.

Wright v. Monarch Investment Building Society (1877) 46 L. J. Ch. 649; 5 Ch. D. 726.—JESSEL, M.R., *approved*.

Mulkern v. Lord (*supra*, col. 266), *discussed*.

Hack v. London Provident Building Society (1883) 52 L. J. Ch. 225, 541; 23 Ch. D. 103; 48 L. T. 247; 31 W. R. 392.—C.A. JESSEL, M.R. and LINDLEY, L.J. *And see post*, col. 272.

Wright v. Monarch Investment Building Society and Hack v. London Provident Building Society, *approved*.

Municipal Permanent Building Society v. Kent (1884) 53 L. J. Q. B. 290; 9 App. Cas. 260; 51 L. T. 6; 32 W. R. 681; 48 J. P. 352.—H.L. (B.). LORDS BLACKBURN and WATSON; SELBORNE, L.C. *dissenting*; affirming C.A. BRETT, M.R., COTTON and BOWEN, L.JJ.

[See judgments at length, where *Mulkern v. Lord* (*supra*, col. 266) and the earlier cases were discussed.]

Hack v. London Provident Building Society and Municipal Permanent Building Society v. Kent, *distinguished*.

French v. Municipal Permanent Building Society (1884) 53 L. J. Ch. 743; 50 L. T. 567.

PEARSON, J.—The material difference between those cases and the one now before me is very great indeed. In those cases there had been mortgages by members to their societies, and the question raised in the actions was a money question—namely, as to whether the societies had been paid what was owing to them, or whether there had been an over-payment. In those cases it has now been decided, and in the latter of them by the H. L., that under the Building Societies Act, 1874, there is power under the arbitration clause to deal with all such questions by arbitration, and that an agreement to refer disputes to arbitration is consequently binding upon members. It was found that there were certain blots in the earlier Acts

by reason of which an arbitrator had not the requisite power; but those imperfections were removed by the Act of 1874, and the requisite power now exists. But this case is quite different. Here the plaintiffs, being members of the society, executed a mortgage to the society, and the latter, under their powers of sale, either as conferred by the deed or under their own rules, sold or purported to sell the mortgaged property to Dickenson. He happens to be a member of the society; but without expressing any definite opinion, I confess that I am at present unable to see how the fact of Dickenson being a purchaser, independently of his being a member, can operate to constitute him anything different from a stranger to the society for the purposes of the transaction in question.—p. 744.

Municipal Permanent Building Society v. Kent, observed on.

Western Suburban, &c. Building Society v. Martin (1880) 53 L. J. Q. B. 382, 17 Q. B. D. 609; 54 L. T. 822; 34 W. R. 630; 51 J. P. 36.—C.A.; reversing 17 Q. B. D. 66.—GROVE and STEPHEN, JJ.

HERSCHELL, L.C.—This case turns upon the true construction of sect. 2 of the Building Societies Act, 1884. There is no doubt that, but for that section, this action was properly stayed upon the authority of the *Municipal Permanent Building Society v. Kent*, and the question is, whether an alteration has been made by the section in question, so that the plaintiffs are to be no longer restrained from pursuing their remedy at law. Now the section is not easy to construe, because difficulties may be suggested whatever view is taken of its construction. It is necessary, therefore, to look carefully at what was the state of the law at the time the Building Societies Act, 1884, was passed. Now, in *Municipal Permanent Building Society v. Kent*, the question arose whether a building society could sue one of its members at law in order to enforce its remedies under a mortgage deed given by the member, or whether the society was limited to the remedy by arbitration, and a majority in the H. L. held that the society was limited to the remedy by arbitration. The rule of the building society providing for the settlement by arbitration of disputes between the society and any of its members, or their legal representatives, was held to be extended to all liabilities between the society and its members, and therefore to apply to liabilities under mortgage. Lord Selborne differed from the majority in the H. L., and he was of opinion that the rule did not extend to disputes arising under a mortgage deed. He thought that the rule related to "disputes under the rules between members (in that character) or their representatives, in respect of their rights or liabilities as such, and the society, and not to questions arising out of covenants, or special stipulations in deeds executed between members and the society, and embodying contracts collateral and additional to the social contract, though of a nature contemplated and authorised by it; nor to any questions between the society as mortgagee and one of its members as mortgagor, with reference to the legal consequences of, or rights and liabilities resulting from, the relation of mortgagor and mortgagee." I may observe in passing, that the same redundancy in the language of the section is to be found in the language I have just quoted, because Lord Sel-

borne, after saying, "and not to questions arising under covenants, &c., in deeds executed between members and the society, and embodying contracts collateral and additional to the social contract," goes on to say, "nor to any questions between the society as mortgagee and one of its members as mortgagor, &c.," which would seem to limit rather than extend the whole proceeding. In that state of things, sect. 2 of the Building Societies Act, 1884, was passed, which purported to limit the meaning of "disputes," and intended to limit the meaning in some way. It appears to me that the judges below have not given sufficient weight to that fact. Considering the language I have read and the language of the first part of the section, I think the section was framed to give to the rules of building societies the meaning put upon them by Lord Selborne in the H. L.—p. 387.

ESHER, M.R. and FRY, L.J. to the same effect.

Municipal Permanent Building Society v. Kent, distinguished.

Royal Liver Friendly Society, Ltd. in re (1887) 56 L. J. Ch. 821; 35 Ch. D. 332; 56 L. T. 817, 36 W. R. 7.—CHITTY, J.

Wright v. Monarch Investment Building Society; Hack v. London Provident Building Society, and Municipal Permanent Building Society v. Kent, followed.

Christie v. Northern Counties Building Society (1889) 59 L. J. Ch. 210; 43 Ch. D. 62; 61 L. T. 796; 38 W. R. 280.—NORTH, J. not approved.

Norton v. Counties Conservative Building Society (1894) 64 L. J. Q. B. 214; [1895] 1 Q. B. 246; 14 R. 59; 71 L. T. 790; 43 W. R. 178; 59 J. P. 149.—C.A. LINDLEY and A. L. SMITH, L.JJ.

Armitage v. Walker (1855) 2 K. & J. 211; 2 Jur. (N.S.) 13; 20 J. P. 53.—WOOD, V.-C. (and see post); and **Wright v. Deeley** (supra, col. 270), approved.

Auld v. Glasgow Working Men's Building Society (1887) 56 L. J. P. C. 57; 12 App. Cas. 197; 56 L. T. 776; 35 W. R. 632.—H. L. (SC.). HALSBURY, L.C., LORDS BRAMWELL, HERSCHELL and MACNAGHTEN, explained.

Walker v. General Mutual Building Society (1887) 36 Ch. D. 777; 57 L. T. 574; 52 J. P. 278.—C.A.

COTTON, L.J.—There are cases exactly in point on the present question. In *Armitage v. Walker* a person in exactly the same position as the present plaintiff was held bound by the rules to refer disputes between him and the society to arbitration. It is contended that that decision has been practically overruled by later decisions, but the only later decision really relied upon was *Auld v. Glasgow Working Men's Building Society*, which was said to establish this proposition, that the plaintiff, having given notice to withdraw, was a creditor outside the rules of the society. That case decided nothing of the kind. The plaintiff, as a member, had entered into a contract with the society, and certain members of the society, the majority at a meeting, had tried to alter the contract into which he as a member had entered with the society. It was held that he was not bound by that; and that, therefore, as a member, he was entitled to insist upon his rights under the

contract originally entered into by him with the society; but it in no way laid down that he was to be treated not as a member but as a creditor. Then there is *Wright v. Jeeley*, where apparently the very point was decided, and in my opinion rightly decided.—p. 784.

BOWEN and RYX, L.J.J. concurred.

Municipal Permanent Building Society v. Kent; Western Suburban, &c. Building Society v. Martin (*supra*), and **Walker v. General Mutual Building Society**, *discussed*.

Sinden v. Banks (1861) 30 L. J. Q. B. 102; 2 El. & El. 623; 7 Jur. (N.S.) 910; 3 L. T. 775; 9 W. R. 415.—CROMPTON and HILL, J.J., *applied*.

Municipal Permanent Building Society v. Richards (1888) 58 L. J. Ch. 8; 39 Ch. D. 372; 59 L. T. 883; 37 W. R. 184.—STIRLING, J.; *affirmed*, C.A.

Armitage v. Walker (*supra*), *followed*.

Walker v. General Mutual Building Society (*supra*), *applied*.

Davies v. Second Chatham Building Society (1890) 61 L. T. 680.—HUDDLESTON, B. and STEPHEN, J. *And see supra*, col. 260.

Walker v. General Mutual Building Society, *referred to*.

Sibun v. Pearce (*post*, col. 275).

WITHDRAWING MEMBERS.

Norwich and Norfolk Building Society, In re, Rackham, Ex parte (1876) 46 L. J. Ch. 785.—C.A. JAMES and MELLISH, L.J.J. and BAGGALLAY, J.A.; and **Mutual Society, In re** (1880) 24 Ch. D. 425, n.—JESSEL, M.R., *discussed*.

Walton v. Edge (1884) 54 L. J. Ch. 362; 10 App. Cas. 33; 52 L. T. 666; 33 W. R. 417; 49 J. P. 468.—H.L. (E.); *affirming* S. C. *nom.* Blackburn and District Building Society, *In re* (1883) 52 L. J. Ch. 894; 24 Ch. D. 421; 49 L. T. 780; 32 W. R. 159.—C.A. BRETT, M.R., COTTON and BOWEN, L.J.J.

SELBORNE, L.C.—Now, with regard to the authorities, there are only three which seem to me to be at all in point; and of those, with regard to the one which is, as far as it goes, adverse to the case of the appellant—namely, the case of the *Norwich Society*—I think it is quite true that some differences have been pointed out. . . . I agree that that is a distinct difference, that a total withdrawal from the society was contemplated in the *Norwich Case*, while here it is at least not manifest that that was contemplated. I think that it was not necessary. Some cases have been pointed out where that did not happen. That is a distinction not without importance, but I think that it is not of sufficient importance to prevent the case, as far as it goes, bearing against the argument for the appellant, because that case at least shows that there is nothing inconsistent either with the nature of the contract contained in rules of this description, or with the effect in point of law of a winding-up order, in the proposition that a withdrawing member, if entitled under the rule, may stand as a *quasi* creditor against the funds when all other creditors have been paid. I do not think that the distinction turning upon the

grant of a certificate by the directors, or upon a subsequent express allowance of 3 per cent. interest, is very material. About interest there may be a question, but that is not necessary for the decision, whether it would be due or not; still, if the construction of the rule is what I take it to be, the result would, I think, be the same. The case of the *Mutual Society*, in my judgment, as in the judgment of all the judges in the C.A., depended upon a particular rule, which they construed, which I construe, and which I think the late Sir G. Jessel construed, as providing for the constitution of a special and definite fund out of which alone withdrawing members were to be paid in a manner which was inapplicable to the state of things existing after the winding up. Therefore the case of the *Mutual Society* has no application. And with regard to *Cantliffe Brothers & Co v. Blackburn Building Society* (*supra*, col. 263), that case stood thus: The question was between bankers who held deeds of the society against which advances had been made and the official liquidator; the official liquidator not representing one class of members alone nor the members alone, but representing all the contributors and also the creditors; and unless the bankers had a right to hold as against all creditors and all contributors they failed in their case. . . . It is not necessary for me to express any opinion as to whether the principle on which the bankers were allowed to stand in the place of actual creditors entitled to immediate payment, and who were paid with their money, would have been applicable to such a claim to stand in the place of withdrawing members against an eventual surplus. It is enough to say that nothing was decided in the C.A., any more than in this House, which had the slightest bearing upon any such question.—p. 365.

LORD BLACKBURN.—I think that the late M.R., in *Mutual Society, In re*, did determine, upon the special rules of the society in that case, that it was not such a matter as I have described, an absolute promise to pay, but only a promise to pay out of a particular fund, which particular fund was destroyed at the time; and I think that no one who reads the rule which is quoted at the bottom of the page can fail to see that it was so, and that Sir G. Jessel was perfectly right in what he decided.—p. 368.

LORD WATSON concurred. *And see post*, col. 276.

Blackburn and District Building Society, In re, *followed*.

Mutual Society, In re, *distinguished*.

Alliance Society, In re (1885) 51 L. J. Ch. 540; 28 Ch. D. 559; 52 L. J. 695.—C.A.; *reversing* KAY, J.

BOWEN, L.J.—The question we have really to answer in the present instance is whether the rights which accrue under art. 54, upon the notice of withdrawal of members who wish to withdraw, are rights which obtain after the winding up or after the closing of the fund referred to in arts. 53 and 56. . . . I think that under arts. 55 and 56, the closing of the fund is a closing which in no way affects the rights of the withdrawing members to look to this source for payment. . . . It seems to me that that train of reasoning is in accordance with the train of reasoning laid down by the C.A. in the *Blackburn Case*, which was affirmed by the H. L.,

although I repeat what I said at the beginning of my judgment—namely, that this is a pure question of construction of this particular society, and no more. For the same reason it seems to me that the true answer to the argument sought to be drawn from the *Mutual Society Case* and the decision of the late M.R. in that case, is that it was decided upon the rules of another society, which are not the same rules as the present. I do not think there is any principle of construction at all to be derived from that case which applies to the present: but if any principle of construction is to be derived from that case which is different from that which I have expressed, I entirely concur with what Baggallay, L.J. has said; and I should differ from the M.R. because I must say I prefer my own construction to his.—pp. 547, 548.

BAGGALLAY and FRY, L.J.J. to the same effect.

Sheffield and South Yorkshire Building Society, In re (1889) 68 L. J. Q. B. 265; 22 Q. B. D. 470; 60 L. T. 186; 53 J. P. 375.—*CAYE and CHARLES, JJ., explained.*

Sibun v. Peace (1890) 44 Ch. D. 354; 63 L. T. 123; 38 W. R. 658.—C.A.

LINDLEY, L.J.—It is quite obvious when you look at the Act and the rules which the Court had to deal with [Sheffield and South Yorkshire Building Society, *In re*], that a man who had given notice of withdrawal, even if he had not been paid out, was not liable to contribute anything under the rules of that Society. . . . Nothing can be due from him, after his notice of withdrawal, whether he has received his money out or not: he has nothing more to contribute. Therefore it is perfectly plain that the decision in the *Sheffield Case* was right. But there are some expressions in that case which look as if the Court treated members who had given notice of withdrawal as no longer members of the society. That is to be explained by the circumstance that, in that particular case, the members there had been paid out, and therefore they had ceased to be members of the society. They had nothing whatever to do with it. . . . the decision . . . has nothing to do with this case one way or the other. The only other case which is at all important is *Walker v. General Mutual Building Society* (*supra*, col. 272) which, so far as it goes, is in accordance with the view which we are now taking of the Act—that is to say, that a member who has given notice of withdrawal, but is not paid out, is still a member.—pp. 372—373.

COTTON and LOPES, L.J.J. to the same effect.

WINDING UP.

Midland Counties Benefit Building Society, In re, 10 Jur. (N.S.) 505; 12 W. R. 661; 10 L. T. 258.—ROMILEY, M.R.: *reversed*, (1864) 33 L. J. Ch. 520, 739; 4 De G. J. & S. 468; 4 N. R. 536; 11 Jur. (N.S.) 229; 13 W. R. 339; 29 J. P. 613.—KNIGHT BRUCE and TURNER, L.J.J.

Doncaster Building Society, In re (1866) L. R. 3 Eq. 158; 15 L. T. 270; 15 W. R. 102; 31 J. P. 310.—WOOD, V.-C., *referred to.* *And see post*, col. 277.

Brownlie v. Russell (1883) 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757.—H.L. (SC.). *See*

BORNE, L.C. and LORDS WATSON, BRAMWELL and FITZGERALD. *And see col.* 280.

Brownlie v. Russell, followed.

Tosh v. North British Building Society (1886) 11 App. Cas. 489; 35 W. R. 413.—H.L. (SC.); *reversing* S. C. *nom.* *North British Building Society, In re* (1885) 12 Rettie 1271.

HERSCHEL, L.C.—There appears to me, therefore, to be no substantial distinction between the rules of this society and the rules of the society in *Brownlie's Case*, and I think, therefore the determination in *Brownlie's Case* determines the present case also. In *Brownlie's Case* it was held that after a winding up an advanced member could not take advantage of the rule enabling him to withdraw, because his right to act under that rule ceased by reason of the order for winding up; but it was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society, and compelled them to repay the amount which was still due upon their advances, but did not substantially alter their position or their rights or render them at all different from what they would have been if they had been withdrawing under the rules.—p. 503.

LORDS BLACKBURN and FITZGERALD to the same effect. *And see post.*

Brownlie v. Russell and Walton v. Edge (*supra*, col. 273), *considered.*

Carriek v. North British Building Society, 22 Scot. Law Rep. 833, *followed.*

Sunderland Universal Building Society, In re (1890) 59 L. J. Q. B. 217; 24 Q. B. D. 894; 62 L. T. 293; 38 W. R. 509; 54 J. P. 613.

MATHEW, J. (for the Court, COLERIDGE, C.J. and MATHEW, J.).—*Brownlie v. Russell* . . . is only material for the reasons given for the view that the right to withdraw does not survive a winding-up order. As appears from the judgment of the L.C., a winding-up order takes away the right, because it necessarily puts a close to the whole concern, terminates at the date the account of each shareholder, and cuts off all chance of profit which, if the thing had gone on, both classes of members might have had. But all these consequences were as clear and as inevitable in the case of these societies when the report of the accountant was published in February, 1887, as if a winding-up order had then been actually made. *Walton v. Edge* was relied upon by the learned counsel for the appellants as an authority for the proposition that members who gave effective notices before the date of the winding-up order were entitled to priority in payment to those members who had not given notice. But the question in that case was as to the rights of members who gave notice not only before there was any winding up, but when there was no information that any winding up was going to take place, and when nothing special was alleged to affect them with notice that the society was not to continue as a going concern. The view we take is in accordance with the valuable judgment of Lord Shand in *Carriek v. North British Building Society*. It is not the order to wind up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case as this puts an end to the right to withdraw.—p. 225. *And see post*, col. 279.

Walton v. Edge (*supra*), *applied*.
Sunderland Universal Building Society, In re, *followed*.

Barnard v. Tomson (1893) 63 L. J. Ch. 488; [1894] 1 Ch. 374, 8 R. 585, 70 L. T. 306.—**NORTH, J.** *And see post*.

Doncaster Building Society, In re, *followed*.
Brownlie v. Russell and **Tosh v. North British Building Society** (*supra*), *adopted*.

Middlesborough, Redcar and Saltburn Building Society, In re [1889] 58 L. J. Ch. 771.—**STIRLING, J.**

Middlesborough & Co. Building Society, In re, *discussed and followed*.

Britannia Building Society, In re [1891] 65 L. T. 196.—**KEKEWICH, J.**

Doncaster Building Society, In re, *applied*.
Brownlie v. Russell and **Tosh v. North British Building Society**, *discussed and explained*.

London Provident Building Society v. Morgan (1893) 62 L. J. Q. B. 544; [1893] 2 Q. B. 266; 5 R. 510; 69 L. T. 595; 42 W. R. 157, 57 J. P. 696.—**BRUCE and KENNEDY, JJ.**

Sunderland Universal Building Society, *explained*.

Barnard v. Tomson, *discussed*.

Ambition Investment Building Society, In re (1895) 65 L. J. Ch. 113; [1896] 1 Ch. 89, 73 L. T. 508; 44 W. R. 141; 2 Manson 607.

V. WILLIAMS, J.—The society has dissolved and has paid all its outside creditors in full, and there is a surplus left; and the question is as to the priorities of their non-borrowing members *inter se*. . . . The cases which have been cited to me form a continuous and uninterrupted current of authority, no one of them in any way contradicting or conflicting with the others. The last . . . is . . . **Barnard v. Tomson**. I do not propose to go into the facts of that case at any length, because, when one comes to look at the judgment of North, J., he is really only recognising and carrying out the principles that were laid down . . . in **Sunderland Universal Building Society, In re**. It will be seen that his judgment is to the effect that the view he takes is that the line ought to be drawn at the time when there has either happened a stoppage of business or a recognition of the fact that business must be stopped. . . . There had not been a stoppage; and as to recognition by the officers of the fact that there must be a stoppage, they, although they considered the financial position of the society sufficiently grave, after they had considered the question, in the result reported against an immediate dissolution. North, J., in saying that, follows . . . **Sunderland Universal Building Society, In re**. . . . There has been a great deal of argument before me as to what is the meaning of that judgment. In particular a question has been raised, and necessarily was raised, as to what they meant when they spoke of the society being known to be insolvent, or when they spoke of the society being no longer able to carry on its business. The words are "notorious that the society could not meet its liabilities." I do not think that the judges had the slightest intention in this portion of their judgment of defining what were the conditions, the happening of which would bring to an end the right of with-

drawal; and all that they meant to do by their judgment was to say that in the particular case before them these conditions were present—that there was in fact a society unable to carry on its business, and that it had become notorious that the society could not meet its liabilities. I do not understand them to lay down any such rule as that the right to withdraw is dependent on either the knowledge of the person giving notice of withdrawal or of the officers of the society that the society is in an insolvent condition. I only understand them to say that the conditions were present in that case, and those conditions being present the society must be considered as having stopped business, or resolved to stop business, at that date which they are there dealing with. . . . That is my understanding of what the judges meant by their judgment; and when I look at **Walton v. Edge** . . . and **Carrick v. North British Building Society**, the cases on which Coleridge, C.J. and Mathew, J. say their judgment is based, I find in them both that the real question propounded by the judges to themselves in those cases was—Had there been a stoppage of business, or anything that was equivalent to a stoppage of business? and they held that whenever there had been a stoppage of business or anything equivalent to it the right of withdrawal was determined. But it does not seem to me that insolvency, or even insolvency known to the officers of the society, is equivalent to a stoppage of business: and I propose to deal with the present case on that basis.—pp. 117–119. *And see post*.

Brownlie v. Russell (*supra*), *considered*.

Kemp v. Wright (1894) 61 L. J. Ch. 59; [1895] 1 Ch. 121; 7 R. 681; 71 L. T. 650; 43 W. R. 213; 59 J. P. 133—C.A. **HERSCHELL, L.C.**, **LINDLEY** and **A. L. SMITH, L.JJ.**; *reversing* [1894] 2 Ch. 441; 58 J. P. 588; 1 Manson 308.—**KEKEWICH, J.**

LINDLEY, L.J.—If a man borrows money and stipulates to repay it by instalments, the majority of the members of his society would obviously have no right, under any intelligible principle of law, to compel him to pay up the whole sum straight off. If they have any such right, it must be given by statutory enactments. It is said that, if this were a winding up under the Companies Act, 1862, a borrowing member could be compelled to do so, and that the Court did this in **Brownlie v. Russell**. I do not think that that case went so far; but if it did, the matter has been set right by the recent Act [of 1894]. Sect. 32 of the Act of 1874 draws a distinction between dissolution and winding up. But what we are dealing with is a dissolution, and not a winding up. It appears to me that there was some misapprehension as to the point decided in **Brownlie v. Russell**.—p. 61.

Kemp v. Wright, *considered*.

Botten C. City and Suburban Building Society (1895) 64 L. J. Ch. 609; [1895] 2 Ch. 441; 13 R. 591; 72 L. T. 722; 44 W. R. 12.

STIRLING, J.—It is, however, contended that any rights of the plaintiff are put an end to by the instrument of dissolution. In support of this proposition **Kemp v. Wright**, before Kekewich, J., is relied on. That case decided several points. . . . The judgment of Kekewich, J. appears to be based on two propositions—first, that what was done in **Kemp v. Wright** could have been

validly done by an alteration of the rules; and secondly, that, this being so, it could be done with equal efficacy by an instrument of dissolution under sect. 32 of the Benefit Building Societies Act, 1874. In principle these propositions cover the present case; and if the matter had rested there, I should have thought it right to follow the decision, even though I might have doubted whether I should myself have arrived at the same conclusion. . . . It is said, however, that the second of these propositions is inconsistent with what is laid down by the L.C. on appeal in the same case. That appeal was directed, not to the first point decided in the Court below, but to the second; but the L.C. (Lord Herschell) thought fit to examine and comment upon the effect of an instrument of dissolution, and he says: ". . . The instrument of dissolution is to set forth certain matters mentioned in sect. 32, sub-sect. 3. There is no provision further than that for determining the rights of members on a dissolution, and no enactment that their rights should be other than those they enjoy under the rules of the society which created the contract between the members." I confess that, having read the judgments more than once, it does seem to me that the last sentence of the L.C. expresses a different view of the effect of an instrument of dissolution from that taken by the learned judge in the Court below. I think that under these circumstances the second proposition cannot be relied on.—p. 612.

Sunderland Universal Building Society, In re (col. 276), *followed*.

Sixth West Kent Building Society v. Shove (1895) 68 L. J. Ch. 482, n.—STIRLING, J., *discussed*, Gwawr-y-Gweithr Industrial, &c. Society, In re, Dovey v. Morgan (1901) 70 L. J. K. B. 614; [1901] 2 K. B. 477; 84 L. T. 824; 49 W. R. 655.—ALVERSTONE, C.J. and LAW-RANCE, J.

Sixth West Kent Building Society v. Shove, followed.

Strohmeier v. Finsbury Building Society (1897) 66 L. J. Ch. 708; [1897] 2 Ch. 469; 77 L. T. 235; 46 W. R. 69.—C.A. LINDLEY, LOPES and CHITTY, L.J., and **Pepe v. City and Suburban Building Society** (*supra*, col. 280), *distinguished*.

Sixth West Kent Building Society v. Hills (1899) 68 L. J. Ch. 476; [1899] 2 Ch. 60; 81 L. T. 86; 47 W. R. 647.

BYRNE, J.—In view of the decisions in *Strohmeier v. Finsbury Building Society*, and *Pepe v. City and Suburban Building Society*, it is impossible to contend successfully that the right of a member of a building society like the present may not be varied by a new rule made under and in accordance with its statutory power of altering rules: and the rules may be varied so as to affect the rights of a member even after he has given notice of withdrawal. But, as was pointed out by the late Chitty, L.J., in *Strohmeier v. Finsbury Building Society*, a rule must not change the constitution of the society, and the power of making and altering rules must be confined to the internal rights of the members of the society. In the same case it was also pointed out that there are obvious limits, which the learned judge did not attempt to define, to the powers of making and altering rules, which have to be considered as the cases arise. Those were decisions in respect of the right of

making rules where no question of known insolvency at the time of making the rules had arisen. I think *Sunderland Universal Building Society, In re*, only extends what had been held in *Brownlie v. Russell* (*supra*), as to the effect of a winding-up order, to a period anterior to the date of the actual order. In *Ambition Investment Building Society, In re* (*supra*), upon a review of the prior authorities, it was held that a right of withdrawal under the rules came to an end when the society or its officers recognised that it must come to an end. In *Barnard v. Tomson* (*supra*, col. 277), North, J., held, that there were no materials for drawing a line earlier than the date of the instrument of dissolution. But in the present case . . . at the date of the alteration in 1891, it was known to the officers and members of the society that the society was insolvent, and that liquidation was inevitable.—p. 480.

Pepe v. City and Suburban Building Society, principle applied.

Allen v. Gold Reefs of West Africa (1900) 69 L. J. Ch. 266; [1900] 1 Ch. 656; 82 L. T. 210; 48 W. R. 452; 7 Maussion 417.—C.A.

West London and General Permanent Building Society, In re (1898) 78 L. T. 393.—C.A. LINDLEY, M.R., HIGBY and V. WILLIAMS, L.J., *applied*.

Brownlie v. Russell (col. 275), *distinguished*. Counties Conservative Permanent Building Society, In re (1900) 69 L. J. Ch. 798; [1900] 2 Ch. 819; 49 W. R. 71.

STIRLING, J.—When the case [*Brownlie v. Russell*] is carefully examined, it appears to be quite different in its nature. There a holder of a share was insisting on a benefit which was expressly conferred by the rules, and it was held that he had the right to do so, and was not to be deprived of it by any implication which might arise in the absence of express provision. The portion of Lord Selborne's judgment which was so much relied on when read in connection with the context, appears to show this clearly. [His lordship read the judgment and continued.] When that particular contract was looked at it was found that there was an express stipulation dealing with that case. In the present case there is none.—p. 803.

And see Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 10.

CARRIERS.

PASSENGERS.

Boson v. Sandford (1686) 2 Show. 478; 3 Lev. 258; 3 Mod. 320; 2 Salk. 440, and **Buddle v. Willson** (1795) 6 Term Rep. 369, *overruled*.

Govett v. Radnidge (1802) 3 East 63; 6 R. R. 39.—ELLENBOROUGH, C.J.

Boson v. Sandford, upheld.

Govett v. Radnidge, not followed.

Powell v. Layton (1806) 2 B. & P. (N.R.) 365.—MANSFIELD, C.J. for the Court.

Govett v. Radnidge and Powell v. Layton, considered.

Pozzi v. Shipton (1838) 8 A. & E. 963; 8 L. J. Q. B. 1; 1 P. & D. 4; 1 W. W. & H. 624.

[Counsel urged that *Govett v. Radnidge* had been overruled in *Powell v. Layton*.]

PATTERSON, J.—It is strong to say "overruled," because it is clear that *Powell v. Layton* would itself have been overruled if brought into the K. B. on error (p. 971). . . . We purposely abstain from giving any opinion, whether the doctrine in *Govett v. Radnidge*, or that in *Powell v. Layton*, be the true decision, as we do not feel ourselves called upon to decide between them, supposing them to differ.—p. 975.

Govett v. Radnidge and Pozzi v. Shipton, approved.

Marshall v. York, Newcastle and Berwick Ry. (1851) 21 L. J. C. P. 34; 11 C. B. 655; 16 Jur. 124.—JERVIS, C.J. and WILLIAMS, J.

Marshall v. York, &c. Ry., followed.

Austin v. G. W. Ry. (1867) 36 L. J. Q. B. 201; L. R. 2 Q. B. 442; 16 L. T. 320; 15 W. R. 863.—Q.B., discussed and followed.

Foulkes v. Metropolitan District Ry. (1879) 41 L. T. 95; 48 L. J. C. P. 553; 4 C. P. D. 267; affirmed, [1880] 5 C. P. D. 157; 49 L. J. C. P. 361; 42 L. T. 345; 28 W. R. 526.—C.A. BRAMWELL, BAGGALLAY and THESIGER, L.JJ.

GROVE, J.—In . . . *Austin v. G. W. Ry.*, Blackburn, J. says this: "What was said in *Marshall v. York, Newcastle and Berwick Ry.* was quite correct," and Lush, J., in the same case, assumes that the undertaking to carry the plaintiff amounted to a contract. Therefore, *quidneque rido*, either there need not be a contract or there was evidence here to go to the jury of an undertaking by the defendants to carry the plaintiff for their own purposes; and the evidence with regard to the issuing of the ticket is not the only evidence applicable to such an issue. When a company take a man into their carriages, treat him as a passenger, examine his ticket to see that it is right, and so on, there is evidence of such an undertaking. *Austin v. G. W. Ry.*, in my opinion, goes even further than the present case. The principle of that case was that the terms under which the company undertook to carry were not complied with; and if a specific agreement between the parties is necessary, in that case there was no such agreement in the ordinary sense, no contract in which the parties were both *ad idem* and agreeing, yet the Court held that the permitting the child to enter the carriage made the company liable. To my mind that is an *à fortiori* case to the present. Here the company did, as there, receive the plaintiff into their carriage, and a jury have found that they were negligent. It is said that the negligence was the negligence of the L. & S. W. Co., consisting in their having their platform too low for the carriages; but I do not think the defendants were justified in bringing their train up to such a platform.—p. 97. LOPES, L.J. concurred.

Foulkes v. Metropolitan District Ry., followed.

Mytton v. Midland Ry. (1859) 28 L. J. Ex. 385; 4 H. & N. 615; 7 W. R. 737.—EX., held overruled.

Hooper v. L. & N. W. Ry. (1880) 50 L. J. Q. B. 103; 43 L. T. 570; 29 W. R. 241; 45 J. P. 223.

DENMAN, J.—Had *Mytton v. Midland Ry.* been expressly overruled by *Foulkes v. Metropolitan Ry.*, I should have entertained no doubt

but that our decision must be governed by the latter case; but *Mytton v. Midland Ry.* does not appear to have been cited in the argument or referred to in the judgments, and it is left to us to decide whether it has been overruled. On consideration, however, I have come to the conclusion that the *ratio decidendi* of *Foulkes v. Metropolitan Ry.* does in effect overrule *Mytton v. Midland Ry.*, and we must hold accordingly.—p. 104. LINDLEY, J. concurred.

Foulkes v. Metropolitan District Ry. and Gill v. Manchester, Sheffield and Lincolnshire Ry. (1873) 42 L. J. Q. B. 89; L. R. 8 Q. B. 186; 28 L. T. 587; 21 W. R. 525.—BLACKBURN and LUSH, JJ.; MELLOR, J. dissenting, distinguished.

Tuohy v. G. S. & W. Ry. [1898] 2 Ir. R. 789.—C.A. FITZGIBBON, WALKER and HOLMES, L.JJ.

Palmer v. Grand Junction Ry. (1839) 8 L. J. Ex. 29; 4 M. & W. 749; 7 D. P. C. 232; 1 H. & H. 489; 3 Jur. 559.—EX., discussed.

Carpue v. London and Brighton Ry. (1844) 13 L. J. Q. B. 133; 5 Q. B. 747; 8 Jur. 464; Dav. & M. 608; 3 Rail. Cas. 692.—DENMAN, C.J. (for the Court); and SKINNER v. London and Brighton Ry. (1850) 5 Ex. 787; 15 Jur. 299.—EX., questioned.

Hammack v. White (1862) 31 L. J. C. P. 129; 11 C. B. (N.S.) 588; 8 Jur. (N.S.) 796; 5 L. T. 676; 10 W. R. 230.

ERLE, C.J.—In *Skinner v. London and Brighton Ry.* both trains belonged to the same company, and a collision was therefore held to be some evidence of negligence. In *Carpue v. London and Brighton Ry.* the only point discussed in the Court above was, whether the company were entitled to notice of action. I entirely dissent from the doctrine that the mere happening of an accident throws on the defendant the onus of disproving negligence.—p. 130.

Carpue v. London and Brighton Ry., disapproved.

Hammack v. White, approved.

Byrne v. Boadle (1863) 33 L. J. Ex. 13; 2 H. & C. 722; 9 L. T. 450; 12 W. R. 279.—EX., followed.

Scott v. London Dock Co. (1864) 34 L. J. Ex. 17.

MARTIN, B. (who dissented).—No one now acts on *Carpue v. London and Brighton Ry.*—p. 18. [His lordship also expressed approval of *Hammack v. White*.]

[The majority of the Court, however, followed *Byrne v. Boadle*, and their decision was affirmed; (1865) 34 L. J. Ex. 220; 3 H. & C. 596; 11 Jur. (N.S.) 204; 13 L. T. 148; 13 W. R. 410.—EX. OH.

Hammack v. White and Cotton v. Wood (1860) 29 L. J. C. P. 333; 8 C. B. (N.S.) 568; 7 Jur. (N.S.) 168.—C.F., upheld.

Manzoni v. Douglas (1880) 6 Q. B. D. 145; 50 L. J. Q. B. 289; 29 W. R. 425; 45 J. P. 391.

DENMAN, J.—I will first deal with the question whether *Hammack v. White* is still to be considered as law. I think it is. . . . The subsequent cases in which *Hammack v. White* has been cited do not in any one instance show that that case is not still good law. No single judge has intimated any dissatisfaction with the

decision; but all have rather approved of it.—p. 150.

LINDLEY, J.—It is then said that *Cotton v. Wood and Hamnuch v. White* have been overruled. In my opinion they are quite consistent with the principle laid down by Erie, C.J., in *Scott v. London Dock Co.*, and I find no case which has expressly overruled them.—p. 153.

Collett v. L. & N. W. Ry. (1851) 20 L. J. Q. B. 411; 16 Q. B. 984; 15 Jur 1053.—Q. B., *explained*.

East Indian Ry. v. Kalidas Mukerjee (1901) 70 L. J. P. C. 63; [1901] A. C. 396; 84 L. T. 210.—P.C.; *reversing* judgment of High Court in Bengal.

HALSBURY, L. C. (for self, LORDS MACNAGHTEN, DAVEY, ROBERTSON and LINDLEY)—That [case] turned upon the duty of the railway company, which was set out in the declaration, to carry a post-office clerk under certain provisions of railway legislation. It was demurred to, upon the ground that there was no contractual relation between the post-office clerk and the railway company. The judgment upon demurrer is sufficiently explained if one looks at the allegations in the declaration and the judgment upon it. But unfortunately Lord Campbell used a phrase which the learned judge Ameer Ali quotes—that the railway company were under an obligation to carry safely, which their lordships think has been the origin of the error. Lord Campbell says: "... The allegation that it was the duty of the company to use due and proper care and skill in conveying is admitted"—admitted, that is to say, by the demurrer. "That duty does not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes: if they are bound to carry, they are bound to carry safely." ... What Lord Campbell is saying there is that they are not relieved from the ordinary obligations which would exist by contract, because by statute they were compelled to carry the post-office clerk; and he goes on to say that the obligation is not satisfied by carrying a man's corpse and not himself. His mind is not applied at all to the extent of the obligation created, but his mind is upon the argument that there was no obligation at all; and he practically says: "You must take as much care of him as if he was a passenger who contracted with you." Whatever may be the difficulty that arises about such a phrase in Lord Campbell's mouth, there is no difficulty whatever if one looks at the declaration and the assignment of the breach of duty, where the duty is set up, as, indeed, Lord Campbell in the earlier parts of his judgment, points out, to carry with reasonable care and diligence; and the allegation in the declaration, corresponding to the duty which exists, is that they did not do so; and then the assignment of breach is not that the man was not carried safely, which according to the argument would be sufficient, but the allegation is that they did not use proper care and skill in the carrying.—p. 65.

Chilton v. London and Croydon Ry. (1847) 16 L. J. Ex. 89; 16 M. & W. 212; 11 Jur. 143; 5 Railw. Cas. 4.—EX., *discussed*.

Brown v. G. E. Ry. (1877) 2 Q. B. D. 406; 46 L. J. M. C. 231; 36 L. T. 767; 25 W. R. 792.

MELLOR, J.—I am inclined to think, notwithstanding the great weight which must be attached to the opinion expressed by Lord Wensleydale, in *Chilton v. London and Croydon Ry.*, which, however, was not necessary to the decision of the case, that this is a case of penalty or forfeiture. It is, however, unnecessary to decide the point.—p. 409.

LUSH, J. to the same effect.

Dearden v. Townsend (1865) 35 L. J. M. C. 50; L. R. 1 Q. B. 10; 12 Jur. (N.S.) 120; 13 L. T. 323; 14 W. R. 52.—Q. B., *discussed and followed*.

Chilton v. London and Croydon Ry., *observed on*.

L. B. & S. C. Ry. v. Watson (1878) 47 L. J. C. P. 634; 3 C. P. D. 429; 39 L. T. 199; 26 W. R. 856.—COLERIDGE, C.J. and LUSH, J.: *affirmed*, (1879) 48 L. J. C. P. 316; 4 C. P. D. 118; 40 L. T. 183; 27 W. R. 614.—G.A. BRAMWELL, BRETT and COTTON, L.JJ.

Brown v. G. E. Ry. (*supra*), *discussed*.

Dearden v. Townsend and L. B. & S. C. Ry. v. Watson, *approved*.

Saunders v. S. E. Ry. (1880) 49 L. J. Q. B. 761; 5 Q. B. D. 456; 43 L. T. 281; 29 W. R. 55; 44 J. P. 781.—COCKBURN, C.J. and LUSH, J.

Dearden v. Townsend and Bentham v. Hoyle (1878) 47 L. J. M. C. 51; 3 Q. B. D. 289; 37 L. T. 753; 26 W. R. 314.—COCKBURN, C.J. and MANISTY, J., *applied*.

Dyson v. L. & N. W. Ry. (1881) 50 L. J. M. C. 78; 7 Q. B. D. 32; 44 L. T. 609; 29 W. R. 365; 45 J. P. 650.—LINDLEY and MATHEW, JJ.

L. B. & S. C. Ry. v. Watson, *discussed and applied*.

Goodies v. Cluff (1884) 13 Q. B. D. 694.—COLERIDGE, C.J. and FIELD, J.

L. B. & S. C. Ry. v. Watson, *not applied*.

G. W. Ry. v. Winder (1892) 61 L. J. Q. B. 608; [1892] 2 Q. B. 595; 67 L. T. 422; 56 J. P. 775.

DAY, J.—There has been a clear misapplication of the word "penalty" by the learned [County Court] judge who had held that *L. B. & S. C. Ry. v. Watson* was applicable. The appeal must be allowed.—p. 596. CHARLES, J. concurred.

McCarthy v. Dublin, Wicklow and Wexford Ry. (1869) 17 W. R. 1101.—WHITESIDE, C.J.: FITZGERALD, J. *dissenting; reversed*, (1870) 18 W. R. 762.—EX. CH. (IR.).

Blake v. G. W. Ry. (1862) 31 L. J. Ex. 346; 7 H. & N. 987; 8 Jur. (N.S.) 1013; 10 W. R. 388.—EX. CH., *followed*.

Buxton v. N. E. Ry. (1868) 37 L. J. Q. B. 258; L. R. 3 Q. B. 549; 9 B. & S. 824; 18 L. T. 795; 16 W. R. 1124.—BLACKBURN and LUSH, JJ.

Blake v. G. W. Ry., *followed*.

Thomas v. Rhymney Ry. (1871) 40 L. J. Q. B. 89; L. R. 6 Q. B. 266; 24 L. T. 145; 19 W. R. 477.—EX. CH.

Blake v. G. W. Ry. and Thomas v. Rhymney Ry., *distinguished*.

Wright v. Midland Ry. (1873) 42 L. J. Ex. 89; L. R. 8 Ex. 137; 29 L. T. 436; 21 W. R. 460.

BRAMWELL, CLEASBY and POLLOCK, BB.—[On the ground that although these cases laid it down that a railway company was liable for injury done through the improper condition of another company's line, over which the first company had running powers, yet they did not apply to injury caused by an act of the other company, done while plaintiff was being carried, but having nothing to do with the plaintiff's being carried; an act, that is, caused by the negligence of the other company's servants over whom the first company had no control.]

Winterbottom v. Wright (1842) 11 L. J. Ex. 415; 10 M. & W. 109.—EX., *discussed*.
Alton v. Midland Ry. (1865) 34 L. J. C. P. 292; 19 C. B. (N.S.) 213; 11 Jur. (N.S.) 672; 12 L. T. 703; 13 W. R. 918.—C.P.

Alton v. Midland Ry., *commented on*.
Taylor v. Manchester Sheffield and Lincolnshire Ry. (1894) 64 L. J. Q. B. 6; [1895] 1 Q. B. 134; 14 R. 34; 71 L. T. 596; 43 W. R. 120; 59 J. P. 100.—C.A.

LINDLEY, L.J.—In the first place that case was not like this, and, in the next place, it has been criticised and commented upon somewhat adversely; I do not say it has been overruled, that is quite another matter.—p. 9.

A. L. SMITH, L.J.—*Alton v. Midland Ry.* . . was decided upon demurrer to a declaration in which it was expressly averred that the rights of the servant for whose injuries the master was therein suing the company were founded upon contract, and this was taken as the premiss upon which the case had to be decided; and it was then held that the master could not sue for injury to his servant caused by breach of a contract entered into between the servant and the company. No question was or could be raised as to what would have been the result if the servant's remedy against the company had been founded upon tort. . . . This case, when looked into, is not the authority which it was supposed to be, and in no way decides that an action brought for personal injury against a company by a passenger who has taken a ticket is necessarily an action upon contract and not upon tort.—*Id.*

Taylor v. Manchester, &c. Ry., *explained*.
Kelly v. Metropolitan Ry. (1895) 64 L. J. Q. B. 563; [1895] 1 Q. B. 944; 14 R. 417; 72 L. T. 561; 43 W. R. 497; 59 J. P. 437.—C.A.
 ESHER, M.R., A. L. SMITH and RIGBY, L.JJ. *See* judgment of A. L. SMITH, L.J.

Taylor v. Manchester, &c. Ry. and **Kelly v. Metropolitan Ry.**, *commented on*.
Meegan v. Belfast and County Down Ry. [1897] 2 Ir. R. 572.—C.A. ASHBOURNE, L.C., O'BRIEN, C.J. and FITZGIBBON and WALKER, L.JJ.

Christie v. Grigg (1809) 2 Camp. 79; *distinguished*, *Sharp v. Grey* (1833) 2 L. J. C. P. 45; 9 Bing. 457; 2 M. & S. 620.—C.P. (*and see post*); *approved*, *Burrell v. Tuohy* (*post*, col. 287).

Bremner v. Williams (1824) 1 Car. & P. 414; 28 R. R. 782; and **Israel v. Clark** (1803) 4 Esp. 259, *questioned*.

Readhead v. Midland Ry. (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379; 9 B. & S. 519; 17 W. R. 737.—EX. CH.

M. SMITH, J. (for the Court).—The dictum of Best, C.J. in *Bremner v. Williams* was not necessary to the decision of the cause. The ruling of Lord Ellenborough in *Israel v. Clark* was also relied on. Of these last two authorities Blackburn, J., in his judgment below, said: "These are, it is true, only *wiki prima* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood." [His lordship also discussed *Sharp v. Grey* (*supra*) and other English cases, as well as American cases on the subject.]
And see "NEGLECTANCE" and "SALE OF GOODS."

Daniel v. Metropolitan Ry., 37 L. J. C. P. 146; L. R. 3 C. P. 216; 16 W. R. 564; 18 L. T. 57.—C.P.; *reversed*, (1868) 37 L. J. C. P. 280; L. R. 3 C. P. 591.—EX. CH.; *latter decision affirmed*, (1871) 40 L. J. C. P. 121; L. R. 5 H. L. 45; 24 L. T. 815; 20 W. R. 37.—H.L. (B.). HATHERLEY, L.C., LORDS CHELMERSFORD, WESTBURY and COLONSAY. *And see* col. 287.

Daniel v. Metropolitan Ry., *followed*.
Pounder v. North Eastern Ry. (1891) 61 L. J. Q. B. 136; [1892] 1 Q. B. 385; 65 L. T. 679; 40 W. R. 189; 56 J. P. 247.—A. L. SMITH and MATHEW, JJ.

Pounder v. N. E. Ry., *distinguished and commented on*.

Cobb v. G. W. Ry. (1894) 63 L. J. Q. B. 429; [1894] A. C. 419; 6 R. 203; 71 L. T. 161, 58 J. P. 636.—H.L. (B.); *affirming* 41 W. R. 275.—C.A. ESHER, M.R., BOWEN and A. L. SMITH, L.JJ.; *which affirmed* DAY and COLLINS, JJ.

SELBORNE, L.C.—Two of the five learned judges who so agreed (Collins, J. and A. L. Smith, L.J.) referred to . . . *Pounder v. N. E. Ry.* . . . How far they may have considered it an authority to govern the case before them I cannot say; but, for my own part, if I thought it necessary in the present case, to consider the correctness of that decision, I doubt whether I should be prepared to follow it. The facts, as I understand them, were, that the servants of the N. E. Co., having distinct notice that the plaintiff was, on reasonable grounds, apprehensive that an assault would be committed on him by certain other passengers by the same train, if he were compelled to travel in the same carriage with them without protection, he was nevertheless compelled so to travel, and was left unprotected, with the result that the apprehended assault was committed. I am unable, at present, to see any distinction satisfactory to my own mind between such a case and that which the M.R. justly distinguished from the present, when he said that (in this case) it "was not alleged that the plaintiff was being ill-used or assaulted on the train, and that, the fact being made known to the defendant's servants, they did not interfere to prevent it." The present case is quite different; the plaintiff's complaint was made not before, but after he had been robbed.—p. 630.

LORDS WATSON, MACNAGHTEN and SHAND agreed, and refrained from expressing any opinion on *Pounder's Case*, the latter observing that in any view it was distinguishable on the facts.

LORD MORRIS also agreed, but said that as at

present advised, he should not be disposed to dissent from *Powder's Case*.

Cobb v. G. W. Ry. (*supra*), *distinguished*.

Abrahams v. Bullock (1902) 86 L. T. 796. 50 W. R. 626.—C.A. COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

Richardson v. G. E. Ry. (1875) L. R. 10 C. P. 480; 32 L. T. 248.—C.P. : *reversed*, (1876) 1 C. P. D. 342; 35 L. T. 351; 24 W. R. 107.—C.A. JESSEL, M.R., MELLISH, L.J. and POLLOCK, B.

Daniel v. Metropolitan Ry. (*supra*) and

Richardson v. G. E. Ry., *distinguished*.

Burrell v. Tuohy [1898] 2 Ir. R. 271.—ANDREWS, MADDEN, BOYD and KENNY, JJ.

Foy v. L. B. & S. C. Ry. (1865) 18 C. B. (N.S.) 225; 11 L. T. 606, 19 W. R. 293.—C.P., *commented on and distinguished*.

Siner v. G. W. Ry. (1869) 38 L. J. Ex. 67, L. R. 4 Ex. 117; 20 L. T. 114; 17 W. R. 417.—EX. CH. M. SMITH, J.—*Foy v. L. B. & S. C. Ry.* is, no doubt, in some of its main features, very like this case; but there the plaintiff was invited expressly by the defendants' servants to descend, and upon that ground the Court of Ex. distinguished the present case from that decision, and I think rightly.—p. 73.

HANNEN, J.—If *Foy v. L. B. & S. C. Ry.* is in conflict with this decision then I think it was incorrect, and, sitting in a Court of error, I feel free from its authority.—p. 74.

BYLES and MELLOR, JJ. to the same effect.

KEATING, J. dissented, and considered *Foy v. L. B. & S. C. Ry.* was indistinguishable.

Siner v. G. W. Ry., *distinguished*.

Jones v. Boyce (1816) 1 Stark. 493; 18 R. R. 812, *discussed*.

Adams v. Lancashire and Yorkshire Ry. (1869) 38 L. J. C. P. 277; L. R. 4 C. P. 739; 20 L. T. 850; 17 W. R. 884.—C.P. *And see post*, col. 288.

Adams v. Lancashire and Yorkshire Ry., *referred to*.

Dulieu v. White & Sons (1901) 70 L. J. K. B. 837; [1901] 2 K. B. 669; 85 L. T. 126.—KENNEDY and PHILLIMORE, JJ.

Siner v. G. W. Ry., *adhered to and distinguished*.

Praeger v. Bristol and Exeter Ry. (1871) 24 L. T. 105.—EX. CH.; *reversing* 23 L. T. 366.—EX.

Praeger v. Bristol and Exeter Ry., *followed*.

Siner v. G. W. Ry.; and **Bridges v. North London Ry.** (1871) 40 L. J. Q. B. 188; L. R. 6 Q. B. 377; 24 L. T. 385; 19 W. R. 824.—EX. CH.; *reversed* (*post*, col. 288), *distinguished*.

Cockle v. London & S. E. Ry. (1872) 41 L. J. C. P. 140; L. R. 7 C. P. 321; 27 L. T. 320; 20 W. R. 754.—EX. CH.

COCKBURN, C.J. (for the Court) [repeated in his judgment the judgments of himself and the other judges in *Praeger v. Bristol and Exeter Ry.*; *Siner's Case* having been there distinguished on two grounds, viz., (1) That there was in *Praeger's Case* a clear invitation to alight, and (2) That the danger to be incurred was not apparent].—The case is distinguishable from that of *Bridges v. North London Ry.* on the ground that in the latter the carriage from which the passenger alighted had been drawn up in a tunnel in the

vicinity of the station. In that case there was no evidence that the train had come to a final standstill, or in other words, arrived at the spot where the company's servants intended the passengers to alight. The question, therefore, was whether there was evidence of anything done by the company's servants which induced the passenger to believe it had so arrived, and act on that belief. But in the present case the evidence of the conduct of the company's servants was such as to warrant the jury in finding that the train had really come to the final standstill, and that the company's servants meant the passengers to get out there or be carried on.—p. 143.

Adams v. Lancashire and Yorkshire Ry.

(*supra*, col. 287), *questioned*.

Gee v. Metropolitan Ry. (1873) 42 L. J. Q. B. 105; L. R. 8 Q. B. 161; 28 L. T. 282; 21 W. R. 584.—EX. CH. *See judgments at length*.

Gee v. Metropolitan Ry., *followed*.

Richards v. G. E. Ry. (1873) 28 L. T. 711.—EX.

Siner v. G. W. Ry. (*supra*), *distinguished*.

Bridges v. North London Ry. (1874) 43 L. J. Q. B. 151; L. R. 7 H. L. 213; 30 L. T. 844; 23 W. R. 62.—H. L. (E.). LORDS CHELMSFORD and HATHERLEY with the JUDGES: *reversing S.C. (supra)*, *explained*.

Robson v. N. E. Ry. (1876) 2 Q. B. D. 85; 46 L. J. Q. B. 50; 35 L. T. 635; 25 W. R. 418.—C.A. COLERIDGE, C.J.—*Siner's Case* was, in some respects, like this case. . . . But in this case we have what was not in *Siner's Case*, an invitation to the passengers to alight, and the Court of Ex. Ch. held, in *Cockle v. London & S. E. Ry. (supra)*, that in such a state of circumstances the passenger was justified in getting out, and there was evidence of negligence on the part of the company.—p. 87.

MELLISH, L.J. to the same effect.

BRETT, J.A.—It appears to me that the judgment of the H. L. in *Bridges v. North London Ry.* puts an end to a long controversy, not as to the law, but as to the mode of dealing with these cases. Some of the judges seem to have been of opinion that these cases should as much as possible be withdrawn from the jury, and that the Court ought to say what was reasonable for a passenger to do. The H. L. held, that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury was the proper tribunal to decide. *Siner v. G. W. Ry.* was decided in the heat of the controversy, and without saying that it ought to be overruled, I may say that it was decided by judges who thought that these cases ought to be left to the judge and not to the jury.—p. 89. AMPHLETT, J.A. concurred. *And see post*, col. 290.

Robson v. N. E. Ry., *approved*.

Rose v. N. E. Ry. (1876) 46 L. J. Ex. 374; 2 Ex. D. 248; 35 L. T. 693; 25 W. R. 205.—C.A. COCKBURN, C.J., BRETT and AMPHLETT, J.J.A.; *reversing* 84 L. T. 761.—KELLY, C.B. and CLEASBY, B.

Bridges v. North London Ry., *discussed*.

Pearson v. Cox (1877) 2 C. P. D. 369; 36 L. T. 495.—C.A. COLERIDGE, C.J., BRAMWELL and BRETT, L.JJ.

BRETT, L.J.—With respect to the opinion I expressed in *Bridges v. North London Ry.*, having again considered what I then said, I see nothing wrong in it, and I continue to hold the

same opinion. But I did not say that there is not always a preliminary question for the judge to decide, namely, whether there is any evidence to go to the jury. On the contrary, I asserted it, and in my answer to the H. L. I laid it down that there is a question for the judge to decide.—p. 373.

Bridges v. North London Ry., corrected.

Metropolitan Ry. v. Jackson (1877) 3 App. Cas. 193; 47 L. J. C. P. 303; 37 L. T. 679; 23 W. R. 175—H.L. (E.); reversing, S. C. non. Jackson v. Metropolitan Ry., 46 L. J. C. P. 376; 2 C. P. D. 125; 36 L. T. 485; 25 W. R. 861.—C.A. COCKBURN, C.J. and AMPHLETT, J.A.; KELLY, G.B. and FRAZER WELLS, J.A. dissenting. CAIRNS, L.C.—In the C.A. Amphlett, L.J. founded himself at the outset on *Bridges v. North London Ry.* in this House. He states: "It is now settled by that case (though previously doubted by many eminent judges), that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or presiding judge." And, in like manner, the L.C.J. states, at the conclusion of his judgment:—"All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the plaintiff with that negligence as its cause, or as materially contributing thereto. I cannot doubt, especially after the decision of the H. L. in *Bridges v. North London Ry.*, that this was a matter of which the jury were the proper judges, and which it was incumbent on the presiding judge to leave to their decision." These expressions of the learned judges appear to me to be of great importance, for I infer from them that if they had not considered *Bridges v. North London Ry.* to have the effect which they attribute to it, their decision in the present case might have been different. Now, my lords, I am bound to say that I cannot look at the case of *Bridges* as in any degree establishing the proposition which it appeared to Amphlett, L.J. to establish, namely, that whether in cases of this sort negligence can be inferred from any given state of facts is itself a question of fact for the jury, or as establishing the proposition which it appeared to the L.C.J. to establish, namely, that the jurors are the proper judges whether, if once any negligence is proved, the accident which has occurred is to be connected with such negligence as its cause, or as materially contributing thereto. Your lordships, in the case of *Bridges*, did not lay down, and I am satisfied your lordships did not mean to lay down, any new rule upon this subject. It is indeed impossible to lay down any rule except that which at the outset I referred to—namely, that from any given state of facts the judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred.—p. 199.

LORD O'HAGAN to the same effect.

LORD BLACKBURN.—Since the decision of your lordships' House in *Bridges v. North London Ry.* it has been more than once said in the Courts below that your lordships had not perhaps overruled the law laid down in *Ryder v. Wombwell* [(1858) 38 L. J. Ex. 8; 1 L. R. 4 Ex. 32. See "INFANT,"] but at least laid down this exception to it, that in cases of railway accidents

the jurors were to decide. In *Robson v. N. E. Ry.* (col. 288) Brett, L.J. says: "The H. L. held that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury ought to decide." My lords, I quite agree that this consideration ought never to be lost sight of, but I cannot think it decisive. . . . But I own myself unable to see anything in *Bridges v. North London Ry.* which justifies the conclusion that your lordships either laid down, or meant to lay down, any new rule on the subject. I think the utmost extent to which your lordships' decision in that case can fairly be pressed is, that in such cases the judges should be cautious before they say that the jury could not legitimately draw the inference which they did draw; and to this I agree.—p. 209.

LORD GORDON.—In the present case I must say that during the argument I felt much inclined to agree with the view taken of the decision of this House in the case of *Bridges* by the L.C.J. and Amphlett, L.J. . . . But having considered that case more maturely, with the assistance which your lordships have received from his lordship on the woolsack, who took part in that decision in this House, I am now satisfied that the view taken by these learned lords was not the right one, and that no fixed or general rule . . . was laid down by the case of *Bridges*.—p. 211.

N. E. Ry. v. Wanless (1874) 43 L. J. Q. B. 185; 1 L. R. 7 H. L. 12; 30 L. T. 275; 22 W. R. 561.—H.L. (E.). CAIRNS, L.C., LORDS CHELMSFORD and SELBORNE: **Bridges v. North London Ry.**; and **Metropolitan Ry. v. Jackson**, discussed.

Dublin, Wicklow and Wexford Ry. v. Slattery (1878) 3 App. Cas. 1155; 39 L. T. 865; 27 W. R. 191.—H.L. (IR.). CAIRNS, L.C., LORDS PENZANCE, O'HAGAN and SELBORNE; LORDS HATHERLEY, COLERIDGE and BLACKBURN dissenting; affirming Ir. R. 10 C. L. 256.—EX. GR.

Dublin, W. & W. Ry. v. Slattery, explained.

Davey v. L. & S. W. Ry. (1888) 53 L. J. Q. B. 58; 12 Q. B. D. 70; 49 L. T. 739; 48 J. P. 279.—C.A. BRETT, M.R. and BOWEN, L.J.; BAGGALLAY, L.J. dissenting.

Davey v. L. & S. W. Ry., commented on but applied.

Wright v. Midland Ry. (1884) 51 L. T. 539.—FIELD, MANISTY and LOPES, JJ.; reversed, W. N. (1885) 39.—C.A.

Davey v. L. & S. W. Ry., considered overruled.

Wright v. Midland Ry.—C.A., followed.

Brown v. G. W. Ry. (1885) 52 L. T. 622.—GROVE, MANISTY and LOPES, JJ.

Dublin, W. & W. Ry. v. Slattery, referred to.

Wakelin v. L. & S. W. Ry. (1886) 56 L. J. Q. B. 229; 12 App. Cas. 41; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404.—H.L. (E.). HALSBURY, L.C., LORDS WATSON, BLACKBURN and FITZGERALD. And see post, col. 298.

Dublin, W. & W. Ry. v. Slattery and

Wakelin v. L. & S. W. Ry., discussed.
Coyle v. G. N. Ry. (1887) 20 L. R. Ir. 409.—PALLES, C.B. and DOWSE, B.

Bilbee v. L. B. & S. C. Ry. (1865) 34 L. J. C. P. 182; 18 C. B. (N.S.) 584; 11 Jur. (N.S.) 745; 18 L. T. 146; 13 W. R. 779.—**ERLE, C.J.** (for the Court), *considered*.
Stubble v. L. & N. W. Ry. (1865) 35 L. J. Ex. 3; 1 L. R. 1 Ex. 13; 4 H. & C. 83; 11 Jur. (N.S.) 954; 13 L. T. 376; 14 W. R. 133.
BRAMWELL, B.—I do not treat *Bilbee v. L. B. & S. C. Ry.* as an authority. I do not mean that it was not rightly decided, but that it establishes no precedent, and lays down no principle. The learned C.J. there seems to have intended to guard against its being cited as an authority.—p. 5.
CHANNELL and **PIGOTT, BB.** to the same effect. **FOLLOCK, C.B.** concurred.

Bilbee v. L. B. & S. C. Ry., followed.
Stapley v. L. B. & S. C. Ry. (1865) L. R. 1 Ex. 21; 35 L. J. Ex. 7; 4 H. & C. 93; 11 Jur. (N.S.) 954; 13 L. T. 406; 14 W. R. 132.
CHANNELL, B.—The case depends upon the principle of *Bilbee v. L. B. & S. C. Ry.* We adopt the opinion there expressed by Erle, C.J., that we ought to be careful not to impose any undue burdens on railway companies that are not imposed on them by Act of Parliament, and we do not say that a railway company must keep servants at every crossing.—p. 27. **FOLLOCK, C.B.** and **PIGOTT, B.** concurred.

Stubble v. L. & N. W. Ry. and **Bilbee v. L. B. & S. C. Ry., discussed.**
Skelton v. L. & N. W. Ry. (1867) 36 L. J. C. P. 249; 1 L. R. 2 C. P. 81; 16 L. T. 568; 15 W. R. 925.—C.P.

Bilbee v. L. B. & S. C. Ry., commented upon and distinguished.
Cliff v. Midland Ry. (1870) L. R. 5 Q. B. 258; 22 L. T. 382; 18 W. R. 456.

MELLOR, J.—It does appear very difficult to distinguish this case from that, so far as the duty to provide a gatekeeper is concerned, but my brother Lush has suggested a distinction in the course of the argument, and if it be not the distinction I really cannot suggest any other, viz., that where a railway company is empowered to make their railway and to use it, and to cross a road on the level, and they make a bridge so near as to obstruct the sight of the person who has to cross, so as to impose a difficulty or a danger which was not contemplated by the legislature, they are bound to use extra precautions, and such a case may be distinguished from the present possibly on that ground. I am not very clear that that is a sound distinction, but it is a distinction upon which possibly we might have felt at liberty to act if we had found it necessary to do so. Without expressing any further opinion upon *Bilbee v. L. B. & S. C. Ry.*, I think that, if the present case cannot be distinguished upon the grounds I have mentioned, we should be bound by it in this Court.—p. 263.

LUSH, J.—It may be, and I am inclined to think it is, a sound principle that if the railway company, in the construction of works so authorised—in the exercise of the discretion which the legislature has vested in them—do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose

upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it were, to make up to the public for that which they have taken away from them. That I take to be the principle of *Bilbee v. L. B. & S. C. Ry.* As I read the case, it may well be sustained upon that principle. If it cannot, then I do not see any ground upon which it can be sustained. But it appears to me, although the principle is not enunciated in that specific form, that that is the ground upon which the learned judges in that case acted.—p. 264.

HANNEN, J. abstained from expressing any opinion on *Bilbee's Case*.

Barrett v. Midland Ry. (1858) 1 F. & F. 361.—**WATSON, B.** *questioned*.
Harrison v. N. E. Ry. (1874) 22 W. R. 335; 29 L. T. 844.

BRAMWELL, B.—In that case the allegation that the plaintiff was lawfully crossing the line was not traversed. There is a further distinction between that case and this. A habit of crossing in a definite track known to the servants of the railway company is one thing, and the habit of crossing anywhere on the line, as alleged in this case, is quite another. In the former case, the decision in *Barrett v. Midland Ry.* may possibly be law. In the unreported case of *Hill v. N. E. Ry.* I was not present at the argument of the rule, and I should have concurred in the decision with the greatest reluctance.—p. 335. **PIGOTT** and **FOLLOCK, BB.** concurred.

Fordham v. L. B. & S. C. Ry. (1868) 37 L. J. C. P. 176; 1 L. R. 3 C. P. 368; 18 L. T. 568; 16 W. R. 365.—C.P.; *affirmed*, (1869) 17 W. R. 893.—**EX. CH.** *distinguished*.
Richardson v. Metropolitan Ry. (1868) 37 L. J. C. P. 800; 1 L. R. 3 C. P. 874, n.; 18 L. T. 721; 16 W. R. 909.—C.P.

Martin v. G. N. Ry. (1855) 24 L. J. C. P. 209; 16 C. B. 179; 3 C. L. R. 817; 1 Jur. (N.S.) 613; 3 W. R. 477.—C.P. *questioned*.

Cornman v. Eastern Counties Ry. (1859) 4 H. & N. 781; 29 L. J. Ex. 94; 4 Jur. (N.S.) 657.

[In *Martin v. G. N. Ry.* the plaintiff in running along the platform of the railway to get into the train, fell over a switch handle; it was held that there was evidence of negligence on the part of the defendants. The plaintiff there was on a part of the platform where he ought not to have gone.]

BRAMWELL, B.—That case will not help this plaintiff, because there was evidence that there was not light enough to enable a person unacquainted with the premises to move about in safety.

WATSON, B.—I have always thought that decision wrong, but perhaps it may be supported on that ground.—p. 784.

PASSENGER'S LUGGAGE.

Richards v. L. B. & S. C. Ry. (1849) 18 L. J. C. P. 251; 7 C. B. 839; 13 Jur. 986; 6 Railw. Cas. 49.—C.P. *approved*.
Butcher v. L. & S. W. Ry. (1855) 21 L. J. C. P. 137; 16 C. B. 13; 3 C. L. R. 805; 1 Jur. (N.S.) 427; 3 W. R. 409.—C.P.

Richards v. L. B. & S. C. Ry., *commented on and distinguished.*

Stewart v. L. & N. W. Ry. (1864) 33 L. J. Ex. 199; 3 H. & C. 185; 10 Jur. (N.S.) 805; 10 L. T. 302; 12 W. R. 689.—EX. *And see post*, col. 294.

Stewart v. L. & N. W. Ry., *overruled.*

Cohen v. S. E. Ry. (1877) 2 Ex. D. 253; 46 L. J. Ex. 417; 36 L. T. 180; 25 W. R. 475.—C.A. MELLISH, L.J., BAGGALLAY and BRETT, J.J.

BRETT, J.A.—I do not recollect exactly how far that case decided the present point. If it is a decision contrary to our present judgment, then I can only say with deference I do not agree with it. . . . *Stewart v. L. & N. W. Ry.* was the case of an excursion train; and Bramwell, B. in the Court below, feeling that he must not overrule a case in a Court of co-ordinate jurisdiction, went through the other process, which is never very difficult to an ingenious mind, that is, where you do not like a case and must not overrule it, you distinguish it. That process he performed with his usual skill. But, sitting here, I do not think one is bound to undertake that task. I think one may fairly say at once that one does not agree with *Stewart v. L. & N. W. Ry.* I cannot see any difference between that case and this, although in that case it was an excursion train. If a railway company chooses to take a man's luggage away from him, and takes it in-charge themselves, it seems to me it is no less an article or thing carried by the railway because the train is an excursion train. I, therefore, with great deference, do not agree with that case, and think it ought to be overruled.—p. 264. *And see post*, col. 303.

Pianciani v. L. & S. W. Ry. (1866) 18 C. B. 226, *approved.* *And see post*, col. 301.

Le Conteur v. L. & S. W. Ry. (1865) 35 L. J. Q. B. 40; 1 L. R. 1 Q. B. 54; 6 B. & S. 941; 12 Jur. (N.S.) 266; 13 L. T. 326; 14 W. R. 80.—Q.B.

Cohen v. S. E. Ry. and Robinson v. Dunmore (1801) 2 B. & P. 416, *distinguished.*

Le Conteur v. L. & S. W. Ry; Butcher v. L. & S. W. Ry.; and Richards v. L. B. & S. C. Ry. (*supra*), *commented on.*

Talley v. G. W. Ry. (1870) 40 L. J. C. P. 9; 1 L. R. 6 C. P. 44; 23 L. T. 413; 19 W. R. 154.—WILLES, J. (for the Court), *approved.* Berghem v. G. E. Ry. (1878) 47 L. J. C. P. 318; 3 C. P. D. 221; 38 L. T. 160; 26 W. R. 301.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Richards v. L. B. & S. C. Ry.; Butcher v. L. & S. W. Ry.; and Talley v. G. W. Ry., *explained and approved.*

Berghem v. G. E. Ry., *disapproved.*

G. W. Ry. v. Bunch (1888) 57 L. J. Q. B. 361; 18 App. Cas. 31; 58 L. T. 128; 36 W. R. 785; 52 J. P. 147.—H.L. (E.), *affirming* S. C. *nom.* Bunch v. G. W. Ry. (1886) 55 L. J. Q. B. 427; 17 Q. B. D. 215; 55 L. T. 9; 34 W. R. 574.—C.A. ESMEY, M.R. and DINDLEY, L.J.; LOPES, L.J. *dissenting; which had reversed*, 34 W. R. 74.—DAY and A. L. SMITH, JJ.

HALESBURY, L.C.—I do not know that it is absolutely necessary in this case to determine what is the exact contract between the company and the passengers, since the learned [County Court] judge has found negligence against the

company; and I do not understand that there is any difference of opinion among us, that if there was any contract to take care of the bag, there is sufficient evidence of negligence. But I must express my opinion that the views expressed by Lord Truro, Jervis, C.J., Williams, Crowder, Willes, Keating and M. Smith, J.J. do not appear to have had sufficient weight given to them (*see Richards v. L. B. & S. C. Ry.; Talley v. G. W. Ry.; Butcher v. L. & S. W. Ry.*) by the judgment of the C.A. in *Berghem v. G. E. Ry.* All these learned judges appear to me to adopt the view that a railway company, in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default. In *Berghem v. G. E. Ry.* the C.A., commenting upon *Talley v. G. W. Ry.*, do not, I think, quite accurately represent the judgment of the Court of C. P. In *Talley v. G. W. Ry.* that judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care, the fact being that the loss was caused by his neglect to do so, and would not have happened without such negligence. The negligence in question was, leaving his portmanteau in a carriage unprotected by his presence; it was found at the end of a journey out open and its contents rifled, in a carriage which he had originally travelled in as far as Swindon, but which he had negligently omitted to re-enter upon leaving the refreshment-room at that station.—p. 366.

LORD WATSON, HERSHELL and MACNAGHTEN to the same effect.

LORD BRAMWELL *dissented.*

Van Toll v. S. E. Ry. (1862) 31 L. J. C. P. 241; 12 C. B. (N.S.) 75; 8 Jur. (N.S.) 1213; 6 L. T. 244; 10 W. R. 578.—C.P., *distinguished.*

Lewis v. McKee (1868) 38 L. J. Ex. 62; 1 L. R. 4 Ex. 58; 19 L. T. 552; 17 W. R. 325.—WILLES, J. (for the Court), *And see post.*

Stewart v. L. & N. W. Ry. (*supra*, col. 293); and **Zunz v. S. E. Ry.** (1869) 38 L. J. Q. B. 209; 10 B. & S. 594; 1 L. R. 4 Q. B. 859; 20 L. T. 873; 17 W. R. 1096.—Q.B., *discussed.* *And see post*, col. 298.

Henderson v. Stevenson (1875) 1 L. R. 2 H. L. Sc. 470; 32 L. T. 703.—CAIRNS, L.C., LORDS CHELMSFORD, HATHERLEY and O'HAGAN.

Henderson v. Stevenson, *discussed.*

Harris v. G. W. Ry. (1876) 45 L. J. Q. B. 729; 1 Q. B. D. 515; 34 L. T. 647; 25 W. R. 63.

BLACKBURN, J.—I also think (if I rightly understand the judgment) that though that decision goes a step further than any prior decision of which I am aware, it is a logical extension of a principle which had been previously recognised by the Courts, and therefore I not only obey that decision, but acquiesce in it. But there are expressions used by the different lords which seem to express opinions which were not, I think, part of the decision of the case before them, and which are not, in my opinion, correct when

applied to the case before us, of a ticket given on the deposit of goods with a company who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not and will not as a general rule receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket, on the production of which the goods will be given up to the person producing it.—p. 733.

MELLOR, J. to the same effect LUSH, J. agreed on this point.

Van Toll v. S. E. Ry. (*supra*); **York, Newcastle and Berwick Ry. v. Crisp** (1854) 23 L. J. C. P. 125; 14 G. B. 527; 2 C. L. R. 1357; 18 Jur. 606; 2 W. R. 428.—O.P.: **Lewis v. McKee** (*supra*), and **Harris v. G. W. Ry.**, *discussed*.

Henderson v. Stevenson, *commented on*. **Parker v. S. E. Ry.**; **Gabell v. S. E. Ry.** (1877) 46 L. J. C. P. 768; 2 C. P. D. 416; 36 L. T. 540; 25 W. R. 564.—C.A. **MELLISH** and **BAGGALLAY, L.J.**; **BRAMWELL, L.J.** *dissenting*; *reversing* [1876] 45 L. J. C. P. 515; 1 C. P. D. 618; 34 L. T. 654.—C.P. *And see post*, col. 297.

Henderson v. Stevenson, *distinguished*. **Burke v. S. E. Ry.** (1879) 49 L. J. C. P. 107; 5 C. P. D. 1; 41 L. T. 554; 28 W. R. 306; 44 J. P. 283.—**COLERIDGE, C.J.** and **LINDLEY, J.**

Zunz v. S. E. Ry. (*supra*); **Henderson v. Stevenson**; **Harris v. G. W. Ry.**, and **Burke v. S. E. Ry.**, *considered*. **Watkins v. Rymlil** (1883) 52 L. J. Q. B. 121; 10 Q. B. D. 178; 48 L. T. 426; 31 W. R. 337; 47 J. P. 357.

STEPHEN, J. (for self, **HAWKINS** and **V. WILLIAMS, JJ.**), after discussing **Van Toll v. S. E. Ry.**, **Lewis v. McKee**, and **Zunz v. S. E. Ry.**, continued **Cockburn, C.J.** (in **Zunz v. S. E. Ry.**) does not say to what authorities he referred. Probably **Van Toll v. S. E. Ry.** and **Lewis v. McKee** would be two of them. They are the strongest cases in that direction which we have been able to find, though they do not appear to have been cited in the argument, which turned to a great extent upon other topics. . . . There have, however, been several subsequent decisions which, though not inconsistent with **Zunz v. S. E. Ry.**, show that it cannot be regarded as a complete statement of the law. . . . In this case [**Henderson v. Stevenson**] a passenger by a steamboat took a ticket on the face of which appeared the words "Dublin to Whitehaven." On the back were the words, "The company incurs no liability in respect of loss, injury or delay to the passenger or to his luggage, whether arising from the act, neglect or default of the company or their servants, or otherwise." There was no reference on the front of the ticket to the back of it, and the plaintiff swore that he did not look at it. It was held that the notice did not affect the company's liability. The facts of the case were so peculiar that it can hardly form a precedent for any other. . . . The principle upon which the case was decided is expressed in a very few words by Lord Cairns: "The question does not depend upon any technicality of law or upon any careful examination of authorities. It is a question simply of common sense. Can it be held that where a person is entering into a con-

tract containing terms which *de facto* he does not know, and as to which he has received no notice that he ought to inform himself upon them" (the words "he is to be bound by these terms," or some equivalent, appear to have dropped out of the report). "It appears to me impossible that that can be held." It may be added that though the case was decided mainly on this ground, several of their lordships, and in particular Lord Chelmsford and Hatherley, entertained doubts as to the right of the defendants to attach such a condition as the one in question to the contract to carry. . . . In this case [**Harris v. G. W. Ry.**] the luggage of a person who had been a passenger by the G. W. Ry. was deposited by her brother on her behalf with the servants of the company at the cloak-room, and the depositor received a ticket which on its face enumerated the articles received, stated the charge at 2d. for each, and ended with these words: "Left in the name of . . . and subject to the conditions on the other side." On the back were conditions, one of which limited the liability of the company to 5s. for each package unless a certain higher rate were charged. The person who deposited the articles said that he did not read the conditions on the back of the ticket, but admitted that he "believed there were some conditions." The judges . . . held that the plaintiff was bound by the conditions on the back of the ticket. . . . Lord Blackburn elaborately distinguishes the case from **Henderson v. Stevenson** on grounds similar to those which we have already stated. . . . He there says that in **Henderson v. Stevenson** there was nothing to show that the steamboat company would believe from the conduct of the passenger that he had represented to them that he had read or looked at the back of the ticket, and, in point of fact, he had not. . . . **Gabell v. S. E. Ry.** was decided at the same time by the same judgment [as **Parker v. S. E. Ry.**], the facts and directions given to the jury being identical in the two cases. The facts in each case closely resembled those of **Harris v. G. W. Ry.** In each case a bag was left at a cloak-room, 2d. was paid, and a ticket received which had printed upon it the words, "See back." On the back were conditions, of which one was, "The company will not be responsible for any package exceeding the value of 10l." Each plaintiff denied that he had read the words on the ticket or seen a printed notice to the same effect hung up in the cloak-room. . . . In this case [**Burke v. S. E. Ry.**] the plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was, "Cheap return ticket, London to Paris and back—second class," and other matter, but no reference to the inside of the cover. On the inside was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants, and said he had not read the condition and did not know of it. **Cockburn, C.J.** asked the jury the question suggested in **Parker v. S. E. Ry.**, and they answered it in favour of the plaintiff. The defendants moved to have judgment entered for them, and this was done, the Divisional Court holding that the book was the contract, and that the condition was an indivisible part of it. The judgment in this case can hardly be supported by any principle short of that laid down in **Zunz v. S. E. Ry.**, if indeed it does not go further. . . . All of them

[the cases] are in favour of the defendant except *Parker v. S. E. Ry.* . . . It must be remembered that the precise question before the Court in *Parker v. S. E. Ry.* was not whether the question in that case was one of law or of fact, but whether the questions put to the jury by the learned judges *ex ante* were proper, which, as all the Court agreed, they were not. It must also be observed that . . . the question before the Court related to the common law contract of the bailment of goods for safe custody, the nature of which is well known in the absence of special terms agreed to by the parties. The present case relates to a contract of a different kind—namely, the deposit of an article for sale on commission, as to which the terms must necessarily depend upon the agreement of the parties, as none are ascertained by the common law. Besides, all the judges in *Parker v. S. E. Ry.* agreed that the effect of the delivery of a document containing terms must depend on the nature of the contract to which it related.—pp. 122–126.

[His lordship then stated the principles which the Court deduced from the authorities.]

Parker v. S. E. Ry. (*supra*, col. 295), and **Watkins v. Rymill**, *discussed*.

Woodgate v. G. W. Ry. (1884) 51 L. T. 826; 33 W. R. 428; 1 Times L. R. 133; 49 J. P. 196. **HAWKINS** and **A. L. SMITH, JJ.** *And see* "DAMAGES."

Parker v. S. E. Ry., *approved*.

Richardson, Spence & Co. v. Rowntree (1894) 63 L. J. Q. B. 283; [1894] A. C. 217; 6 L. R. 95; 70 L. T. 817; 58 J. P. 493.—**H.L. (R.).**

HERSCHELL, L.C.—That was a case in its broad features very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of one of the railway companies, and received in return for the deposit of the luggage a ticket on which there was printed "See back"; and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the C. A. held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods the plaintiff was bound by the conditions; that those questions were to be determined by the jury, and that upon their determination would depend the liability of the defendants. . . . Now what are the facts, . . . which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. . . . Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is and must be this, that where there are no facts beyond those which I have stated, the defendants are entitled as matter of law to say that the plaintiff is bound by those conditions. That seems to me to be absolutely in the teeth of the judgment of the C. A. in *Parker v. S. E. Ry.*, with which I entirely agree: and it does not seem either to be consistent, when the case is carefully considered, with *Henderson v. Scrimmon* (*supra*, col. 294), in your lordships' House.—p. 284. **LORDS WATSON, ASHBOURNE and MORRIS** concurred.

Aldridge v. G. W. Ry. (col. 304), *followed*.
Zunz v. S. E. Ry. (col. 294), *distinguished*.
Kent v. Midland Ry. (1874) 44 L. J. Q. B. 18; L. R. 10 Q. B. 1; 31 L. T. 430; 28 W. R. 25.—**Q.B.**, *followed*.

Mahony v. Waterford, Limerick and Western Ry. (1899) [1900] 2 Q. B. 273.—**PALLES, C.B.**

Lewis v. G. W. Ry. (col. 305); **Glenister v. G. W. Ry.** (1873) 29 L. T. 423; 22 W. R. 72.—**Q.B.**; **Wakelin v. L. & S. W. Ry.** (col. 290); **Woodgate v. G. W. Ry.**, and **Webb v. G. W. Ry.** (1877) 26 W. R. 111.—**MELLOR and FIELD, JJ.**, *discussed and applied*.

Mahony v. Waterford, Limerick and Western Ry., *distinguished*.

Graham v. Belfast and Northern Counties Ry. (1900) [1901] 2 Ir. R. 13.—**JOHNSON and BOYD, JJ.**; **PALLES, C.B.** *dissenting*.

JOHNSON, J.—*Mahony's Case* does not apply, because there wilful misconduct was found as a fact, and in that state of things it was for the defendant company to discharge or excuse themselves from liability.—p. 21.

Patscheider v. G. W. Ry. (1878) 3 Ex. D. 153; 38 L. T. 149; 26 W. R. 268.—**CLEASBY, B.** and **HAWKINS, J.**, *distinguished*.

Hodgkinson v. L. & N. W. Ry. (1884) 14 Q. B. D. 228, 32 W. R. 602.

COLLIERIDGE, C.J.—The plaintiff when she quitted the station left her luggage "in the custody of the porter," who had then ceased to be acting as the company's agent. . . . *Patscheider v. G. W. Ry.* is clearly distinguishable; there, the plaintiff had no opportunity of taking possession of her box. Possibly the porter may be responsible for the loss; but the company clearly are not.—p. 280. **CAYE, J.** concurred.

CARRIAGE OF GOODS AT COMMON LAW.

Nicholson v. Willan (1804) 5 East 507; 2 Smith 107; 15 R. L. 745, *questioned*.
Garnett v. Willan (1821) 5 B. & Ald. 53; 24 R. R. 276.

BEST, J.—*Nicholson v. Willan*, . . . for the reasons already stated, is not an authority in favour of the defendant, but if it were, I think that the authority of that case is considerably shaken by *Birkett v. Willan* (1819) 3 B. & Ald. 376; 1 Chit. 633; 20 R. R. 479, where the decision of the Court proceeded expressly on the ground that the carrier was liable for gross negligence.—p. 63.

BATLEY and HOLROYD, JJ. also discussed *Nicholson v. Willan* and the earlier cases.

Wyld v. Pickford (1841) 8 M. & W. 443.—**PARKE, B.** for the Court (*see judgment*, where the older cases are discussed), *explained*.

Butt v. G. W. Ry. (1851) 11 C. B. 140; 20 L. J. C. P. 241.

JERVIS, C.J.—In *Wyld v. Pickford* it was held, that, where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract; but that he is not exempted thereby from all responsibility, but is,

notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care.—p. 150. *And see post*, cols. 301, 303.

Wyld v. Pickford, *applied*
The Glendarroch (1894) 43 L. J. P. 89; [1894] P. 226; 6 R. 686; 70 L. T. 344.—C.A. ESHER, M.R., LOPES and DAVEY, J.J.

Baily v. Merrell (1616) 3 Bulst. 94, *explained*.

Brass v. Maitland (1856) 26 L. J. Q. B. 49; 6 El. & Bl. 470; 2 Jur. (N.S.) 710; 4 W. R. 647. CAMPBELL, C.J. (for self and WIGHTMAN, J.; CROMPTON, J. *dissenting*).—One case can be cited deserving particular notice, *Baily v. Merrell*, from Bulstrode, in which it was held, between carrier and the owner of the goods to be carried, that, although the defendant had represented the goods to be of a given weight, an action would not lie against him on the ground that they were of much greater weight, whereby the plaintiff's horse had been injured in drawing them. But there the representation must have been free from fraud, and the reason given for the decision is, that the carrier might, without difficulty, have ascertained the true weight of the goods. Therefore this can only be regarded as an authority that the carrier has no right to expect any communication respecting the nature of the goods, where he may himself easily discover it.—p. 63.

Muschamp v. Lancaster and Preston Junction Ry. (1841) 10 L. J. Ex. 460; 8 M. & W. 421; 2 Railw. Cas. 607; 5 Jur. 656.—EX., *applied*.

Mytton v. Midland Ry. (*supra*, col. 281).

Muschamp v. Lancaster and Preston Junction Ry., *applied*.

Bristol and Exeter Ry. v. Collins (1859) 29 L. J. Ex. 41; 7 H. L. Cas. 194; 5 Jur. (N.S.) 1367.—H.L. (E.). CHELMSFORD, L.C., LORDS BROUGHAM, GRANWORTH, WENSLEYDALE and KINGSDOWN (with the JUDGES): *reversing* S. C. *nom.* Collins *v.* Bristol and Exeter Ry. (1856) 26 L. J. Ex. 103; 1 H. & N. 517; 3 Jur. (N.S.) 141.—EX. CH.; which *reversed* 25 L. J. Ex. 185; 11 Ex. 790.—EX.

G. W. Ry. v. Blower (1872) 41 L. J. C. P. 268; L. R. 7 C. P. 653; 26 L. T. 888; 20 W. R. 776.—WILLES and KEATING, JJ.: and *Kendall v. L. & S. W. Ry.* (1872) 41 L. J. Ex. 184; L. R. 7 Ex. 373; 26 L. T. 785; 20 W. R. 886.—EX., *held not applicable*.

Nugent v. Smith (1876) 45 L. J. C. P. 19, 697; 1 C. P. D. 19, 423; 34 L. T. 827; 25 W. R. 117.—C.A. COCKBURN, C.J., JAMES and MELLISH, J.J., MELLOR, J. and OLDFASBY, B.; *reversing* (1875) 33 L. T. 731; 24 W. R. 237.—BRETT and DENMAN, JJ. *See* judgments, where the earlier cases are discussed.

Stuart v. Crawley (1818) 2 Stark. 323; 20 R. L. 691, *distinguished*.

Richardson v. N. E. Ry. (1872) 41 L. J. C. P.

60; L. R. 7 C. P. 75; 26 L. T. 131; 20 W. R. 461.

WILLES, J.—That was an action for the loss of a greyhound which had been delivered to the defendant, a carrier. The dog had no collar, but was taken to the defendant's warehouse with a string round its neck, and the defendant's servants gave a receipt for it, which was not done here. The dog in that case was afterwards tied by this string to a watch-box, and it slipped from its noose and was lost. Lord Ellenborough held that the defendant in that case was responsible, and he said that it was not like the case of a delivery of goods imperfectly packed, since there the defect was not visible, but that there the defendant had the means of seeing that the dog was insufficiently secured. . . . Obviously, that case is a very different one from the present, because here the dog was delivered with a collar and a strap, which clearly indicated that the proper mode of securing the animal was by these. The present case differs from *Stuart v. Crawley* in two particulars. In the first place the company are not common carriers of dogs, and in the next place the dog which was delivered in that case was evidently not intended to be secured by the string, and the defendant had the means of seeing how it ought to be secured, whereas here the company had a right to suppose that the collar and strap were intended for securing the dog.—p. 63.

CARRIERS ACT, 1830.

Owen v. Burnett (1834) 3 L. J. Ex. 76; 2 C. & M. 353; 4 Tyr. 133, *commented on*.
Hinton v. Dibbin (1842) 2 Q. B. 646; 2 G. & D. 36; 6 Jur. 601.

DENMAN, C.J. (for the Court), after discussing the earlier decisions, said: "It remains only to advert to *Owen v. Burnett*, upon which much reliance was placed in the course of the argument, not for the sake of the decision, but the language of two of the learned judges, who are supposed to have intimated an opinion that, although the article damaged was amongst those enumerated in the Act, the carrier would still have been liable for the damage if guilty 'of gross negligence.'" Vaughan, B., in giving judgment for the defendant, is reported to have said, "If gross negligence were made out it would be different." Bayley, B., the other judge referred to, does not in terms so express himself, nor is what he says necessarily equivalent, and we have before taken occasion to observe upon the manner in which in this same case he speaks of "gross negligence." But, supposing it to be so, the observation is wholly extra-judicial, and unnecessary for the decision of the case. That decision is in favour of these defendants. For it was expressly found by the jury that the loss was occasioned by the negligence of the carrier alone; and yet the judgment was in his favour. Moreover, in the same case the Court showed a disinclination to limit the operation of the statute: for, whereas in the preamble mention is made of valuable packages in "small compass," and thence an argument was urged that to such only would the Act be applicable, the Court held the contrary, and that it did apply to a package which is stated in the case to have been "of a considerable size." In no other case has the question now before us been even noticed.—p. 665.

Hearn v. L. & S. W. Ry. (1857) 24 L. J. Ex. 180; 10 Ex. 793; 3 C. L. R. 597; 1 Jur. (N.S.) 236.—*EX. explained.*

Pianciani v. L. & S. W. Ry. (*supra*, col. 293), and **Wallace v. Dublin and Belfast Ry.** (1874) 1 Ir. R. 30, C. L. 341, *approved.*

Milten v. Brasch (1882) 52 L. J. Q. B. 127; 10 Q. B. D. 142; 47 L. T. 685; 31 W. R. 190; 47 J. P. 180.—*C.A.*; *reversing* 51 L. J. Q. B. 166; 8 Q. B. D. 35; 45 L. T. 683.—*LOVEB.*

LINDLEY, L.J. (for self, **BAGGALLAY**, and **BRIET, L.J.**)—In holding that the defendants were liable for damages for the detention, although not for the loss of these articles, the learned judge followed what he understood to be the law as laid down in *Hearn v. L. & S. W. Ry.* That case at first sight appears in favour of the plaintiff. But if the pleadings demurred to are carefully examined, it will be found that the plaintiff, in his new assignment, carefully negated the loss of the goods for the detention of which he was suing, and the point really decided was that where goods which ought to be declared and are not declared are detained by a carrier without being lost by him, he is liable for such detention. This is consistent with the language of the Carriers Act, which exonerates carriers from liability for loss or injury to certain kinds of goods if not declared, but does not exonerate carriers from their liability for the undue detention of such goods. In this case, however, the learned judge found as a fact that the goods were lost within the meaning of the Carriers Act, although the loss was only temporary; and, assuming this finding to be correct, it appears to us impossible to hold the carriers irresponsible for the loss, but responsible for detention caused by the loss. There is nothing in the Carriers Act to warrant such a refinement, nor does the decision in *Hearn v. L. & S. W. Ry.*, as has already been shown.—p. 129.

Hart v. Baxendale (1851) 20 L. J. Ex. 338; *reversed, nom. Baxendale v. Hart* (1852) 21 L. J. Ex. 123; 6 Ex. 769; 16 Jur. 126.—*EX. CH.*

Davey v. Mason (1841) Carr. & M. 45, *overruled.*

Bernstein v. Baxendale (1859) 28 L. J. C. P. 265; 6 C. B. (N.S.) 251; 5 Jur. (N.S.) 1056; 7 W. R. 396.

WILLES, J.—I know that in *Hart v. Baxendale*, although this does not appear in the report, the Court of Ex. intimated that silk hose was within the statute, and that the ruling of Lord Abinger, in *Davey v. Mason*, could not be sustained.—p. 267.

COCKBURN, C.J. and **CROWDER, J.** to the same effect.

BYLES, J.—I concur in correcting the opinion I expressed at *nisi prius* as to the silk guards, which I considered not within the Act, according to the ruling of Lord Abinger in *Davey v. Mason*. That ruling, I find, has been since reflected upon by the Court of Ex., and I now agree that the word "silks" in the Act comprehends silk made up into any article.—p. 268.

Butt v. G. W. Ry. (*supra*, col. 298), *explained.*
G. W. Ry. v. Rimell (1857) 27 L. J. C. P. 201; 18 C. B. 575.

JERVIS, C.J.—I think the judge has entirely misconceived the judgment of this Court in *Butt v. G. W. Ry.*, because, when the defendants rely

upon the statute for their defence, negligence has nothing to do with the question. The rule is this: under the statute, felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has no effect one way or the other. Where the defence is independent of the statute, negligence alone is a sufficient answer. Under the statute felony is an answer; under the carrier's notice negligence is an answer. That is the result of the decision in *Butt v. G. W. Ry.*; we only decided that felony by the defendant's servants without negligence on their part was not a good answer to a defence that the value of the goods was not declared according to the notice.—p. 205. **CRESSWELL and WILLIAMS, JJ.** concurred.

WILLES, J.—I am glad the L.C.J. has explained *Butt v. G. W. Ry.*, for the case is cited in modern text-books as an authority under the statute with which it had nothing whatever to do.—*ib.*

G. W. Ry. v. Rimell, dicta followed.

Metcalfe v. L. B. & S. C. Ry. (1858) 27 L. J. C. P. 205; 4 C. B. (N.S.) 307; 6 W. R. 498.—*C.P.*

Metcalfe v. L. B. & S. C. Ry., approved.

Vaughton v. L. & N. W. Ry. (1874) 43 L. J. Ex. 75; L. R. 9 Ex. 93; 30 L. T. 119; 22 W. R. 336; 12 Cox C. C. 580.—*EX.*

Vaughton v. L. & N. W. Ry., commented on and limited.

McQueen v. G. W. Ry. (1875) 44 L. J. Q. B. 180; L. R. 10 Q. B. 569; 32 L. T. 759; 23 W. R. 698; 13 Cox C. C. 88.

COCKBURN, C.J.—I quite agree with the doctrine involved in the decision of the Court in *Vaughton v. L. & N. W. Ry.* to this extent, that it is not necessary to show, in order to make out a replication of a felonious act on the part of the carrier's servants, that the taking was by any particular servant or servants. It is enough if there is proof to satisfy the jury that the taking was by some one who was more or less one of the company's servants, without specifying particularly which of them. But when we are dealing with the propositions involved in the directions which I gave to the jury in this case upon what I then considered to be the substance of the ruling of the late Pigott, B., in *Vaughton v. L. & N. W. Ry.*, the language of that judgment, I think, when we apply it to the particular facts of that case, must be understood in a much more limited sense than that which appears when it is looked at more with reference to the words and the language used, than with reference to the particular facts of the case. But, looking at the language of that judgment, which I followed almost *verbatim* in the direction that I gave to the jury, it comes to this, that where, in the opinion of the jury, the facts are more consistent with the guilt of the carrier's servants than that of any person not in their employ, then the carrier is called upon for an answer, and if the conduct of certain persons is impugned, and if those persons are not called as witnesses, the inference would be that a felony has been committed by them. I think that proposition is not maintainable. It appears to me that the question of probability or improbability can only be considered as an ingredient or element in the consideration of the general case. But, in considering the proposition of whether the fact that

a felony has been committed by the company's servant or servants has or has not been established, or whether the suspicion is that they have been guilty of felony, rather than that a stranger or strangers have been, because though they had an opportunity of access they had not such great opportunities of access, the greater or less degree of probability cannot be an element in the consideration of the question.—p. 133.

MELLOR and QUAIN, JJ. to the same effect.

Butt v. G. W. Ry. (*supra*, col. 298), *approved*.
Shaw v. G. W. Ry. (1893) 10 R. 85; [1894] 1 Q. B. 873; 70 L. T. 218; 42 W. R. 285; 58 J. P. 318.—LAWRANCE and WRIGHT, JJ. See judgment of the latter, where the cases are reviewed. *And see post*, col. 807.

RAILWAY AND CANAL TRAFFIC ACT, 1854.

Cohen v. S. E. Ry. (*supra*, col. 293), *approved*.
Machin (or Machin) v. L. & S. W. Ry. (1848) 17 L. J. Ex. 271; 2 Ex. 415; 12 Jur. 501; 5 Rail. Cas. 802.—EX. *approved*.
Doolan v. Midland Ry. (1877) 2 App. Cas. 792; 37 L. T. 317; 25 W. R. 882.—H.L. (IR.), *reversing* (1876) Ir. R. 10 C. L. 47.—EX. CH. WHITESIDE, C.J. *dissenting*; *which reversed* C.P. LORD BLACKBURN.—I think that the decision in *Cohen v. S. E. Ry.* was right, and, without repeating the reasons given by Mellish, L.J., I refer to them as in my opinion fully justifying that judgment (p. 807). The word "servant" in the Railway and Canal Traffic Act, 1854, s. 7, I think, from the subject-matter of the Act, embraces not merely servants properly so called, but also the agents, whom, though not strictly servants, the companies employ to do for them what they have contracted to do. This was the construction put on the same word in an analogous enactment, sect. 8 of the Carriers Act: see *Machin v. L. & S. W. Ry.*—p. 810.
CAIRNS, L.C., LORDS O'HAGAN and GORDON, to the same effect.

Simons v. G. W. Ry. (1856) 26 L. J. C. P. 25; 18 C. B. 805; 4 W. R. 651, *approved*.
M'Manus v. Lancashire and Yorkshire Ry. (1859) 28 L. J. Ex. 353; 4 H. & N. 327; 3 Jur. (N.S.) 651; 7 W. R. 547.—EX. CH.; *reversing* 27 L. J. Ex. 201; 2 H. & N. 693.—EX.

Simons v. G. W. Ry., *dictum questioned*.
Garton v. Bristol and Exeter Ry. (1861) 1 B. & S. 112; 30 L. J. Q. B. 273; 7 Jur. (N.S.) 1234; 9 W. R. 734.

BLACKBURN, J.—Right or wrong that case [*Simons v. G. W. Ry.*] is expressly in point in your favour.

COCKBURN, C.J.—It is so; that case is decisive on that point. The Court of C. P. there, however, seem also to intimate an opinion on a point which it was not necessary to decide; namely, that the condition that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time when they should be delivered," is just and reasonable within the statute—a proposition which, with great deference to that Court, I consider very questionable. Three days is a very short time. Perhaps the consignee may not open the package until the fourth day, when he finds the goods damaged through the negligence of the company's servants; and the consignee who does

not receive goods may not know that they have been sent to him, while the consignor may not know that they have not reached their destination.—p. 146 CROMPTON, HILL and BLACKBURN, JJ. concurred.

M'Manus v. Lancashire and Yorkshire Ry.

(*supra*), *followed*.

M'Cance v. L. & S. W. Ry. (1861) 31 L. J. Ex. 65; 7 H. & N. 477; 7 Jur. (N.S.) 1804; 5 L. T. 587; 10 W. R. 154.—EX.; *affirmed*, (1864) 34 L. J. Ex. 39; 3 H. & C. 343; 10 Jur. (N.S.) 1058; 11 L. T. 426; 12 W. R. 1086.—EX. CH.

Simons v. G. W. Ry. (*supra*), *approved*.

Peek v. North Staffordshire Ry. (1863) 32 L. J. Q. B. 241; 10 H. L. Cas. 473; 9 Jur. (N.S.) 914; 8 L. T. 768; 11 W. R. 1025.—H.L. (E.). WESTBURY, L.C., LORDS CRANWORTH and WENSLEYDALE; LORD CHILMSFORD *dissenting*; assisted by the JUDGES: *reversing* (1860) 29 L. J. Q. B. 97; El. Bl. & El. 986; 6 Jur. (N.S.) 370; 1 L. T. 407; 8 W. R. 364.—EX. CH.; *which reversed* (1857) 27 L. J. Q. B. 465; El. Bl. & El. 958; 4 Jur. (N.S.) 1078. 6 W. R. 797.—Q.B. *And see post*, col. 305.

Peek v. N. Staffordshire Ry., *applied*.

Aldridge v. G. W. Ry. (1864) 33 L. J. C. P. 161; 15 C. B. (N.S.) 582.—C.P. (*see supra*, col. 298); Robinson v. G. W. Ry. (1865) 35 L. J. C. P. 123; 1 H. & R. 97; 12 Jur. (N.S.) 692; 14 W. R. 206.—C.P.

Robinson v. G. W. Ry., *followed*.

D'Arc v. L. & N. W. Ry. (1874) L. R. 9 C. P. 325; 30 L. T. 763; 22 W. R. 919.—C.P.

Baxendale v. G. W. Ry. (1858) 28 L. J. C. P.

69; 5 C. B. (N.S.) 309; 4 Jur. (N.S.) 1241; 7 W. R. 54.—C.P.; and Garton v. G. W. Ry. (1859) 28 L. J. C. P. 158; 5 C. B. (N.S.) 669; 5 Jur. (N.S.) 685.—C.P., *followed*.

Nicholson v. G. W. Ry. (1858) 28 L. J. C. P.

89; 4 C. B. (N.S.) 366; 4 Jur. (N.S.) 1187; 7 W. R. 49.—C.P., *explained*.

Garton v. Bristol and Exeter Ry. (1859) 28 L. J. C. P. 306; 6 C. B. (N.S.) 639; 5 Jur. (N.S.) 1313.—C.P.

Baxendale v. G. W. Ry., Garton v. Bristol

and Exeter Ry., and Oxlade v. N. E. Ry.

(col. 309), *referred to*.
West v. L. & N. W. Ry. (1870) 39 L. J. C. P. 282; L. R. 5 C. P. 692; 23 L. T. 371; 18 W. R. 1028.—C.P.

Garton v. Bristol and Exeter Ry. and

Baxendale v. S. W. Ry. (1862) 12 C. B. (N.S.) 758; 1 N. R. 246.—ERLE, C.J., *considered*.

Palmer v. L. & S. W. Ry. (1866) 35 L. J. C. P. 289; L. R. 1 C. P. 588; 12 Jur. (N.S.) 926; 15 L. T. 159; 15 W. R. 11.

ERLE, C.J.—It is said that we are concluded by authority, and that *Baxendale v. L. & S. W. Ry.* and *Garton v. Bristol and Exeter Ry.* are in point. In answer to this, I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact, depending on the matters proved in each case. . . . On the authority of these two cases Mr. Palmer now moves for another injunction;

and I have been thus obliged either to grant every such application or to reconsider the question of authority, and I have come to the conclusion that it ought not to bind in the manner that a precedent in law binds.—p. 291. M. SMITH, J. concurred.

WILLES and KEATING, JJ., were of opinion that the precedents which would entitle the applicant to judgment bound the Court, and, moreover, that they were right.

Palmer v. L. & S. W. Ry., *observed on*.

Palmer v. L. B. & S. C. Ry. (1871) 40 L. J. C. P. 133; L. R. 6 C. P. 194; 24 L. T. 135; 19 W. R. 627.

KEATING, J.—It was indeed argued in addition on behalf of the company, that, even if the preference was systematic, yet, provided it were for the convenience of the public at large, it would be allowable, and for this position the judgment of Erle, C.J., in *Palmer v. L. & S. W. Ry.* was referred to. I do not think that the L.C.J. in that case intended to lay it down that a company might create a monopoly in its own favour, to the disadvantage of the rest of the trade, even to suit the convenience of the public; but merely that, in determining what amount of departure from a general rule would be justifiable, public convenience was an element in the consideration of such a question, and that in that particular case the company were justified in what they had done.—p. 136. BRETT and M. SMITH, JJ. concurred.

Peek v. N. Staffordshire Ry. (*supra*, col. 304), *held not applicable*.

Lewis v. G. W. Ry. (1877) 47 L. J. Q. B. 131; 3 Q. B. D. 195; 37 L. T. 774; 26 W. R. 255.—C.A. BRAMWELL, BRETT and COTTON, L.JJ. *And see supra*, col. 298.

Harrison v. L. B. & S. C. Ry. (1862) 31 L. J. Q. B. 113; 2 B. & S. 122; 8 Jur. (N.S.) 740; 6 L. T. 466.—EX. CH.; *reversing* (1860) 29 L. J. Q. B. 209; 6 Jur. (N.S.) 954.—Q.B., *held overruled*.

Peek v. N. Staffordshire Ry., *applied*.

Lewis v. G. W. Ry., *distinguished*.

Asbenden v. L. B. & S. C. Ry. (1880) 5 Ex. D. 190; 42 L. T. 586; 28 W. R. 511; 44 J. P. 203.

HAWKINS, J.—To me it seems that this question is concluded by *Peek v. North Staffordshire Ry.* above referred to, where it was expressly held that a condition exempting the company from responsibility for injury, however caused, without limitation or exception, was neither just nor reasonable, for such a condition would, if valid, exempt them from liability for loss or damage happening through the grossest, most culpable negligence, or even wilful misconduct. In my opinion, the condition relied on by the now defendants that they will not be liable "in any case" unless a declaration of value is signed and delivered to them at the time of booking, would equally, in the absence of such declaration, cover every loss however occasioned. . . . **Harrison v. L. B. & S. C. Ry.** must, therefore, as far as it affects the question before us, be considered as virtually overruled.—p. 132.

KELLY, C.B. to the same effect. *And see post*.

Lewis v. G. W. Ry., *approved*. *And see post*.

Moore v. G. N. Ry. (1882) 10 L. R. Ir. 95.—FITZGERALD and BARRY, L.JJ.

Beal v. S. Devon Ry. (1864) 3 H. & C. 337; 11 L. T. 184; 12 W. R. 115.—EX. CH.; *affirming* (1860) 5 H. & N. 875.—EX., *approved*.

Peek v. N. Staffordshire Ry., *observed on*. Manchester, Sheffield and Lincolnshire Ry. v. Brown (1883) 8 App. Cas. 703; 53 L. J. Q. B. 124; 50 L. T. 281; 32 W. R. 207; 48 J. P. 388.—H.L. (E.); *reversing* S. C. *nom.* Brown v. Manchester, &c. Ry. (1882) 52 L. J. Q. B. 132; 40 Q. B. D. 250; 48 L. T. 473; 31 W. R. 491.—C.A., BAGGALLAY, BRETT and LINDLEY, L.JJ.; *which reversed* (1882) 9 Q. B. D. 230.—MATHEW and CAVE, JJ.

LORD BLACKBURN.—The spirit and object of the enactment in the Railway and Canal Traffic Act are very well expressed in *Beal v. South Devon Ry.*—p. 711.

LORD WATSON.—The only point which that learned [County Court] judge seems to have had in view in delivering judgment, and in subsequently framing a case between the parties, was whether every contract between a railway company and a trader which exempts the railway company from the consequences of the default or negligence of their servants, is necessarily an illegal contract. The learned judge in his opinion, to the terms of which I need not particularly advert, plainly drew from *Peek v. North Staffordshire Ry.* what I consider to be an erroneous inference, namely, that it had been held by this House that such a condition could in no circumstances be inserted in a written contract between the parties without rendering that contract or condition null and void under the statute of 17 & 18 Vict. c. 31. . . . Then as regards the special rate, I am not prepared to adopt the view which seems to have been taken by the learned judges of the Appeal Court, that whenever the lower rate without liability on the part of the company is such as to induce the bulk of the traders to prefer it to the ordinary rate with liability on the part of the company, the conditions attached to the lower rate must necessarily be illegal and void. That does not appear to me to be a reasonable construction of the words of the statute, "just and reasonable condition." It does not appear to me to be warranted by the judgment of this House in *Peek v. North Staffordshire Ry.* That case authoritatively decides, upon the statute, these three points—in the first place, that a condition of this kind must be in writing in order to bind the trader; in the second place, that it must be proved to the satisfaction of the Court to be a reasonable condition; and, in the third place, that the onus of showing that it is a reasonable condition rests upon the railway company who allege it.—pp. 714–715.

LORD BRAMWELL.—*Peek v. North Staffordshire Ry.* was decided twenty years ago. At the time it was decided, and from thence continuously until now, I have thought it was wrongly decided, as I know it was contrary to the intention of the framers of the Act; and this case confirms me in that opinion. For here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me, who am neither fishmonger nor carrier, nor with any knowledge of their business. And although that case has been in existence for twenty years, and has been acted upon in Courts of law, if it were within my competency to overrule it I would do

so, because it is impossible to say that people have regulated their contracts in reference to it: they have done nothing of the sort. What they have done is this: they have entered into their contracts without reference to it, and when it has become convenient they have broken those contracts, and having had the benefit of them they have turned round and have sought to avoid them.—p. 716. LORD FITZGERALD concurred.

Lewis v. G. W. Ry. (*supra*, col. 305). *followed*.

Hoare v. G. W. Ry. (1877) 37 L. T. 186; 25 W. R. 63.—COLERIDGE, C.J. and LINDLEY, J.; and **Goldsmith v. G. E. Ry.** (1881) 44 L. T. 181; 29 W. R. 651.—LINDLEY and MATHEW, JJ. *distinguished*.
Stevens v. G. W. Ry. (1885) 52 L. T. 324; 49 J. P. 310.

MATHEW, J.—**Hoare v. G. W. Ry.** and **Goldsmith v. G. E. Ry.**... are no authorities for saying that mere misdelivery, which is all that is proved here, is evidence of wilful misconduct. **Hoare v. G. W. Ry.** is a much stronger case than the one before us. In that case the station-master, knowing the name of a particular person, and knowing it was not the name upon the goods, chose to give up the goods without even an inquiry, and I gather that the goods were lost. It was held, there was evidence of wilful misconduct; but it cannot be said that it is any authority for the proposition that misdelivery is evidence of wilful misconduct. Then, again, **Goldsmith v. G. E. Ry.** was only a question as to the construction of the contract, and in that case the contract was held not to cover delay, for the simple reason that "delay" did not appear in the excepted perils.—p. 825.

A. L. SMITH, J. to the same effect.

Peek v. N. Staffordshire Ry. (col. 805), and **Ashenden v. L. B. & S. C. Ry.** (col. 305), *discussed*.

Dickson v. G. N. Ry. (1886) 56 L. J. Q. B. 112; 18 Q. B. D. 176; 55 L. T. 868; 35 W. R. 202; 51 J. P. 388.—C.A. ESSER, M.R., LINDLEY and LOPES, L.JJ. *See judgments*.

Manchester, &c. Ry. v. Brown (*supra*), *adhered to*.

G. W. Ry. v. McCarthy (1887) 56 L. J. P. C. 33; 12 App. Cas. 218; 56 L. T. 582; 35 W. R. 429; 51 J. P. 532.—H.L. (IR.). LORDS HERSHELL, WATSON, BRAMWELL and FITZGERALD; *reversing* S. C. *nom.* McCarthy v. G. W. Ry. (1886) 18 L. R. Ir. 1.—C.A.

G. W. Ry. v. McCarthy; Ashenden v. L. B. & S. C. Ry.; and Dickson v. G. N. Ry., *discussed*.

Sheridan v. Midland G. W. Ry. (1888) 24 L. R. Ir. 146.—C.A. ASHBOTRNE, L.C., FITZGIBBON, BARRY and NAISH, L.JJ.

Sheridan v. Midland G. W. Ry., *referred to*.
Nevin v. Great Southern and Western Ry. (1891) 30 Ir. L. R. 125.—Q.B.D.

G. W. Ry. v. McCarthy and Shaw v. G. W. Ry. (*supra*, col. 303), *discussed*.
Duckham Bros. v. G. W. Ry. (1899) 80 L. T. 774.—DARLING, J.

Parker v. G. W. Ry. (1844) 13 L. J. C. P. 105; 7 Man. & G. 253; 8 Jur. 194; 7

Scott (N.R.) 835; 3 Rail. Cas. 563.—TINDAL, C.J. (for the Court; *see judgment*), *questioned*.

Parker v. G. W. Ry. (1851) 15 Jur. 109.

MARTIN, B.—If the point should arise which came before the Ct. of C. F. in **Parker v. G. W. Ry.**, as to whether an action for money had and received could be maintained under such circumstances, I should like to see it brought to a Court of error.—p. 110.

Parker v. G. W. Ry. (13 L. J. C. P. 105) and **Att.-Gen. v. Birmingham and Derby Junction Ry.** (1840) 2 Rail. Cas. 124.—COTTENHAM, L.C., *observed on*.

Finnie v. Glasgow & S. W. Ry. (1855) 2 Macq. H. L. Cas. 177.—CRANWORTH, L.C.; LORD ST. LEONARDS *dissenting*.

CRANWORTH, L.C. said that he did not wish to be supposed to unequivocally assent to the doctrine [**Parker v. G. W. Ry.**] that where a company is bound to make equal charges, but does make unequal charges, the remedy for the person who has paid the higher charge is to recover back the difference.—p. 185.

LORD ST. LEONARDS considered the judgment in **Att.-Gen. v. Birmingham, &c. Ry.** to be not "very clear or altogether satisfactory."—p. 202.

Parker v. G. W. Ry. (1856) 25 L. J. Q. B. 209; 6 El. & Bl. 77; 2 Jur. (N.S.) 325; 4 W. R. 365.—Q.B., *commented on*.

Basendale v. G. W. Ry. (1864) 33 L. J. C. P. 197; 16 C. B. (N.S.) 137; 10 Jrr. (N.S.) 496; 9 L. T. 814; 12 W. R. 602.—EX. CH.

COCKBURN, C.J.—If the observations in the judgment in **Parker v. G. W. Ry.** are to be taken as having decided that such an action [for money received to the use of the plaintiffs] cannot be maintained in a case like the present, I think such decision erroneous, and that we ought not in this Court to be bound by it.—p. 198.

Parker v. G. W. Ry. (1851) 21 L. J. C. P. 57; 11 C. B. 545.—C.P., *questioned*.

Sutton v. G. W. Ry. (1865) 35 L. J. Ex. 18; 3 H. & C. 800; 11 Jur. (N.S.) 879; 13 L. T. 221; 13 W. R. 1091.—EX. CH.; *affirmed, nom.* G. W. Ry. v. Sutton (1869) 38 L. J. Ex. 177; 13 R. 4 H. L. 226; 18 W. R. 92.—H.L. (E.). CAIRNS, L.C., LORDS CHELMSFORD and COLONSAY.

ERLE, C.J.—The decision in **Parker's Case** turned upon the particular facts stated in the special case, and did not relate to the meaning of "description and quantity" in the equality clause; and in this Court, I submit, it ought not to be followed.—p. 33.

[The majority of the Court disagreed with Erle, C.J.'s decision.]

G. W. Ry. v. Sutton and Lancashire and Yorkshire Ry. v. Gidlow (1875) 45 L. J. Ex. 625; 13 R. 7 H. L. 517; 32 L. T. 573; 24 W. R. 144.—H.L. (E.). CAIRNS, L.C., LORDS CHELMSFORD and HATHERLEY, *followed*. *And see post*.

L. & N. W. Ry. v. Evershed (1878) 48 L. J. Q. B. 22; 3 App. Cas. 1029; 39 L. T. 306; 26 W. R. 863.—H.L. (E.). CAIRNS, L.C., LORDS HATHERLEY, BLACKBURN and GORDON; *affirming* S. C. *nom.* Evershed v. L. & N. W. Ry. (1877) 3 Q. B. D. 135.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.; *which affirmed* 46

L. J. Q. B. 289; 2 Q. B. D. 254; 36 L. T. 12; 25 W. R. 411.—MELLOR and LUSH, JJ.

L. & N. W. Ry. v. Evershed, *discussed*.
Murray v. Glasgow & S. W. Ry. (1883) 11 Court Sess. Cas., 4th Ser. 205.

Finnie v. Glasgow & S. W. Ry. (*supra*), *commented on*.

G. W. Ry. v. Sutton; L. & N. W. Ry. v. Evershed; Ransome v. Eastern Counties Ry. (1857) 26 L. J. C. P. 91; 1 C. B. (N.S.) 437; 3 Jur. (N.S.) 217; **Oxlade v. N. E. Ry.** (1857) 26 L. J. C. P. 129; 1 C. B. (N.S.) 454; 3 Jur. (N.S.) 637.—C. P., and **Murray v. Glasgow & S. W. Ry.**, *explained*.
Denaby Main Colliery Co. v. Manchester, Sheffield and Lincolnshire Ry. (1885) 55 L. J. Q. B. 181; 11 App. Cas. 97; 54 L. T. 1. 50 J. P. 340; 6 Gly. & Can. Traff. Cas. 183.—H. L. (E.). HALSBURY, L.C., LORDS SELBORNE, BLACKBURN and FITZGERALD; *varying* S. C. *nom.* M. S. & L. Ry. v. Denaby Main Colliery Co., 14 Q. B. D. 209; 52 L. T. 598.—C.A. BRETT, M.R., COTTON and LINDLEY, L.J.; *which partly reversed* 53 L. J. Q. B. 579; 13 Q. B. D. 634.—MATHEW and DAY, JJ. See judgments at length.

M. S. & L. Ry. v. Denaby Main Colliery Co., *applied*.

Rhyannay Ry. v. Rhyannay Iron Co. (1890) 59 L. J. Q. B. 414; 25 Q. B. D. 146; 63 L. T. 407; 38 W. R. 764.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Harris v. Cockermouth and Workington Ry. (1858) 27 L. J. C. P. 162; 3 C. B. (N.S.) 603; 4 Jur. (N.S.) 239; 6 W. R. 209.—C.P.

M. S. & L. Ry. v. Denaby Main Colliery Co., and L. & N. W. Ry. v. Evershed, *explained*.

Budd v. L. & N. W. Ry. (1877) 86 L. T. 802; 25 W. R. 752; 4 Ry. & Can. Traff. Cas. 393, *overruled*.

Phippes v. L. & N. W. Ry. (1892) 61 L. J. Q. B. 379; [1892] 2 Q. B. 229; 66 L. T. 721.—C.A. LORDS HERSHELL, LINDLEY and KAY, L.JJ. See judgment of LORD HERSHELL.

LIEU.

Northfield Iron and Steel Co., In re (1866) 14 L. T. 695.—ROMILLY, M.R., *distinguished*.

G. W. Ry. v. Ex parte Bushell, *In re* (1882) 22 Ch. D. 470; 52 L. J. Ch. 734; 48 L. T. 196; 31 W. R. 419.—C.A.

JESSIEL, M.R.—If it is a material distinction, the goods remained the property of the company in that case, notwithstanding the winding-up order. The words of the agreement did apply there; in the present case they do not.—p. 472. COTTON and BOWEN, L.JJ. concurred.

TOOLS AND CHARGES.

Midland Ry. v. Ambergate, Nottingham and Boston Ry. (1853) 10 Hare 359; 1 W. R. 162.—WOOD, V.-C., *approved*.

Lancashire and Yorkshire Ry. v. Gidlow (*supra*, col. 308), *explained*.

Hall v. L. B. & S. C. Ry. (1885) 15 Q. B. D. 505; 53 L. T. 345; 5 Ry. & Can. Traff. Cas. 28.—WILLS and MANISTY, JJ.

Hall v. L. B. & S. C. Ry., *followed*.

Sowerby v. G. N. Ry. (1891) 60 L. J. Q. B. 467; 65 L. T. 546; 7 Ry. & Can. Traff. Cas. 156.—C.A. HALSBURY, L.C., ESHER, M.R. and FRY, LJ.

L. & N. W. Ry. v. Donellan; L. & N. W. and G. W. Rys. v. Billington (1898) 67 L. J. Q. B. 681; [1892] 2 Q. B. 7; 78 L. T. 575.—C.A. A. L. SMITH and CHITTY, L.JJ.; *reversed, nom. L. & N. W. and G. W. Joint Rys. v. Billington* [1898] 68 L. J. Q. B. 162; [1899] A. C. 79; 79 L. T. 503.—H. L. (E.). HALSBURY, L.C., LORDS WATSON, SHAND and LUDLOW.

L. & N. W. Ry. v. Donellan, *approved on another point*.

Midland Ry. v. Loseby (1899) 68 L. J. Q. B. 326; [1899] A. C. 133; 80 L. T. 93; 47 W. R. 656.—H. L. (E.). LORDS MACNAGHTEN, MORRIS, SHAND, DAVEY, JAMES OF HEREFORD and LUDLOW.

CHAMPERTY AND MAINTENANCE.

Seear v. Lawson (1880) 49 L. J. Bk. 69; 15 Ch. D. 426; 42 L. T. 893; 28 W. R. 929.—C.A., *held applicable*.

Guy v. Churchill (1888) 58 L. J. Ch. 345; 40 Ch. D. 481; 60 L. T. 473; 37 W. R. 504.—CHITTY, J.

Seear v. Lawson and Guy v. Churchill, *applied*.

Howard v. Fanshawe (1895) 64 L. J. Ch. 666; [1895] 2 Ch. 581; 13 R. 663; 73 L. T. 77; 43 W. R. 645.—STIRLING, J.

Seear v. Lawson, *applied*.

Perkins, *In re*, Poyser v. Beyfus (1898) 67 L. J. Ch. 454; [1898] 2 Ch. 182; 78 L. T. 666; 46 W. R. 595; 5 Manson 193.—C.A. LINDLEY, M.R., RIGBY and COLLINS, L.JJ.

Wallis v. Portland (Duke) (1797) 3 Ves. 494; and **Bradlaugh v. Newdegate** (1883) 52 L. J. Q. B. 454; 11 Q. B. D. 1; 31 W. R. 792.—COLERIDGE, CJ., *applied*.

Alabaster v. Hamess (1894) 64 L. J. Q. B. 76; [1895] 1 Q. B. 339; 14 R. 54; 71 L. T. 740; 43 W. R. 196.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Bradlaugh v. Newdegate, *commented on*.

Grant v. Thompson (1895) 15 R. 290; 72 L. T. 264; 43 W. R. 446; 18 Cox C. C. 100.

WILLS, J.—I should scarcely have thought it necessary to say so much if it were not for my great respect for the opinion expressed by the late Lord Chief Justice Coleridge, in *Bradlaugh v. Newdegate*, that the doctrine of maintenance is not confined to interference in civil actions. I do not think it was necessary for the decision of the case with which he was dealing, and he probably had not authorities on the point brought before him. On the present argument nothing has been brought before us supporting the proposition.—p. 293.

Reynell v. Sprye (1852) 1 D. M. & G. 660; 21 L. J. Ch. 638; *affirming* 8 Hare 274; **Sprye v. Porter** (1856) 7 E. & B. 58; 26 L. J. Q. B. 64; 3 Jur. (N.S.) 330; 5 W. R. 81; **Stanley v. Jones** (1831) 7 Bing. 369; 5 M. & P. 193; 9 L. J. (O.S.) C. P. 51; **Hutley v. Hutley** (1873) 42 L. J.

Q. B. 52; L. R. 8 Q. B. 112; 28 L. T. 63; 21 W. R. 479; and *Strange v. Brennan* (1846) 15 Sim. 346; *affirmed*, 2 Coop. C. C. 1; 15 L. J. Ch. 389; 10 Jur. 619, *considered*.
Rees v. De Bernari (1896) 65 L. J. Ch. 656; [1896] 2 Ch. 437; 74 L. T. 585.—*ROMER, J.* *And see Brulllaugh v. Newdegate* (1888) (*supra*).

CHARITY.

1. JURISDICTION AND POWERS.
2. DEALINGS WITH CHARITY PROPERTY.
3. CHARITABLE GIFTS.
4. CONSTITUTION AND ADMINISTRATION OF CHARITIES.
5. MORFMAIN ACTS.

1. JURISDICTION AND POWERS.

Upton Warren, In re (1833) 1 Myl. & K. 410.—*BROUGHAM, L.C., followed.*
Clarke's Charity, In re (1836) 8 Sim. 34.—*SHADWELL, V.-C., discussed.*
Hospital for Incurables, In re (1884) 13 L. R. Ir. 361.—*PORTER, M.R.*

Nicholls, Ex parte, Hackney Charities, In re (1864) 34 L. J. Ch. 169; 10 Jur. (N.S.) 941; 11 L. T. 34; 12 W. R. 1129.—*M.R., reversed*, (1865) 4 De G. J. & S. 588, 11 L. T. 758; 11 Jur. (N.S.) 126; 13 W. R. 398.—*L.J.J., dictum not followed.*

Burnham National Schools, In re (1873) 43 L. J. Ch. 340; 18 R. 17 Eq. 241; 22 W. R. 198.
JESSEL, M.R.—It was said first, that this order, which is an order to appoint additional trustees of a charity, ought not to have been made, because this was a contentious case, and that the charity commissioners have no jurisdiction to decide contentious cases. That was founded on the 5th section of the Charitable Trusts Act, 1860. . . . The meaning of that section I should have thought to have been plain and obvious. It is that the charity commissioners should not be compelled to take upon themselves the exercise of the jurisdiction conferred by this Act in any case in which they considered it could be so much better dealt with by a judicial Court, that it would be improper for them to exercise that jurisdiction. . . . It was not that they might decline the jurisdiction altogether. It was not any case in which they might consider they ought not to exercise it—that would have enabled them to repudiate the jurisdiction—but it was that they might decline to exercise it in any one of the cases named, or for other reasons, meaning for special reasons of the same kind, or of a similar kind. But if the charity commissioners considered they ought to exercise the jurisdiction, this section, it appears to me, did not interfere with it at all. . . . I find that in the case of the *Hackney Charities* Lord Romilly appears to have taken a different view from mine. I may mention that that decision itself is no authority, because it was reversed on appeal, and still less, therefore, can an *obiter dictum* of the judge who decided that case be binding upon me; but it does certainly appear that the view taken by his lordship was that the charity commissioners had no jurisdiction in

contentious cases. . . . However, not considering myself bound by that *dictum*, feeling myself free to give my own opinion as to the construction of the section, I am compelled to say it appears to me so plain and so clear, that, notwithstanding that *dictum*, I do not feel it necessary to call upon counsel to argue on the other side.—p. 342.

Markwell's Legacy, In re (1854) 23 L. J. Ch. 502; 17 Beav. 618; 2 W. R. 217.—*ROMILLY, M.R., held overruled.*

Lister's Hospital, In re (1855) 6 De G. M. & G. 184.—*CRANWORTH, L.C., KNIGHT BRUCE and TURNER, L.J.J., followed.*
St. Giles's and St. George's, Bloomsbury, In re (1858) 27 L. J. Ch. 560; 25 Beav. 313; 4 Jur. (N.S.) 297.

ROMILLY, M.R.—*Lister's Hospital, In re*, overrules *Markwell's Legacy, In re*.—p. 561.

Blandford v. Thackerell (1793) 2 Ves. 238;

S. C. nom. Blandford v. Fackerell, 4 Bro. C. C. 394; 2 R. R. 202.—*LOUGHBOROUGH, L.C. (and see post)*; and *Lister's Hospital, In re, distinguished.*

Brann v. Devon (Earl) (1868) L. R. 3 Ch. 800; 19 L. T. 181; 16 W. R. 1180; *reversing* 37 L. J. Ch. 463; 18 L. T. 784.—*STUART, V.-C. WOOD, L.J.*—It appears to me that *Lister's Hospital, In re*, is manifestly distinguishable from this. The Court there agreed with the view which I had taken in a previous case, namely, that a petition of that nature did not deal with the charity *quâ* charity; but there being already a well-constituted charity and a pending matter, namely, the payment of money into Court, which was necessarily applicable to lands to be held upon the same uses, the petition was not an original petition to regulate the charity itself, but was simply for the purpose of doing that which the common order and forms of the Court would require to be done, namely, to invest a sum of money which had to be invested as if in the case of an ordinary settlement. That seemed to me not to come within the purview of the Act. But here, if there be any one thing more plain than another, it is that these persons cannot have any benefit until the charity is established by the fund being appropriated for this purpose.—p. 806. *SELWYN, L.J.* concurred.
And see post, col. 313.

Brann v. Devon (Earl), approved.

Holme v. Guy (1877) 46 L. J. Ch. 648; 5 Ch. D. 901; 36 L. T. 600; 25 W. R. 547.—*JESSEL, M.R.; affirmed*, C.A. *JAMES, MELLISH and BAGGALLAY, L.J.J.*

Holme v. Guy, observed on.

Meyrick's Charity, In re (1855) 24 L. J. Ch. 699; 1 Jur. (N.S.) 438; 3 W. R. 435.—*KINDERSLEY, V.-C., and Att.-Gen. v. Sidney Sussex College* (1866) 21 Ch. D. 514, n.; 15 L. T. 318; 15 W. R. 162.—*L.C., followed.*

Att.-Gen. v. Manchester (Dean and Canon) (1881) 18 Ch. D. 596; 50 L. J. Ch. 562; 45 L. T. 184; *affirmed*, C.A.

HALL, V.-C.—It was said that *Holme v. Guy* is an authority that such a case as this is not within the provisions of the Act. It appears to me that all the remarks of the M.R. in that case, instead of tending to show that this is not a case within the Act, show clearly that it is within it. The

evil of having proceedings taken in such a case which might lead to no good result, is one which must be carefully borne in mind and considered.—p. 609.

Brittain v. Overton (1877) 53 L. J. Ch. 299, n.; 25 Ch. D. 49, n.; 49 L. T. 128, n.; 32 W. R. 27, n.—JESSEL, M.R., *principle applied*.

Holme v. Guy, *referred to*.

Bentham v. Kilmorey (Earl) (1883) 53 L. J. Ch. 528; 25 Ch. D. 39; 50 L. T. 137; 32 W. R. 69.—CHITTY, J.; *affirmed*, C.A. COTTON and LINDLEY, L.JJ.

Att.-Gen. v. Sidney Sussex College (*supra*), *observed on*.

Glen v. Gregg (1882) 51 L. J. Ch. 551, 783; 21 Ch. D. 513; 47 L. T. 285; 31 W. R. 149.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.; *reversing* 46 L. T. 375; 30 W. R. 633.—KAY, J.

Att.-Gen. v. Sidney Sussex College, *discussed*.

Glen v. Gregg, *explained*.

Rendall v. Blair (1890) 45 Ch. D. 139; 59 L. J. Ch. 641; 63 L. T. 265; 38 W. R. 689.—C.A. BOWEN and FRY, L.JJ.; COTTON, L.J. *dissenting*; *reversing* KAY, J., who held that the action required the consent of the commissioners. BOWEN, L.J. (agreeing on this point with Cotton, L.J.) said: "One case and one case only was said to be inconsistent with this view, namely, *Glen v. Gregg*, in which it was said that the dilatory action taken by Lord Chelmsford as L.C. had been afterwards disapproved by the C.A. here. On examination of Lord Chelmsford's decision in *Att.-Gen. v. Sidney Sussex College*, it does not appear to me that it is that portion of Lord Chelmsford's decision which is disapproved of by the Court in *Glen v. Gregg*, but the action taken by the L.C. in a case in which *ex concessio* the consent of the charity commissioners was required in deciding to allow such consent to be waived, and to proceed with the action, although such consent had not been acquired. In doing that Lord Chelmsford was enabling the parties to consent to waive a bar which was instituted for the benefit of the public and for the protection of charities. I think the C.A. might well consider that such action by the L.C. was not to be justified upon the ordinary principles of law; and I think it is to such a point that the criticism in *Glen v. Gregg* was directed. It does not appear to me that *Glen v. Gregg* in any way decides, or was intended to decide, that in a case in which the consent of the commissioners was required, but had not been obtained, the Court might not cure the blot by allowing the action to stand over.—p. 159. FRY, L.J. concurred.

Spencer v. Harding (1870) 39 L. J. C. P. 332; 1 L. R. 5 C. P. 561; 23 L. T. 237; 19 W. R. 48.—C.P. *principle applied*.

Rendall v. Blair, *discussed and explained*.
Braund v. Devon (Earl) (*supra*, col. 312), *followed*.

Rooke v. Dawson [1895] 1 Ch. 480; 64 L. J. Ch. 301; 13 R. 270; 72 L. T. 248; 43 W. R. 313, 59 J. P. 231.

CHITTY, J.—There [*Braund v. Devon (Earl)*] an attempt was made to present the case in favour of the plaintiff as a private trust, as

distinct from a charitable trust and for that purpose reliance was placed on *Blanford v. Thackerell* (*supra*). But in *Blanford v. Thackerell* there were two distinct things. There was an attempt on the part of the testator to create a charitable trust, which failed; but there remained a good private trust which was capable of being enforced. As was pointed out by both the L.JJ. in *Braund v. Devon (Earl)*, the plaintiff's case was neither more nor less than this: "I am an object of the charity." *Braund v. Devon (Earl)* remains wholly unaffected by the judgment of Bowen and Fry, L.JJ. in *Rendall v. Blair*. . . . The substance of Bowen, L.J.'s judgment is that the plaintiff, [master of a charity school] was suing by virtue of a common law right. . . . Having regard to the undertaking given, the plaintiff's case, in the result as presented, was: There are trespassers, persons calling themselves managers who are not managers, who are endeavouring to interfere with my common law right, which is incident to my possession. Fry, L.J. agreed with that judgment, adding only one word of explanation, and the explanation was that he did not intend to confine the principle of the judgment to cases of common law right only, but extended it to individual equitable rights not relating to the administration of the trusts of the charity. That was, for the purposes of the decision, a *dictum*—a *dictum*, however, in which Bowen, L.J. immediately concurred in a short second judgment. . . . What exact cases the L.J. [Fry] was referring to it is not necessary for me to consider in detail—possibly the case of an equitable right to specific performance of a contract; and there may be others. . . . This proposition was laid hold of by the plaintiff's counsel to show that whenever a person can say, "I am an object of the charity," he can maintain an action in regard to the charity without the consent of the charity commissioners. In other words, the proposition is forced to this extent, that by this incidental observation, the two L.JJ. overruled the decision of their predecessors in *Braund v. Devon (Earl)*. The L.JJ. did not even mention that case, and had no intention of overruling it.—pp. 487—489.

Ilminster Free School, In re, 4 Jur. (N.S.) 444.—BOMILLY, M.R.; *reversed*, (1858) 2 De G. & J. 535; 4 Jur. (N.S.) 676.—KNIGHT BRUCE and TURNER, L.JJ.; *latter decision affirmed*, *nom.*
Baker v. Lee (1861) 30 L. J. Ch. 625; 8 H. L. Cas. 495; 7 Jur. (N.S.) 1; 2 L. T. 701.—H.L. (E.). LORDS WENSLEYDALE and CHELMSFORD; CAMPBELL, L.C. and LORD CRANWORTH *dissenting*.

Charitable Bequests Commissioners v. Archbold (1847) 11 Ir. Eq. R. 187.—BRADY, L.C.; *reversed*, *nom.* Archbold v. Charitable Bequests Commissioners (1849) 2 H. L. Cas. 440.—COTTENHAM, L.C., LORDS BROUGHAM and CAMPBELL.

Morice v. Durham (Bishop) (1805) 10 Ves. 522; 7 R. R. 232.—ELDON, L.C., *explained*. *And see post*, col. 315.

Charity Commissioners, Ex parte, Tamworth School, In re (1868) 37 L. J. Ch. 473; L. R. 3 Ch. 543; 18 L. T. 541; 16 W. R. 778.—WOOD and SELWYN, L.JJ.; *reversing* 18 L. T. 233; 16 W. R. 574.—MALINS, V.-C.

Tamworth School, In re (*supra*), *applied*.
 Gilchrist's Trusts, In re, or Gilchrist Educational Trust, In re (1894) 64 L. J. Ch. 298; [1895] 1 Ch. 367; 13 R. 228; 71 L. T. 875; 43 W. R. 234.—KEKEWICH, J.

Morice v. Durham (Bishop) (*supra*), *discussed*.

Yeap Cheah Neo v. Ong Cheng Neo (*post*, col. 325); Sutton, In re, Stone v. Att.-Gen. (*post*, col. 320); Douglas, In re, Obert v. Barrow (*post*, col. 323).

Morice v. Durham (Bishop), *applied*.

Hunter v. Att.-Gen. (*post*, col. 324).

2. DEALINGS WITH CHARITY PROPERTY.

Campden Charities, In re (1880) 49 L. J. Ch. 676.—HALL, V.-C.; *reversed*, (1881) 50 L. J. Ch. 646; 18 Ch. D. 310; 45 L. T. 152; 30 W. R. 496.—C.A. JESSEL, M.R., JAMES and LUSH, L.JJ.

Brompton (Incumbent), Ex parte (1852) 22

L. J. Ch. 281; 5 De G. & Sm. 626.—

PARKER, V.-C., *approved*.

Campden Charities (No. 2), In re (1883) 52 L. J. Ch. 780; 24 Ch. D. 213; 48 L. T. 521; 31 W. R. 741.—CHITTY, J.

Sons of Clergy Corporation v. Sutton (1860)

29 L. J. Ch. 393; 27 Beav. 651; 6 Jur

(N.S.) 584.—ROMILLY, M.R., *adopted*.

Royal Society of London and Thompson, In re (1881) 50 L. J. Ch. 344; 17 Ch. D. 407; 44 L. T. 274; 29 W. R. 838.—HALL, V.-C.

Royal Society of London and Thompson,

In re, *partly applied*.

Finnis to Forbes, Tower Ward Schools Trustees, *Ex parte* (1883) 53 L. J. Ch. 141; 24 Ch. D. 591; 48 L. T. 814; 32 W. R. 55.—BACON, V.-C.

Sons of Clergy Corporation v. Sutton,

referred to.

Sons of Clergy Corporation and Skinner, In re (1892) 62 L. J. Ch. 148; [1893] 1 Ch. 178; 3 R. 161; 67 L. T. 751; 41 W. R. 461.—NORTH, J.

Sons of Clergy Corporation v. Sutton,

applied.

St. John Street Wesleyan Chapel Charter, In re (1893) 62 L. J. Ch. 927; [1893] 2 Ch. 618; 69 L. T. 105.—STIRLING, J.

[*See now* Charitable Trusts (Places of Religious Worship) Amendment Act, 1894 (57 & 58 Vict. c. 35).]

Sons of Clergy Corporation v. Sutton, ratio

decidendi overruled.

Clergy Orphan Corporation, In re (1894) 64 L. J. Ch. 66; [1894] 3 Ch. 145; 7 R. 549; 71 L. T. 460; 43 W. R. 150.—C.A.

DAVEY, L.J. (for self, HENSCHALL, L.C. and LINDLEY, L.J.).—In *Sons of Clergy Corporation v. Sutton* Lord Romilly put a construction on these sections. Although in the result Lord Romilly's conclusion may not differ much from that which we have endeavoured to express, we cannot agree with him in the reasons which he gave for his judgment. We do not think it was a legitimate mode of interpreting the Act (Charitable Trusts Act, 1853), first to consider sect. 62 and then to construe the interpretation clause by sect. 62 of the Act. Lord Romilly

held that the word "endowment" in sect. 66 applied only to endowments for a special purpose in connection with a charity, and not to endowments for the general purposes of the charity. As we have already said, we cannot agree with this construction of sect. 66, and we may add that it seems to us inconsistent with the other sections—see, for example, sect. 44. Lord Romilly's view has been followed in other cases, but apparently on his authority without the expression of any opinion as to its correctness by the judges who adopted and followed it. The test whether the property of a charity is an endowment within the meaning of the Act is not whether it is applicable to the general purposes of the charity or only to some specific purpose in connection with it, although this circumstance may be important in considering whether the endowment is exempt from the provisions of the Act in the case of a charity falling within the description in sect. 62.—p. 74.

Clergy Orphan Corporation, In re, considered.

Gilchrist's Trusts, In re (*supra*, col. 315).

Shaftoe's Charity, In re (1878) 47 L. J. P. C.

98; 3 App. Cas. 872; 38 L. T. 793.—P.C.

LORD SELBORNE, SIR J. COLVILLE, SIR B.

PEACOCK, SIR M. SMITH and SIR R.

COLLIER, *approved*.

Sutton Coldfield Grammar School, In re (1881) 51 L. J. P. C. 8; 7 App. Cas. 91; 45 L. T. 631; 30 W. R. 341.—P.C. SIR B. PEACOCK, SIR M. SMITH, SIR R. COLLIER, JESSEL, M.R., SIR R. COUCH and SIR A. HOBHOUSE.

Sutton Coldfield Grammar School, In re,

followed.

Hemsworth Free Grammar School, In re (1887) 56 L. J. P. C. 52; 12 App. Cas. 444; 56 L. T. 212; 35 W. R. 418.—P.C. HALSBURY, L.C., LORDS FITZGERALD, HOBHOUSE, SIR B. PEACOCK and SIR R. COUCH.

Hemsworth Free Grammar School, In re,

followed.

Colchester Grammar School, In re (1898) 67 L. J. P. C. 86; [1898] A. C. 477; 78 L. T. 509.—P.C.

LORD HOBHOUSE (for self, LORDS WATSON, MACNAGHTEN, MORRIS, DAVEY and SIR R. COUCH).—In the *Hemsworth School Case* the scheme complained of removed the site of the school from Hemsworth to Barnsley. A petition of appeal was presented by inhabitants of Hemsworth whose children were at the school. It was held that the inhabitants as such had no *locus standi* for appealing; they could only appeal in respect of some vested interests of their boys, and the vested interests saved by the [Endowed Schools] Act [1869], had been spent many years before. This decision accords in principle with the previous decisions in the case of *Haydon Bridge School* (*Shaftoe's Charity, In re*), and *Sutton Coldfield School*, and it is even more closely applicable to the present case. Indeed, so far as the facts of the present case constitute any distinction, they are less favourable to the right of appeal than those of the *Hemsworth Case*, for the removal of the school did affect the interests of the Hemsworth boys in a maternal sense, only it was not in the sense contemplated by the Act in sects 13 and 89. The argument, perhaps, was not presented as it

has now been presented for the petitioners, but the decision clearly governs the present case.—p. 89.

Att.-Gen. v. Coventry Corporation (1700) 2 Vern. 396; 2 Bro. P. C. 236; 3 Madd. 353; 3 Swanst. 311, n.; 18 R. R. 288, *discussed*.
Att.-Gen. v. Bristol Corporation (1820) 2 J. & W. 294.—ELDON, L.C.; *reversing* (1819) 3 Madd. 319; 22 R. R. 136.—LEACH, V.-C.

Att.-Gen. v. Cordwainers' Co. (1833) 3 Myl & K. 534.—LEACH, M.R., *considered*.
Att.-Gen. v. Coopers' Co. (1840) 3 Beav. 29; 4 Jur. 572.—LANGDALE, M.R.

Att.-Gen. v. Drapers' Company (1841) 4 Beav. 67.—LANGDALE, M.R., *not applied*.
South Molton Corporation v. Att.-Gen. (1854) 23 L. J. Ch. 567; 5 H. L. Cas. 1; 18 Jur. 435.—H.L. (E.). CRANWORTH, L.C., LORDS BROUGHAM and ST. LEONARDS; *reversing* S. C. *nom.* Att.-Gen. v. South Molton Corporation, 14 Beav. 357.—ROMILLY, M.R.

See judgments where earlier cases are discussed. And see post.

Thelford School Case (1610) 8 Co. Rep. 130 c.; 9 Arnold v. Att.-Gen. (1692) Shower P. C. 22; **Att.-Gen. v. Johnson** (1753) Amb. 190.—HARDWICKE, L.C.; **Att.-Gen. v. Bristol Corporation** (*supra*); **Mercers' Co. v. Att.-Gen.** (1828) 2 Bligh (N.S.) 165; 31 R. R. 33.—LYNDHURST, L.C.; and **Att.-Gen. v. Coopers' Co.** and **Att.-Gen. v. Drapers' Co.**, *discussed*.

South Molton Corporation v. Att.-Gen., *applied*.

Beverley Corporation v. Att.-Gen. (1857) 27 L. J. Ch. 66; 6 H. L. Cas. 310; 3 Jur. (N.S.) 871.—H.L. (E.). CRANWORTH, L.C., LORDS BROUGHAM and WENSLEYDALE; *reversing* S. C. *nom.* Att.-Gen. v. Beverley Corporation (1855) 24 L. J. Ch. 374; 6 De G. M. & G. 256; 15 Beav. 540; 1 Jur. (N.S.) 763.—L.J.J. and M.R.

Att.-Gen. v. Wyggeston Hospital (1849) 12 Beav. 113—M.R., *questioned*.

Magdalen Coll., Oxford v. Att.-Gen. (1857) 6 H. L. Cas. 189; 6 W. R. 716.—H.L. (E.). CRANWORTH, L.C. and LORD WENSLEYDALE; *varying* S. C. *nom.* Att.-Gen. v. **Magdalen Coll., Oxford** (1854) 23 L. J. Ch. 844; 15 Beav. 223; 18 Jur. 363.—ROMILLY, M.R., *applied*.

Att.-Gen. v. Payne (1859) 27 Beav. 168; 7 W. R. 604.

ROMILLY, M.R. refused to enter into the question whether the point, which is not decided by Lord Langdale in *Att.-Gen. v. Wyggeston Hospital*, but is covered by his *dictum* in 12 Beavan, with respect to the validity of the leases, is correct or not; and the more so because the matter has been seriously doubted by Kindersley, V.-C., in *Att.-Gen. v. Vansittart* (1855, not reported).—p. 173.

Att.-Gen. v. Wax Chandlers' Co. (1870) L. R. 5 Ch. 503; 23 L. T. 173; 19 W. R. 33.—SELBORNE, L.C., *distinguished*.
Merchant Taylors' Co. v. Att.-Gen. (1871) 40 L. J. Ch. 545; L. R. 6 Ch. 512; 25 L. T. 109; 19 W. R. 641.—HATHERLEY, L.C. and JAMES, L.J.

Att.-Gen. v. Wax Chandlers' Co., *reversed*.
South Molton Corporation v. Att.-Gen. (*supra*), *approved*.

Att.-Gen. v. Cordwainers' Co. and Att.-Gen. v. Coopers' Co. (*supra*), *distinguished*.
Att.-Gen. v. Wax Chandlers' Co. (1873) 42 L. J. Ch. 425; L. R. 6 H. L. 1; 28 L. T. 681; 21 W. R. 361.—H.L. (E.).

LORD CHELMSFORD.—The rules to be collected from the cases are, as Hatherley, L.C. truly stated, clearly and precisely laid down by Lord St. Leonards in *South Molton Corporation v. Att.-Gen.* The only cases which have any bearing upon the present, are those where a testator, without expressing any general intention to devote his whole property to charity, has devised it, and required the devisee to give portions of it to certain charitable objects, not exhausting the whole estate, and has either left the residue or surplus undisposed of, or has appropriated it to an object which may or may not require the whole of it to be applied. In the former case . . . the devisee, according to *Att.-Gen. v. Bristol Corporation* (*supra*), will take the whole of the property subject to the specific appropriation. In the latter case . . . the question to whom it [the surplus or residue] belongs is one which depends entirely upon the construction of the instrument of gift, and the discovery of the intention of the testator may occasionally be not unattended with difficulty. . . . *Att.-Gen. v. Cordwainers' Co.* and *Att.-Gen. v. Coopers' Co.* are both of them distinguishable from the present case. In the case of the *Cordwainers' Co.* the M.R. held that the estate devised to the corporation was given to them absolutely, and was rather a gift upon condition than a gift upon trust. And in the case of the *Coopers' Co.* (which appears to have been somewhat doubted), the sum of three pounds given for the repairs of the houses devised to the company was represented to be an amount remaining after gifts of different objects, and was to be put into the common box of the company towards the reparation of the houses when need should be, imputing that it should go into the funds of the company and be mixed up with and become part of them. It seems to me very difficult to distinguish this case from *Merchant Taylors' Co. v. Att.-Gen.*—p. 428.

LORDS COLONAY and CAIRNS to the same effect.

Att.-Gen. v. Wax Chandlers' Co., *explained*.
Cunningham v. Foot (1878) 3 App. Cas. 974; 38 L. T. 1889; 26 W. R. 859.—H.L. (TR.), *referred to*.

Goodman v. Saltash (Mayor) (1882) 52 L. J. Q. B. 193; 7 App. Cas. 633; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276.—H.L. (E.).

Pennington v. Cardale (1858) 27 L. J. Ex. 438; 3 H. & N. 656; 6 W. R. 837.—EX., *commented on and disapproved*.

Magdalen Hospital Governors v. Knotts (1879) 4 App. Cas. 394; 48 L. J. Ch. 579; 40 L. T. 466; 27 W. R. 602.—H.L. (E.); *affirming* (1878) 47 L. J. Ch. 726; 8 Ch. D. 709; 38 L. T. 624; 26 W. R. 646.—O.A. JAMES, COTTON and THESIGER, L.J.J.; *which reversed* (1876) 46 L. J. Ch. 149; 24 D. L. 175; 36 L. T. 139; 25 W. R. 181.—JESSEL, M.R.

CAIRNS, L.C.—The C. A., as the authority for the view that the lease is voidable only, refers to what is stated as a principle of the decision

and not a mere *obiter dictum* in *Pennington v. Cardale*. I cannot agree that it was any necessary part of the decision in *Pennington v. Cardale*, that the lease was voidable. The question in that case related to the meaning of the exception of certain premises out of a lease granted by a dean and chapter in 1849. The excepted premises were described as rents reserved in any building leases granted by the dean and chapter, and the Court held that these words, upon the whole context, meant leases which *de facto* had been granted by the dean and chapter, whether interests were lawfully created by them or not. The inquiry whether these leases were void or voidable was immaterial. It is true that in delivering the judgment of the Court, Martin, B. says of a lease granted by the dean and chapter contrary to the statute, "It seems quite clear from the authorities cited upon the argument that this lease was not void, but voidable only." These observations do not appear to me to have been necessary for the decision of the case; and, even if they were accurate, they did not relate to the effect of leases or grants by a corporation such as that of the appellants; but they referred to the class of cases relating to ecclesiastical corporations with a head, of which I have already spoken.—p. 334. LORDS SELBORNE and GORDON concurred.

Stockport Ragged, Industrial and Reformatory Schools. In re (1898) 67 L. J. Ch. 372; [1898] 1 Ch. 610; 73 L. T. 290; 46 W. R. 455.—STIRLING, J.; *reversed*, (1898) 68 L. J. Ch. 41; [1898] 2 Ch. 687; 79 L. T. 507; 47 W. R. 166.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.JJ.

3. CHARITABLE GIFTS.

Philanthropic Society v. Kemp (1842) 11 L. J. Ch. 360; 4 Beav. 581.—LANGDALE, M.R., and **Sturge v. Dimsdale** (1843) 6 Beav. 462, 7 Jur. 643.—LANGDALE, M.R., *commented on*.

Arnold v. Chapman (1748) 1 Ves. sen. 108. HARDWICKE, L.C.; and Att.-Gen. v. **Mountmorris (Lord)** (1765) Dick. 379, *discussed*.

Robinson v. Geldard (1852) 3 Mac. & G. 735.—TRURO, L.C.; *reversing* (1849) 18 L. J. Ch. 454; 3 De G. & Sm. 499; 14 Jur. 143.—KNIGHT BRUCE, V.-C.

Robinson v. Geldard, *distinguished*. **Tempest v. Tempest** (1856) 26 L. J. Ch. 501; 7 De G. M. & G. 470; 3 Jur. (N.S.) 251; 5 W. R. 402.—CRANWORTH, L.C.; *reversing* 2 Kay & J. 635.—WOOD, V.-C.

Robinson v. Geldard, *explained*. **Tempest v. Tempest**, *followed*. **Beaumont v. Olivier** (*post*, col. 339).

Miles v. Harrison, W. N. 1873, p. 137.—WICKENS, V.-C.; and **Sturge v. Dimsdale** (*supra*), *observed on*. **Wills v. Bourne** (1873) L. R. 16 Eq. 487; 43 L. J. Ch. 89.

SELBORNE, L.C. (for M.R.), observed that some doubt had been thrown on **Sturge v. Dimsdale** (p. 489). . . . As to **Miles v. Harrison**, his lordship had not before him the grounds on which Wickens, V.-C. proceeded. If there was nothing more in the will than was stated in the report in the Weekly Notes, then, with all deference to the V.-C., for whose opinion he had the highest respect, his lordship would have been

disposed to come to a different conclusion; but the words were not so strong as in the present case, and it might be that, if the whole will were before the Court, it would be found that the V.-C.'s opinion was well founded.—p. 490.

Wills v. Bourne, *followed*. **Miles v. Harrison** (1874) 43 L. J. Ch. 835; L. R. 9 Ch. 316; 30 L. T. 190; 22 W. R. 441.—C.A. CAIRNS, L.C., JAMES and MELLISH, L.JJ.; *reversing* WICKENS, V.-C. (*supra*).

Beaumont v. Olivier (*post*, col. 339); **Wills v. Bourne**, and **Miles v. Harrison**, *discussed*.

Llewellyn v. Rose, W. N. 1869, p. 178.—MALINS, V.-C.; and **Lewis v. Boetefeur** (1878) 38 L. T. 93.—BACON, V.-C.; *affirmed*, W. N. 1879, p. 11.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.JJ., *commented on*.

Arnold, In re, **Ravenscroft v. Workman** (1888) 57 L. J. Ch. 682; 37 Ch. D. 637; 58 L. T. 469; 36 W. R. 424.—KAY, J.

Wills v. Bourne, **Miles v. Harrison**, and **Arnold**, In re, **Ravenscroft v. Workman**, *distinguished*.

Somers-Cocks, In re, **Wegg-Prosser v. Wegg-Prosser** (1895) 65 L. J. Ch. 49; [1895] 2 Ch. 449; 13 R. 819; 73 L. T. 58; 44 W. R. 106.—KEKEWICH, J. See judgment.

Williams v. Kershaw (1835) 5 Cl. & F. 111, n.; 5 L. J. Ch. 84; 1 Keen. 274, n.—PEPYS, M.R.; *applied*, **Ellis v. Selby** (1836) 5 L. J. Ch. 214; 1 Myl. & Cr. 286; 7 Sm. 352.—L.C. & V.-C.; *not applied*, **Robinson v. Geldard** (*supra*, col. 319).

Williams v. Kershaw and **Ellis v. Selby**, *referred to*.

Jarman's Estate, In re, **Leavers v. Clayton** (1878) 47 L. J. Ch. 675; 8 Ch. D. 584; 39 L. T. 89; 26 W. R. 907.—HALL, V.-C.

Dolan v. Maedermot (1868) L. R. 3 Ch. 676; 17 W. R. 3.—CAIRNS, L.C., *distinguished*.

Jarman's Estate, In re, **Leavers v. Clayton**, *followed*.

Hewitt's Estate, In re, **Gateshead Corporation v. Hudspeth** (1883) 53 L. J. Ch. 132; 49 L. T. 587.—KAY, J.

Jarman's Estate, In re, **Leavers v. Clayton**, and **Ellis v. Selby**, *referred to*.

Harbison, In re, **Morris v. Larkin** (1901) [1902] 1 Ir. R. 103.—PORTER, M.R.

Williams v. Kershaw, *distinguished*. **Sutton**, In re, **Stone v. Att.-Gen.** (1885) 54 L. J. Ch. 613; 28 Ch. D. 464; 33 W. R. 519.

PEARSON, J.—One of the cases principally relied upon by Mr. Warrington was **Williams v. Kershaw**, which was decided by the then M.R. (I believe Lord Cottenham). There, the gift was "for such benevolent, charitable, and religious purposes, as they in their discretion shall think most advantageous and beneficial," and the M.R. says: "It was argued, in order to prove the gift to be good, that the terms must be taken conjointly; if so, every application must be to a religious purpose, which would no doubt, be benevolent, and, in a legal sense, charitable; but the question is, did the testator so consider it? Did he mean that there should be no application of any part of the residuary fund except to religious purposes? Such does not appear to me to be his intention; he intended to restrain

the discretion of the trustees only within the limits of what was benevolent, or charitable, or religious. If this be the right construction, then the question is what the decisions have ascertained to be the rule on this subject?" Undoubtedly, if I am obliged to say that the proper construction of the present gift is "in charitable or deserving objects," the case would fall entirely within the reasoning of the M.R. in *Williams v. Kershaw*, and I should be compelled to hold that the gift was bad. But, to my mind, there is an entire difference between a gift to the three purposes, "benevolent, charitable, and religious," without any conjunction, copulative or disjunctive, between the first two adjectives, and the gift in the present case to "charitable and deserving" objects. I agree with the M.R. that "benevolent, charitable, and religious" means that the gift may be applied in any of those three ways. But when, as in the present case, the copulative conjunction connects the words "charitable and deserving," to my mind it changes the grammatical meaning altogether. The objects are to be at once charitable and deserving; and in that way the gift will be good.—p. 613.

Thomson v. Shakespear (1860) 29 L. J. Ch. 140, 270; 1 De G. F. & J. 399; 6 Jur. (N.S.) 281; 2 L. T. 479; 8 W. R. 265.—**KNIGHT BRUCE and TURNER, L.JJ.**, affirming **Johns** 612; 1 L. T. 398.—**WOOD, V.-C.**, followed.

Carne v. Long (1860) 29 L. J. Ch. 568; 2 De G. F. & J. 75; 6 Jur. (N.S.) 639; 2 L. T. 552; 8 W. R. 570.—**CAMPBELL, L.C.**; reversing, on different grounds, (1858) 27 L. J. Ch. 589; 4 Jur. (N.S.) 474.—**STUART, V.-C.**

Thomson v. Shakespear and Carne v. Long, discussed.

Beaumont v. Oliveira (1869) 38 L. J. Ch. 239; 1 L. R. 4 Ch. 309 (*post*, col. 339).

Carne v. Long, explained and distinguished. **Cocks v. Manners** (1871) 40 L. J. Ch. 640; 1 L. R. 12 Eq. 574; 24 L. T. 869; 19 W. R. 1053.—**WICKENS, V.-C.**

Thomson v. Shakespear, principle applied; **Hoare v. Hoare** (1886) 56 L. T. 147.—**CHITTY, J.**, distinguished and not applied; **Armstrong v. Reeves** (1890) 25 L. R. Ir. 325.—**CHATTERTON, V.-C.**, discussed and distinguished; **Clarke, In re**, **Clarke v. Clarke** (*post*, col. 322).

Carne v. Long, explained and distinguished. **Cocks v. Manners and Morrow v. McConville** (1883) 11 L. R. Ir. 236.—**CHATTERTON, V.-C.**, approved and followed. **Wilkinson's Trusts, In re** (1887) 19 L. R. Ir. 531.—**C.A. ASHBOURNE, L.C., FITZGIBBON and BARRY, L.JJ.**

Cocks v. Manners and Carne v. Long, discussed. **Bradshaw v. Jackman** (1887) 21 L. R. Ir. 12.—**PORTER, M.R.**

Clark's Trusts, In re (1875) 45 L. J. Ch. 194; 1 Ch. D. 497; 24 W. R. 238.—**HALL, V.-C.**; and **Carne v. Long**, applied.

O.C.

Cocks v. Manners, distinguished. **Dutton, In re**, **Peake, Ex parte** (1878) 48 L. J. Ex. 350; 4 Ex. D. 54; 40 L. T. 430.—**KELLY, C.B.**, and **HUDDESTON, B.** And see *post*.

Clark's Trusts, In re, explained. **Pease v. Pattinson** (1886) 32 Ch. D. 154; 55 L. J. Ch. 617; 54 L. T. 209; 34 W. R. 361. [Counsel having stated, in argument, that it had been distinctly laid down by **Hall, V.-C.**, in *Clark's Trusts, In re*, that a friendly society is not a charitable institution, and that, therefore, a gift to it cannot, on its ceasing to exist, be applied under the *cy-près* doctrine to general charitable purposes.]

BACON, V.-C.—In that case the gift was to a particular society, which afterwards ceased to have any existence. It was the case of an ordinary lapsed legacy, where the legatee has died in the testator's lifetime.—p. 137.

Cocks v. Manners, discussed. **White, In re**, **White v. White** (*post*, col. 323).

Clark's Trusts, In re, approved. **Pease v. Pattinson and Spiller v. Maude** (1881) 32 Ch. D. 158, n.—**JESSEL, M.R.**; and see **S. C.** (1864) 10 Jur. (N.S.) 1089; 5 N. R. 30; 11 L. T. 329; 13 W. R. 69.—**BOMILLY, M.R.**, distinguished. **Cunnack v. Edwards** (1896) 65 L. J. Ch. 801; [1896] 2 Ch. 679; 75 L. T. 122; 45 W. R. 99.—**C.A. HALSBURY, L.C., A. L. SMITH and RIGBY, L.JJ.**; partly affirming and partly reversing (1895) 64 L. J. Ch. 344; [1895] 1 Ch. 489; 13 R. 334; 72 L. T. 386; 43 W. R. 325; 59 J. P. 279.—**CHITTY, J.**

Cocks v. Manners, dictum applied. **Dutton, In re**, **Peake, Ex parte** (*supra*); **Amos, In re**, **Carrier v. Price** (1891) 60 L. J. Ch. 570; [1891] 8 Ch. 159; 65 L. T. 69; 39 W. R. 550.—**NORTH, J.**; **Clark's Trusts, In re**; and **Carne v. Long** (*supra*), discussed and distinguished. **Morrow v. McConville; Wilkinson's Trusts, In re**; and **Bradshaw v. Jackman**, followed. **Clarke, In re**, **Clarke v. Clarke** (1901) 70 L. J. Ch. 631; [1901] 2 Ch. 110; 84 L. T. 811; 49 W. R. 628.—**BYRNE, J.**

Thorner v. Wilson (1855) 24 L. J. Ch. 667; 3 Drew. 245; and (1858) 28 L. J. Ch. 145; 4 Drew. 530.—**KINDERSLEY, V.-C.**; **Smart v. Prujean** (1801) 6 Ves. 560; 5 R. R. 395.—**ELDON, L.C.**; and **Cocks v. Manners**, applied.

Delany, In re; **Conoley v. Quick** (1902) 71 L. J. Ch. 811; [1902] 2 Ch. 642; 87 L. T. 46; 51 W. R. 27.—**FARWELL, J.**

Att.-Gen. v. Syderfin (1693) 1 Vern. 224; 1 Eq. Cas. Abr. 96; 1 Meriv. 59; 7 Ves. 43, n., approved.

Moggridge v. Thackwell (1808) 7 Ves. 36; 6 R. R. 76.—**ELDON, L.C.** (see judgment at length); affirmed, (1807) 13 Ves. 416.—**H.L.**

Att.-Gen. v. Syderfin and Moggridge v. Thackwell, followed. **Wheeler v. Sheer** (1729) Mosely 285.—**KING, L.C.**, commented on and distinguished. **Mills v. Farmer** (1815) 1 Meriv. 55; 19 Ves. 483; 13 R. R. 247.—**ELDON, L.C.**

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Att.-Gen. v. Syderfin, *approved*,
White, *In re*, White v. White (*post*).

Att.-Gen. v. Oxford (Bishop) (1786) 1 Bro.
C. C. 444, n.—KENYON, M.R.; Corbyn v.
French (1799) 4 Ves. 118; 4 R. R. 251.—
ARDEN, M.R. (*and see post*, col. 337); **Att.-**
Gen. v. Andrew (1798) 3 Ves. 633.—
ROSSLYN, L.C.; **Att.-Gen. v. Boulbee**
(1794) 2 Ves. 380.—ARDEN, M.R.; and
Mills v. Farmer, *discussed and dis-*
tinguished.

Cherry v. Mott (1886) 5 L. J. Ch. 65; 1 Myl.
& Cr. 123.—PEPYS, M.R.

Cherry v. Mott, *approved*,
Chamberlayne v. Brockett (*post*, col. 327).

Mills v. Farmer, *explained*,
Ironmongers' Co. v. Att.-Gen. (1844) 10 Cl. & F.
908.—H.L. (B.). LYNCHBURST, L.C., LORDS
BROUGHAM, CAMPBELL and COTTENHAM;
affirming, S. C. *nom.* **Att.-Gen. v. Iron-**
mongers' Co. (1841) 10 L. J. Ch. 201;
Cr. & Ph. 208; 5 Jur. 356.—COTTENHAM,
L.C.; *which reversed in part* (1840) 2 Beav.
313.—LANGDALE, M.R., *discussed*.

Lyons Corporation v. Advocate-General of
Bengal (1876) 45 L. J. P. C. 17; 1 App. Cas.
91; 84 L. T. 77; 24 W. R. 679.—P. C. SIR J.
COLVILLE, SIR B. PEACOCK, SIR M. SMITH and
SIR R. COLLIER.

Att.-Gen. v. Boulbee; Mills v. Farmer and
Cherry v. Mott, *dicta applied*,
Biscoe v. Jackson (1887) 56 L. J. Ch. 540; 35
Ch. D. 460; 56 L. T. 753; 35 W. R. 554.—KAY,
J.; *affirmed*, C.A. COTTON, LINDLEY and FRY,
L.JJ. *See judgment of LINDLEY, L.J.*

Baker v. Sutton (1836) 5 L. J. Ch. 264; 1
Keen 224.—LANGDALE, M.R.; **Townsend**
v. Carus (1844) 13 L. J. Ch. 169; 3 Hare
257; 8 Jur. 104.—WIGRAM, V.-C.; and
Wilkinson v. Lindgren (1870) 39 L. J.
Ch. 722; L. R. 5 Ch. 870; 23 L. T. 375;
18 W. R. 961.—HATHERLEY, L.C.,
approved.

White, In re, White v. White (1893) 2 R. 380;
[1893] 2 Ch. 41; 62 L. J. Ch. 342; 68 L. T. 187;
41 W. R. 683.—C.A. LINDLEY, BOWEN and A. L.
SMITH, L.JJ. *And see post*, col. 324.

Baker v. Sutton, *commented on*,
Piercy, In re, Whitwham v. Piercy (*post*,
col. 326).

London University v. Yarrow (1857) 26 L. J.
Ch. 430; 1 De G. & J. 72; 3 Jur. (N.S.)
421.—CRANWORTH, L.C., KNIGHT BRUCE
and TURNER, L.JJ., *followed*.

Douglas, In re, Obert v. Barrow (1887) 56 L. J.
Ch. 915; 35 Ch. D. 472; 56 L. T. 786; 35 W. R.
740.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

London University v. Yarrow and Douglas,
In re, Obert v. Barrow, *discussed*,
Foveaux, In re, Cross v. London Anti-vivi-
section Society (*post*, col. 324).

London University v. Yarrow, *explained*,
Piercy, In re, Whitwham v. Piercy (*post*,
col. 326).

Bairds' Trustees v. Lord Advocate (1888) 15
Sess. Cas., 4th Series 682, *disapproved*,
Income Tax Commissioners v. Pemsel (1891)
61 L. J. Q. B. 265; [1891] A. C. 531; 65 L. T.
621; 55 J. P. 805.—H.L. (B.). LORDS WATSON,
HERSCHELL, MACNAGHTEN and MORRIS; HALS-
BURY, L.C. and LORD BRAMWELL, *dissenting*;
affirming S. C. *nom.* **Reg. v. Income Tax Com-**
missioners (1888) 58 L. J. Q. B. 196; 22 Q. B. D.
296; 59 L. T. 832; 60 L. T. 446; 37 W. R. 294;
53 J. P. 198; 5 Times L. R. 12, 163.—C.A.
ESHER, M.R., FRY and LOPES, L.JJ.

Income Tax Commissioners v. Pemsel, *dis-*
missed.

Nottage, In re, Jones v. Palmer (1895) 64 L. J.
Ch. 695; [1895] 2 Ch. 649; 12 R. 571; 73 L. T.
269; 44 W. R. 22.—KEKEWICH, J., *affirmed*,
C.A. LINDLEY, LOPES and RIGBY, L.JJ.

Income Tax Commissioners v. Pemsel, *dis-*
missed.

Cunnack v. Edwards (*supra*, col. 322).

Bairds' Trustees v. Lord Advocate,
approved.

Income Tax Commissioners v. Pemsel, *dis-*
missed.

Blair v. Duncan (1901) 71 L. J. P. C. 22;
[1902] A. C. 37; 86 L. T. 157; 50 W. R. 369.—
H.L. (SC.). HALSBURY, L.C., LORDS SHAND,
DAYE and BRAMPTON. *See judgments*, where
the Scottish cases are discussed.

Income Tax Commissioners v. Pemsel; Marsh
v. Means (1887) 3 Jur. (N.S.) 790.—WOOD,
V.-C.; **Joy, In re**, Purday v. Johnson
(1888) 60 L. T. 175.—CHITTY, J.; and
Armstrong v. Reeves (1890) 25 L. R. Ir.
325.—CHATTERTON, V.-C., *discussed*.

Foveaux, In re, Cross v. London Anti-vivi-
section Society (1896) 64 L. J. Ch. 856; [1895]
2 Ch. 501; 13 R. 730; 73 L. R. 202; 43 W. R.
661.—CHITTY, J.

Income Tax Commissioners v. Pemsel,
Foveaux, In re; Cross v. London Anti-vivi-
section Society, and Nottage, In re, Jones
v. Palmer (*supra*), *discussed*.

Cranston, In re, Webb v. Oldfield [1898] 1
Ir. R. 431.—C.A. ASHBOURNE, L.C., FITZGIBBON
and WALKER, L.JJ.; HOLMES, L.J., *dissenting*.

Income Tax Commissioners v. Pemsel, *ex-*
plained.

Ross Charity, In re, Perry Almshouses, *In re*
(*post*, col. 334).

Income Tax Commissioners v. Pemsel and
White, In re, White v. White (*supra*),
explained.

Macduff, In re, Macduff v. Macduff (1896) 65
L. J. Ch. 700; [1896] 2 Ch. 451; 74 L. T. 706;
45 W. R. 154.—C.A. LINDLEY, LOPES and
RIGBY, L.JJ.; *affirming* 44 W. R. 344.—STIRLING,
J. *See judgments at length*.

Macduff, In re, Macduff v. Macduff, *applied*,
Hunter, In re, Hood v. Att.-Gen. (1897) 1 Ch.
518; 45 W. R. 344.—ROMER, J.; *reversed*, 66
L. J. Ch. 545; [1897] 2 Ch. 105; 76 L. T. 725;
45 W. R. 610.—C.A. LINDLEY, LOPES and
RIGBY, L.JJ.

Hunter, In re, Hood v. Att.-Gen.—C.A., *re-*
versed and judgment of ROMER, J.
restored.

Hunter v. Att.-Gen. (1899) 68 L. J. Ch. 449;

[1899] A. C. 309; 80 L. T. 752; 41 W. R. 673.
—H.L. (E.). HAISBURY, L.C., LORDS WATSON,
SHAND AND DAVEY.

DAVEY, L.J. agreed that advowsons might be the subject of charitable trusts as decided by Kay, J. in *St. Stephen, Coleman St. In re* (post, col. 332), and having distinguished the different classes of cases applicable, held that the present fell within *Morice v. Durham (Bishop)* (supra, col. 315), and that class of case.

Lyons (Mayor) v. East India Co. (1836) 1 Moore P. C. 175. LORD BROUGHAM, PARKE and ROSANQUET, J.J. and CHIEF JUDGE IN BANKRUPTCY, *approved*.

Gibbs v. Runney (1813) 2 V. & B. 294; 13 R. R. 88.—GRANT, M.R., *discussed*.

Choaik Choon Nioh v. Spottiswoode, Wood's Oriental Cases, *approved*.

Yeap Cheah Neo v. Ong Cheng Neo (1875) 1 R. 6 P. C. 381.

SIR M. SMITH (for self, SIR J. COLVILLE, SIR B. PHAEOCK and SIR R. COLLIER).—Their lordships think it was rightly held in *Choaik Choon Nioh v. Spottiswoode*, that whilst the English statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities was to be considered a part of it.—p. 394.

Yeap Cheah Neo v. Ong Cheng Neo, *distinguished*.

Bedford Charity (Masters) In re (1819) 2 Swanst. 470; 16 R. R. 163.—ELDON, L.C., *referred to*.

Perry v. Tuomey (1888) 31 L. R. Ir. 481.—PORTER, M.R.

Sorresby v. Hollins (1740) 9 Mod. 221.—HARDWICKE, L.C., *followed*.

Grimmett v. Grimmett (1754) Amb. 221; Dick. 251.—HARDWICKE, L.C.

Grimmett v. Grimmett, *followed*.
English v. Ordie, Highm. Mortm. 82.

Sorresby v. Hollins, *explained*.
Att.-Gen. v. Tyndall (post, col. 334).

Sorresby v. Hollins, *principle approved*.
Faversham Corporation v. Ryder (1854) 23 L. J. Ch. 905; 5 De G. M. & G. 350; 18 Jur. 387.—KNIGHT BRUCE and TURNER, L.JJ.

Sorresby v. Hollins and Grimmett v. Grimmett, *discussed*.

Carter v. Green (1857) 26 L. J. Ch. 845; 3 K. & J. 598; 3 Jur. (N.S.) 905.—WOOD, V.-C.

Sorresby v. Hollins and Grimmett v. Grimmett, *discussed*.

Lewis v. Allenby (1870) L. R. 10 Eq. 668; 18 W. R. 1127.—STUART, V.-C.

Lewis v. Allenby, *distinguished*.
Clarke, In re, Husband v. Martin (1885) 54 L. J. Ch. 1080; 52 L. T. 406; 53 W. R. 516.

KAY, J.—*Lewis v. Allenby* was a case in which the trustees had a discretion as to the distribution of the testator's residue, but the testator had given some indication of the mode in which he wished the discretion to be exercised, mentioning hospitals and other charitable institutions in England as some of the objects of his bounty, some of which institutions are exempted from the Mortmain Act and enabled to hold

land, and it was held that the gift was valid, as being equivalent to a gift of the impure personality to charities by law enabled to take it. But in this case the gift is to the executors and trustees, to give to the poor as they may think fit.—p. 1081.

Lewis v. Allenby, *followed*.
Seton-Smith, In re, Bright-Smith v. Att.-Gen. (1894) 73 L. T. 732, n.—NORTH, J.

Lewis v. Allenby, *discussed*.
Johnston v. Swann (1818) 3 Madd. 457.—LEACH, V.-C., *commented on*.

Piercy, In re, Whitwham v. Piercy (1898) 67 L. J. Ch. 297; [1898] 1 Ch. 565; 78 L. T. 277; 46 W. R. 503.—G.A.; *affirming* (1896) 65 L. J. Ch. 364; 73 L. T. 732.—NORTH, J.

LINDLEY, M.R.—I do not myself quite follow the reasoning of Stuart, V.-C. in that case [*Lewis v. Allenby*], but we must consider that his decision has been acted upon, as it certainly has, and has been considered right from the time when it was pronounced almost until now—and I find it referred to in the standard text-books to which we are accustomed to look, without any comment—Lewin on Trusts, Jarman on Wills, and Theobald's Law of Wills. Speaking from my own recollection, I do not remember that it has been seriously contested. It has presented difficulties, and that is to my mind because the reasoning of the V.-C. is open to some comment; but it has certainly been acquiesced in and followed. I think the decisions of Pearson, J. in *Oney, In re, Broadbent v. Barrow* (col. 330), and of North, J. himself in *Seton-Smith, In re, Bright-Smith v. Att.-Gen.* (supra), are instances in point if any are required. But apart from those authorities I think that the real principle applicable to the case is that upon which Lord Hardwicke proceeded in *Grimmett v. Grimmett*, and the C. A. in *Faversham Corporation v. Ryder*, and Wood, V.-C. in *Carter v. Green*. That strikes me as good sense and not bad law. Applying those principles, I have come to the conclusion that there is nothing amiss with this gift to the trustees. What they will do with the fund is quite another matter. It is said that that view is opposed to two cases which unfortunately were not cited to Stuart, V.-C. when he decided *Lewis v. Allenby*—namely, *Baker v. Sutton* (supra, col. 323), and *Johnston v. Swann*, and unquestionably looking at the orders there made, and what was done, those decisions do appear to be opposed to the view taken by Stuart, V.-C.; but in neither of those cases was the precise point argued, and in neither does it appear what view the trustees took—whether they claimed the legacy and claimed the right to exercise the power, or whether they did not. Of course it is quite possible that in both cases the trustees may not have claimed the right at all, but left the Court to deal with the matter. If that is the true view, and is the explanation, as it may well be, of *Johnston v. Swann* and *Baker v. Sutton*, then they are not opposed to the view I am expressing. If they are, I am bound to say that upon principle I think the decision in *Lewis v. Allenby* is right, although, as I said before, I do not quite follow the reasoning of the V.-C. He seems to have construed the will as amounting to an exclusion of institutions which could not take mixed personality or the proceeds of the sale of realty. That is where I fail to follow

him I do not think that that is the right view. I look upon the will here simply as conferring an ordinary power of appointment, which may be properly or improperly exercised, and until we know what the trustees do in the exercise of their power, we cannot say that the disposition conferring the power is bad.—p. 300.

RIGBY, F.J., who agreed, discussed also *London University v. Yarron* (*supra*, col. 323), and continued: It was decided upon this point, that where objects were pointed out some of which were illegal, with an alternative which would be legal, the power given to the trustees, their selection under which might include, and did, I suppose, in that case include, the legal objects, was quite sufficient to take the case out of the statute. That goes very much further than the cases, which are numerous, as to universities. It went to the question of whether the gift was valid, being for certain purposes, some of which would be valid and others invalid. . . . In *Clark, In re*, there was a plain object, for the poor as the trustees might think fit, and I think it very likely that that was quite a sufficient circumstance to distinguish that case in principle from the one that we are now deciding.—p. 301.

V. WILLIAMS, L.J. also discussed the cases.

Att.-Gen. v. Chester (Bishop) (1785) 1 Bro. C. C. 444.—THURLOW, L.C., *discussed*.
Girdlestone v. Creed (1853) 10 Hare 480.—WOOD, V.-C., *distinguished*.

Sinnett v. Herbert (1872) 41 L. J. Ch. 388; L. R. 7 Ch. 232; 26 L. T. 7; 20 W. R. 270; *varying* 40 L. J. Ch. 509; L. R. 12 Eq. 201; 24 L. T. 778; 19 W. R. 946.—BACON, V.-C.

HATHERLEY, L.C.—In that case [*Girdlestone v. Creed*] there was a direction to lay out the money in building and endowing, and, but for the saving statute (43 Geo. 3, c. 108), which says that you may, to the extent of 500*l.*, apply money towards the building of churches, the bequest for the building and endowing would, upon several authorities, have been a totally void bequest, because the one object could not be separated from the other.—p. 391.

Att.-Gen. v. Chester (Bishop) and Sinnett v. Herbert, *followed*.

Chamberlayne v. Brockett (1872) 42 L. J. Ch. 368; L. R. 8 Ch. 206; 28 L. T. 248; 21 W. R. 299.—C.A. SELBORNE, L.C., JAMES and MELISH, L.J.J.; *varying* 41 L. J. Ch. 789; 27 L. T. 92; 20 W. R. 730.—ROMILEY, M.R.

Sinnett v. Herbert, *observed on and followed*.
Champney v. Davy (1879) 48 L. J. Ch. 268; 11 Ch. D. 949; 40 L. T. 189; 27 W. R. 390.—HALL, V.-C. *And see post*, col. 330.

Sinnett v. Herbert and Chamberlayne v. Brockett, *distinguished*.

Biscoe v. Jackson (1881) 50 L. J. Ch. 597 (*post*, col. 337).

Chamberlayne v. Brockett, *distinguished*.

White's Trusts, *In re* (1886) 55 L. J. Ch. 701; 33 Ch. D. 449; 55 L. T. 162; 34 W. R. 771; 50 J. P. 695.

BACON, V.-C.—The question, and the only question, before me is whether the doctrine of *cy-près* is to be applied to the present case. In my opinion there is no ground upon which that doctrine can be applied to this legacy. The rule stated in all the cases is, that where there is a general gift to general purposes of charity, that gift may be sustained on the doctrine of *cy-près*,

although the particular objects fail, or are no longer in existence. *Chamberlayne v. Brockett* has been referred to as justifying the construction Mr. Millar sought to place upon this gift; but there the residue of the testatrix's estate was given for plain general charitable purposes, and it would have been against reason and against all the decisions to say that such a bequest as there was in that case was invalid, because no land had yet been obtained as indicated by the will. The judgment upon which Mr. Millar relies contains a plain and very distinct exposition of the law by Lord Selborne, who says: "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If this condition is never fulfilled the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." Words cannot be plainer than that.—p. 703.

Chamberlayne v. Brockett, *followed*.
Stratheden (Lord), *In re*, *Alt v. Stratheden* (Lord) (1894) 63 L. J. Ch. 872; [1894] 3 Ch. 265; 8 R. 515; 71 L. T. 225; 42 W. R. 647.—ROMER, J.

Stratheden (Lord), *In re*, *Alt v. Stratheden* (Lord), *discussed*.
Nottage, *In re*, Jones v. Palmer (*supra*, col. 324).

Chamberlayne v. Brockett, *applied*.
Gyde, *In re*, Ward v. Little (1898) 79 L. T. 261.—C.A. LINDLEY, M.R., CHITTY and V. WILLIAMS, L.J.J.; *reversing* 78 L. T. 449.—NORTH, J.

Chapman v. Brown (1801) 6 Ves. 404; 5 R. R. 351.—GRANT, M.R.; and *Magistrates of Dundee v. Morris* (1858) 3 Macq. H. L. 134.—CHELMSFORD, L.C., LORDS CRANWORTH and WENSLEYDALE, *discussed*.
Fisk v. Att.-Gen. (1867) 12 R. 4 Eq. 521; 17 L. T. 27; 15 W. R. 1200.—WOOD, V.-C.

Chapman v. Brown, *distinguished*.
Fisk v. Att.-Gen., *followed*.
Hunter v. Bullock (1872) 41 L. J. Ch. 637; L. R. 14 Eq. 45; 26 L. T. 349; 20 W. R. 460.—BACON, V.-C.

Fisk v. Att.-Gen., *followed*.
Chapman v. Brown and Limbrey v. Gurr (1819) 6 Madd. 151; 22 R. R. 262, *distinguished*.
Dawson v. Small (1874) 43 L. J. Ch. 406; L. R. 18 Eq. 114; 30 L. T. 252; 22 W. R. 514.—BACON, V.-C. *And see post*, col. 330.

Chapman v. Brown and Cramp v. Playfoot (1858) 4 K. & J. 479.—WOOD, V.-C. *not followed*.

Fisk v. Att.-Gen., *followed*.
Williams, *In re* (1877) 47 L. J. Ch. 92; 5 Ch. D. 735; 36 L. T. 939; 25 W. R. 689.—MALINS, V.-C.

Chapman v. Brown and Magistrates of Dundee v. Morris, *commented on*.
Fisk v. Att.-Gen., *commented on and followed*.
Birkett, *In re* (1878) 9 Ch. D. 576; 47 L. J. Ch. 846; 39 L. T. 418; 27 W. R. 164.
JESSEL, M.R.—I quite agree to this, that if the

first object is not so defined that you can reasonably ascertain the amount required, the whole must fail because you might then apply the whole of the gift to the first object; and therefore, if you could apply the whole of the income properly and fairly to the first object, there would, of course, be no ascertainable residue. And that appears to me to have been *Chapman v. Brown*, which I must say, with the greatest possible deference to three or four judges, does not appear to me to be overruled by *Magistrates of Dundee v. Morris*. In that case the H. L. thought there was sufficient limitation pointed out by the will as to the charitable object to enable them to ascertain the amount required for carrying out that object. But in *Chapman v. Brown* Sir W. Grant was of opinion that there was not enough to enable him to decide; and I must say, if it were not improper for me to express an opinion as between Wood, V.-C. and Sir W. Grant, that in my opinion Sir W. Grant was clearly right, namely, that there was not enough. The purpose in *Chapman v. Brown* was this. The testatrix gave the residue of her estate to executors "for the purpose of building or purchasing a chapel for the service of Almighty God." Now, could any human being say what would be reasonable for the purpose of building such a chapel? You might have any kind of chapel . . . there is no possible limitation, so that there was nothing at all to guide the Court, that I can find, in *Chapman v. Brown*; and there was nothing to prevent the whole of the residue from being applied to the building of the chapel. The executors had a discretion. . . . It appears to me, therefore, that there is nothing in the authority of *Magistrates of Dundee v. Morris* which at all interferes with *Chapman v. Brown*, the principle being, as I have said, that if you cannot fairly ascertain what is the extreme sum required for the first purpose, so that you may properly apply the whole property given to the first purpose, then of course, if the first purpose is void, the contingent surplus cannot be ascertained, and the whole gift fails. That being my opinion as to the case if it were untrammelled by any authorities, what do I find as regards authority? It is of the utmost importance, as regards our law, that judges of the first instance should not disregard a series of decisions by other judges of first instance, none of which have been appealed or have been otherwise interfered with. In *Fisk v. Att.-Gen.*, in 1867, where there was a gift to an incumbent of a sum of stock upon trust, out of the dividends to apply such part thereof as should be required to keep in repair a family grave, and to apply the surplus for charity, Wood, V.-C. decided that, although the gift of the grave failed, yet the gift of the corpus was not affected, and the whole of the income was applicable to the charity. It may be difficult on principle to discover how he arrived at that conclusion, but he did arrive at it. The gift here in question is, to my mind, wholly undistinguishable from the gift there. I cannot find any possibility of fairly distinguishing it.—p. 379. *And see post*, col. 330.

Loscombe v. Wintingham (1850) 13 Beav. 87.—LANGDALE, M.R. distinguished. *And see post*.

Clark v. Taylor (1858) 1 Drew. 642: 1 W. R. 476.—KINDERSLEY, V.-C.

Clark v. Taylor and Fisk v. Att.-Gen. (*supra*), followed.

Ovey, In re, Broadbent v. Barrow (1885) 54 L. J. Ch. 752; 29 Ch. D. 560; 52 L. T. 349; 33 W. R. 821.—PEARSON, J. *And see col.* 326.

Hoare v. Osborne (1866) 35 L. J. Ch. 345; L. R. 1 Eq. 585; 12 Jur. (N.S.) 243; 14 L. T. 9; 14 W. R. 383.—KINDERSLEY, V.-C.; **Rickard, In re**, Rickard v. Robson (1862) 31 L. J. Ch. 897; 8 Jur. (N.S.) 665; 7 L. T. 87; 10 W. R. 657.—ROMILLY, M.R.; **Rigley's Trusts**, In re (1866) 36 L. J. Ch. 146; 15 L. T. 499.—KINDERSLEY, V.-C.; **Fisk v. Att.-Gen.** and **Champney v. Davy** (*supra*, col. 327), discussed and followed.

Vaughan, In re, Vaughan v. Thomas (1886) 33 Ch. D. 137; 55 L. T. 547; 35 W. R. 104; 51 J. P. 70.—NORTH, J. *See judgment*.

Clark v. Taylor, explained.

Slevin, In re, Slevin v. Hepburn (1891) 60 L. J. Ch. 439; [1891] 2 Ch. 236; 64 L. T. 311; 39 W. R. 578.—C.A. LINDLEY, BOWEN and KAY, L.JJ.: reversing (1890) 60 L. J. Ch. 200; (1891) 1 Ch. 373.—STIRLING, J.

Clark v. Taylor, explained and followed.

Fisk v. Att.-Gen. and **Ovey**, In re, Broadbent v. Barrow, followed.
Rymer, In re, Rymer v. Stanfield (1894) 64 L. J. Ch. 86; [1895] 1 Ch. 19; 12 R. 22; 71 L. T. 590; 43 W. R. 87.—C.A. HERSCHELL, L.C., LINDLEY and A. L. SMITH, L.JJ.; affirming 42 W. R. 581.—CHITTY, J.

Fisk v. Att.-Gen.; **Birkett**, In re (*supra*, col. 328); **Vaughan**, In re, Vaughan v. Thomas, and **Dawson v. Small** (*supra*, col. 328), followed.

Rogerson, In re, Bird v. Lee (1901) 70 L. J. Ch. 444; [1901] 1 Ch. 715; 84 L. T. 200.—JOYCE, J.

Loscombe v. Wintingham (*supra*, col. 329) and **Hoare v. Hoare** (1886) 55 L. T. 147.—CHITTY, J., discussed.

Clergy Society, In re (1856) 2 K. & J. 615.—WOOD, V.-C.; and **Maguire's Trusts**, In re (1870) 39 L. J. Ch. 710; L. R. 9 Eq. 632; 18 W. R. 623.—JAMES, V.-C., followed.

Davis, In re, Hansen v. Hillyer (1902) 71 L. J. Ch. 459; [1902] 1 Ch. 876; 86 L. T. 292; 50 W. R. 378.—BUCKLEY, J. *See judgment*.

Att.-Gen. v. Lepine (1815) 19 Ves. 309; 2 Swanst 181; 1 Wils. 465; 19 R. R. 55.—M.R., considered.

Davis's Trusts, In re (1889) 61 L. T. 430.—KAY, J.

Carey v. Carey (1854) 6 Ir. Ch. R. 255.—BRADY, L.C., considered.

Delmar's Charitable Trusts, In re (1897) 66 L. J. Ch. 555; [1897] 2 Ch. 163; 76 L. T. 694; 45 W. R. 630.

STIRLING, J.—Undoubtedly there are many cases in which it has been decided that a gift to A. or B. is substitutional, and that conclusion has been arrived at more particularly in cases where the gift is in favour of "A. or his children." A typical example is *Carey v. Carey*, which was referred to in the argument, and which I have carefully considered since; but that case (and,

as it appears to me, all the others which I have examined) was decided upon a consideration of the whole will, and all the circumstances which can be taken into consideration upon the construction of a will.—p. 557.

Powerscourt v. Powerscourt (1824) 1 Moll. 616; Beat. 572.—**MANNERS, L.C., approved.** Darling, in re, Farquhar v. Darling (1895) 65 L. J. Ch. 62; [1896] 1 Ch. 50; 13 R. 834; 73 L. T. 382; 44 W. R. 75.—**STIRLING, J.**

Att.-Gen. v. Price (1810) 17 Ves. 371; 11 R. R. 107; and **Isaac v. Defriez** (1754) Amb. 595, *followed*.

Liley v. Hay (1842) 11 L. J. Ch. 415; 1 Hare, 580; 6 Jur. 756, *not followed*. Gillam v. Taylor (1878) 42 L. J. Ch. 674; L. R. 16 Eq. 581; 28 L. T. 833; 21 W. R. 823.

WICKENS, V.-C.—I have unwillingly come to the conclusion that I am bound by *Att.-Gen. v. Price* and *Isaac v. Defriez*, and that I must treat this as a charitable gift. It is remarkable that those cases do not appear to have been cited before Wigram, V.-C. in *Liley v. Hay*. . . In *Isaac v. Defriez*, the words, as they appear from the note in the other case, were these: "He gave the same unto his own and his then present wife, Dyffe Simpson's" poorest "relations." Not abstractedly poor, but "to be distributed and paid to them and such of them proportionably, share and share alike, at the discretion of his executors. In other words, to be divided equally amongst such persons as the trustees considered to be the poorest" relations. Every one of them might have had 10,000l. a year, and some might have had 20,000l. a year; then those who had the 10,000l. a year would have taken it. If the cases . . . had been cited before Wigram, V.-C. in *Liley v. Hay*, I should have followed the more recent decision. As it is, I am not entitled to dissent from authorities so much in point, and I must hold this bequest to be a charitable one.—p. 675.

Isaac v. Defries, explained.

Gillam v. Taylor, dictum disapproved.

Att.-Gen. v. Northumberland (Duke) (1877) 7 Ch. D. 745; 47 L. J. Ch. 569; 26 W. R. 586; *varied*, (1878) 38 L. T. 245.—**C.A. JAMES and THESIGER, L.JJ.**

JESSEL, M.R.—Upon that [the meaning of "poorest"] there really is authority; and the singular part of the matter is, that the authority which I am now going to quote [*Isaac v. Defriez*] was unfortunately—I cannot say misunderstood, because I cannot believe that the late Wickens, V.-C. misunderstood it—but probably overlooked by him: I think by some accident he must have trusted to memory instead of looking at the authority. . . . That is, the Court read the word "poorest" to mean "poor" or "very poor." The Court did not mean poorest in the sense of being least wealthy of a number of wealthy people (p. 760). Now, that is an entire mistake of the V.-C.'s. The decree in *Isaac v. Defriez* was only for poor relations, and the decree would not have comprised a person who had 10,000l. a year. . . . It [*Gillam v. Taylor*] is no authority at all, so far as that dictum is concerned, and is totally opposed to the whole theory of charity administration in this Court.—p. 752.

Att.-Gen. v. Pearce (1740) 2 Atk. 87.—**HAARDWICKE, L.C., applied.**

Hall v. Derby Sanitary Authority (1885) 55

L. J. M. C. 1; 16 Q. B. D. 163; 54 L. T. 175; 50 J. P. 278.—**MANISTY and A. L. SMITH, JJ.**

Att.-Gen. v. Comber (1824) 2 Sim. & S. 93; 25 R. R. 163.—**LEACH, V.-C.; and Thompson v. Corby** (1860) 27 Beav. 649; 8 W. R. 367.—**BONILLY, M.R., followed.** Dudgeon, in re, Truman v. Pope (1896) 74 L. T. 613.—**STIRLING, J.**

Att.-Gen. v. Hotham (Lord) (1823) T. & R. 209; *affirmed*, (1827) 3 Russ. 415; 24 R. R. 21, *followed*.

Att.-Gen. v. Webster (1875) 44 L. J. Ch. 766; 1 R. 20 Eq. 483.—**JESSEL, M.R. And see post.**

Att.-Gen. v. Hotham, referred to Haigh v. West (1893) 62 L. J. Q. B. 532; [1893] 2 Q. B. 19; 4 R. 396; 69 L. T. 165; 57 J. P. 358.—**C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.**

Att.-Gen. v. Brown (1818) 1 Swanst. 265.—

ELDON, L.C., adhered to.

Att.-Gen. v. Heelis (1824) 2 Sim. & S. 67; 2 L. J. (O.S.) Ch. 189.—**LEACH, V.-C., discussed.**

Att.-Gen. v. Dublin Corporation (1827) 1 Bligh (N.S.) 312; 30 R. R. 43.—**ELDON, L.C. and LORD REESDALE.**

Att.-Gen. v. Brown, commented on.

Att.-Gen. v. Eastlake (1855) 11 Hare, 205.—**WOOD, V.-C. See judgment.**

Att.-Gen. v. Eastlake; Att.-Gen. v. Blizard (1855) 25 L. J. Ch. 171; 21 Beav. 233; 11 Jur. (N.S.) 1195.—**ROMILLY, M.R.; Att.-Gen. v. Webster (supra) and St. Bride's, Fleet Street, Church (or Parish Estate), in re** (1877) 56 L. J. Ch. 692, n.; 35 Ch. D. 147, n.—**JESSEL, M.R. affirmed.** W. N. 1877, p. 149.—**C.A., followed.**

St. Botolph Without Bishopsgate Parish Estates (1887) 56 L. J. Ch. 691; 35 Ch. D. 142; 56 L. T. 884; 35 W. R. 688.—**NORTH, J.**

Att.-Gen. v. Webster, considered.

St. Stephen, Coleman St., in re, St. Mary's, Aldermanbury, in re (1888) 57 L. J. Ch. 917; 39 Ch. D. 492; 59 L. T. 395; 36 W. R. 837.—**KAY, J. And see col. 325.**

Att.-Gen. v. Eastlake (supra), applied.

Smith v. Kerr (1902) 71 L. J. Ch. 369; [1902] 1 Ch. 774; 86 L. T. 477.—**C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.**

4. CONSTITUTION AND ADMINISTRATION.

Att.-Gen. v. Bowyer (1798) 3 Ves. 714; 4 R. R. 132.—**ELDON, L.C., approved.** Abbott v. Fraser (1874) 44 L. J. P. C. 26; L. R. 6 P. C. 96; 31 L. T. 596; 23 W. R. 422.—**P.-C.**

SIR M. SMITH (for self and **JAMES, L.J., SIR B. PEACOCK and SIR R. COLLIER**).—Apart, therefore, from the second article of the deed there would seem to be nothing in principle or in positive law to render such a gift as the present illegal as a gift in mortmain. The direction to the trustees to procure a charter or Act to incorporate a body empowered to hold the property and carry into

effect the objects of the gift, necessarily implies a corroboration to be fulfilled previously to the vesting of the property; and the permission of the Crown to hold the lands would of necessity precede their acquisition by the corporation, and render it lawful. Commentators of high authority on French law have treated such dispositions apart from the edict as clearly good. . . . The same doctrine was sanctioned, and the grounds on which it rests were fully expounded by Lord Eldon in the case of *Downing College*, which in its circumstances bore some analogy to the present—*Att.-Gen. v. Bowyer*.—p. 31.

Etherington v. Wilson (1875) 45 L. J. Ch. 153; 1 Ch. D. 160; 33 L. T. 652; 24 W. R. 803.—C.A. JAMES and MELLISH, L.J., BAGGALLAY, J.A. and BRAMWELL, B.; *reversing* 44 L. J. Ch. 687; L. R. 20 Eq. 606; 32 L. T. 789.—MALINS, V.-C., *applied*.

Kensit v. St. Ethelburga, Bishopsgate Within (1899) [1900] P. 80.—DR. TRISTRAM; *Davey v. Hinde* (1900) [1901] P. 95.—DR. TRISTRAM.

Att.-Gen. v. Skinners' Co. (1820) 5 Madd. 173; 26 R. R. 126.—LEACH, V.-C., *affirmed, with variations*, (1821) Jacob 629.—ELDON, L.C.

Att.-Gen. v. Stamford (Earl) (1841) 1 Ph. 737.—LYNDHURST, L.C., on re-hearing of cause heard by COTTENHAM, L.C., *observed on*.

Att.-Gen. v. Ladlow Corporation (1848) 2 Ph. 685.—COTTENHAM, L.C.

Storie's University Gift, In re, 29 L. J. Ch. 824; 6 Jur. (N.S.) 606.—ROMILLY, M.R., *reversed*; (1860) 30 L. J. Ch. 198; 2 De G. F. & J. 529; 7 Jur. (N.S.) 31; 3 L. T. 638; 9 W. R. 323.—KNIGHT BRUCE and TURNER, L.JJ.

Dummer v. Chippenham Corporation (1807) 14 Ves. 245, *referred to*.

United States of America v. Wagner (1867) 36 L. J. Ch. 624; L. R. 2 Ch. 588; 16 L. T. 646; 15 W. R. 1026.—CHELMSFORD, L.C., TURNER and CAIRNS, L.JJ.

Dummer v. Chippenham Corporation; Fremington School, In re, Ward, Ex parte (1847) 11 Jur. 421.—KNIGHT BRUCE, V.-C.; *Willis v. Child* (1851) 20 L. J. Ch. 118; 13 Beav. 117; 15 Jur. 803.—LANGDALE, M.R.; *Wilkes' Charity, In re* (1851) 20 L. J. Ch. 588; 3 Mac. & G. 440.—TRUBNO, L.C., and *Dangers v. River* (1860) 29 L. J. Ch. 685; 28 Beav. 233; 6 Jur. (N.S.) 864; 8 W. R. 225.—ROMILLY, M.R., *discussed and applied*.

Hayman v. Rugby School Governors (1874) 43 L. J. Ch. 834; L. R. 18 Eq. 28; 30 L. T. 217; 22 W. R. 587.—MALINS, V.-C.

St. Leonard's, Shoreditch, In re (1884) 54 L. J. P. C. 30; 10 App. Cas 304; 51 L. T. 305; 33 W. R. 756.—P.C. SELBORNE, L.C., SIR B. PEACOCK, SIR R. COLLIER and SIR R. COUCH, *followed*.

Swansea Grammar School, In re, Swansea Grammar School v. Charity Commissioners (1894) 63 L. J. P. C. 101; [1894] A. C. 252; 6 R. 470; 70 L. T. 738.—P.C. HERSHELL, L.C., LORDS HOBHOUSE, ASHBOURNE and MACNAGHTEN.

Robinson v. London Hospital, Governors (1853) 22 L. J. Ch. 754; 10 Hare, 19.—WOOD, V.-C., *corrected*.
Calvert v. Armitage (1863) 1 H. & M. 446; 2 N. R. 60; 8 L. T. 269.

WOOD, V.-C.—I cannot discover from the reports of *Robinson v. London Hospital* any special reason for making the order in that shape. I always thought the rule was clearly the other way. According to the report the decision seems wrong.—p. 446.

Att.-Gen. v. Calvert (1857) 26 L. J. Ch. 682; 23 Beav. 248; 3 Jur. (N.S.) 500.—ROMILLY, M.R., *distinguished*.

Ross Charity, In re; Perry Almshouses, In re (1898) 68 L. J. Ch. 66; [1899] 1 Ch. 21; 79 L. T. 366; 47 W. R. 197; 63 J. P. 52.—C.A.; *affirming* respectively [1897] 66 L. J. Ch. 662; [1897] 2 Ch. 397; 77 L. T. 89; 46 W. R. 27; 61 J. P. 742.—NORTH, J.; and [1898] 67 L. J. Ch. 206; [1898] 1 Ch. 391; 46 W. R. 360.—STIRLING, J.

LINDLEY, M.R.—Great reliance was placed by the appellants on *Att.-Gen. v. Calvert*. The charity there was a pre-Reformation charity, and the Court had to decide how the endowment should be applied under circumstances never contemplated by the founder, but arising out of the change in the national religion effected by the Reformation. The judgment must be read with reference to the case with which the Court had to deal. We have no such problem to solve. *Att.-Gen. v. Calvert* does not assist us in construing the deed of endowment before us, nor justify us in holding that mere performance of the conditions contained in it entitles a person not a member of the Church of England to the benefit of the charity founded by that deed.—p. 71.

CHITTY, L.J.—An argument presented by counsel for the charity commissioners requires notice. They said broadly that no eleemosynary charity can be an "ecclesiastical charity" within the (Local Government) Act of 1894. I do not agree. . . . They referred to a passage in Lord Macnaghten's speech in *Income Tax Commissioners v. Pemsel* (*supra*, col. 324), in which charity in its legal sense was spoken of as comprising four principal divisions—trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under the preceding heads. Lord Macnaghten was not there ranging charities into four distinct classes, each of which was exclusive of the others. It is plain that there may be a charity in the legal sense for purposes which are both eleemosynary and ecclesiastical or religious.—p. 73. V. WILLIAMS, L.J. concurred.

5. MORTMAIN ACTS.

Att.-Gen. v. Meyrick (1750) 2 Ves. 44.—STRANGE, M.R. *See now* Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 79), s. 3.

Att.-Gen. v. Bowles (1754) 2 Ves. Sen. 547; 3 Atk. 806.—HARDWICKE, L.C., *not followed*.
Att.-Gen. v. Tyndall (1764) Amb. 614; 2 Eden 207.—HENLEY, L.C. *And see post*.

Att.-Gen. v. Bowles, commented on.

Att.-Gen. v. Whitchurch (1796) 3 Ves. 141.—ARDEN, M.R. *And see* Thomson v. Shakespear (*supra*, col. 321). *And see post*.

Att.-Gen. v. Nash (1792) 3 Bro. C. C. 588.—
THURLOW, L.C., *approved*.
Att.-Gen. v. Parsons (1803) 8 Ves. 186.—
ELDON, L.C.

Att.-Gen. v. Tyndall (*supra*), *not applied*.
Henshaw v. Atkinson (1818) 3 Madd. 306.—
LEACH, V.-C.

Henshaw v. Atkinson, *followed*.
Biscoe v. Jackson (*post*, col. 337).

Att.-Gen. v. Davies (1802—4) 9 Ves. 535;
7 R. R. 295—M.R. and L.C., *applied*.
Pritchard v. Arbouin (1827) 3 Russ. 456; 5 L. J.
(O.S.) Ch. 175; 27 R. R. 166—LEACH, M.R.

Att.-Gen. v. Tyndall, *commented on*.
Att.-Gen. v. Parsons, *applied*.
Giblett v. Hobson (1834) 4 L. J. Ch. 41; 3
Myl. & K. 517.—BROUGHAM, L.C.; *affirming*
5 Sim. 65.—SHADWELL, V.-C.

Att.-Gen. v. Davies and Pritchard v. Arbouin,
principle applied.
Mather v. Scott (1837) 6 L. J. Ch. 380; 2
Keen, 172.—LANGDALE, M.R.

Att.-Gen. v. Davies, *approved*.
Tye v. Gloucester Corporation (1851) 21
L. J. Ch. 81; 14 Beav. 173; 15 Jur. 887.—
ROMILLY, M.R.

Att.-Gen. v. Tyndall, *disapproved*.
De Thémmines v. De Bonneval (1828) 5 Russ.
288; 7 L. J. (O.S.) Ch. 35; 29 R. R. 17.
—LEACH, M.R., *followed*.
Carter v. Green (1857) 26 L. J. Ch. 845; 3 K.
& J. 591; 3 Jur. (N.S.) 905.—WOOD, V.-C.

Carter v. Green, *not followed*.
Wilkinson v. Barber (1872) L. R. 14 Eq. 96;
41 L. J. Ch. 721; 26 L. T. 937; 20 W. R. 763.
[In argument, the next-of-kin asked for costs
as between solicitor and client whatever the
decision might be, as they were next-of-kin,
raising a not unreasonable contention, and said
that rule had been acted upon in *Carter v. Green*.]
ROMILLY, M.R. said that he knew of no such
rule, and could not act upon it.—p. 99.

Att.-Gen. v. Bowles (col. 334), *questioned*.
Att.-Gen. v. Davies; **Att.-Gen. v. Nash**;
Att.-Gen. v. Whitechurch; and **Att.-Gen.**
v. Parsons, *discussed*.
Pritchard v. Arbouin; **Giblett v. Hobson**;
and **Mather v. Scott**, *explained and*
approved.

Philpott v. St. George's Hospital (1857) 6
H. L. Cas. 338; 27 L. J. Ch. 70; 3 Jur. (N.S.)
1269; *reversing* (1855) 25 L. J. Ch. 33; 21
Beav. 134; 1 Jur. (N.S.) 1102.—ROMILLY, M.R.
CRANWORTH, L.C.—That [*Att.-Gen. v. Bowles*]
was a bequest to executors of a sum of 500l. to
lay out a part in building a small schoolhouse,
with a little house adjoining for the school-
master, the purchase of the ground and expenses
of the building not to exceed 200l. Lord Har-
dwick held that the 200l. might be lawfully laid
out in building upon lands belonging to, or
which might belong to, the parish. I have not
the least hesitation in saying that all the judges
who have questioned this decision have questioned
it upon the soundest ground. I am surprised
that a judge of Lord Hardwick's extreme
accuracy and knowledge of jurisprudence gene-

rally should have fallen into such an error as
that. . . . That was undoubtedly a wrong
decision, and it is declared to be so by Lord North-
ington, just ten years afterwards, in *Att.-Gen. v.*
Tyndall, where Lord Northington pointed out
the error into which Lord Hardwick had fallen.
. . . . But Lord Northington, while triumphantly
showing the error in *Att.-Gen. v. Bowles*, says.
"Building on a site is laying out the money in
reality, and therefore contrary to the spirit of
the statute. It is demandable in a *propre*, and
is a purchase of so much reality." That has been
entirely overruled in subsequent times.—p. 351.
LORDS BROUGHAM and WENSLEYDALE, who
concurred, also discussed the cases.

Att.-Gen. v. Hodgson (1846) 15 L. J. Ch.
290; 15 Sim. 146; 10 Jur. 300.—SHAD-
WELL, V.-C.; and **Philpott v. St. George's**
Hospital.—Before the M.R., *questioned*.
Hall v. Warren (1861) 9 H. L. Cas. 120; 10
W. R. 66.—H.L. (S.); *varying S.C. nom.* Warren
v. Radall (1858) 4 K. & J. 603; 3 Jur. (N.S.) 822;
6 W. R. 847.—WOOD, V.-C.

LORD KINGSDOWN.—It appears to me ex-
tremely difficult to reconcile *Att.-Gen. v. Hodg-*
son with the principles of former decisions or
with the common understanding of mankind.
The testator gave money for a charity, which
the law would not permit to take effect, and
directed that "if no such institution could be
conveniently established" the money should be
applied to other charitable purposes not open to
objection. The first charity could not be estab-
lished at all, conveniently or inconveniently.
The condition, to use the words of Sir W. Grant
in *Murray v. Jones* (1813) 2 V. & B. 313),
if there was a condition, was more than performed.
The testator did not say, nor could he intend,
that the gift over should take effect only in the
event of the first gift being good in point of law,
but also in the event of its being held to be sub-
ject to inconvenience in its execution. . . .
Philpott v. St. George's Hospital was founded
on the decision in *Att.-Gen. v. Hodgson*. There
was more to be said in favour of the decree in
the former case than in the latter, because the
particular events on which the gift over was to
take effect were more distinctly specified. But
I agree with the V.-C. in the opinion which he
has expressed in his judgment in the present
case, that the authority of those cases cannot be
maintained consistently with the principles of
former decisions.—p. 438.

CAMPBELL, L.C. and LORD CRANWORTH to the
same effect.

LORD WENSLEYDALE, while not dissenting,
observed, that he felt considerable difficulty in
overruling or distinguishing the two cases.—
p. 437.

Philpott v. St. George's Hospital and Tat-
ham v. Drummond (*post*, col. 337),
explained.

Cresswell v. Cresswell (1868) 37 L. J. Ch. 521;
L. R. 6 Eq. 69.—GIFFARD, V.-C.

Philpott v. St. George's Hospital, *dis-*
tinguished.

Booth v. Carter (1867) L. R. 3 Eq. 757.—
ROMILLY, M.R., *not followed*.

Watmough's Trusts, In re (1869) 38 L. J. Ch.
723; L. R. 8 Eq. 272; 17 W. R. 959.—MALINS,
V.-C.

Philpott v. St. George's Hospital, and Pratt v. Harvey (1871) L. R. 12 Eq. 544; 25 L. T. 200; 19 W. R. 950.—WICKENS, V.-C., *explained*.

Booth v. Carter; Sewell v. Crewe-Read (1866) 36 L. J. Ch. 136; L. R. 3 Eq. 60.—ROMILLY, M.R.; and **Cresswell v. Cresswell** (*supra*), *distinguished*.

Cox, In re, Cox v. Davie (1877) 47 L. J. Ch. 2; 7 Ch. D. 204; 47 L. T. 457; 26 W. R. 74.—JACON, V.-C.

Pratt v. Harvey, discussed.

Biscoe v. Jackson (1881) 50 L. J. Ch. 597; 45 L. T. 8.—HALL, V.-C.; *partly reversed* on another point, (1882) 51 L. J. Ch. 464; 46 L. T. 355.—A. JESSEL, M.R., BRETT and HOLKER, L.JJ.

Widmore v. Woodroffe (1766) Amb. 686; 1 Bro. C. C. 13, n.; and **Middleton v. Clitherow** (1798) 3 Ves. 784.—ELDON, L.C., *applied by* HALL, V.-C.

Perring v. Trail (1874) 43 L. J. Ch. 775; L. R. 18 Eq. 88; 30 L. T. 248; 23 W. R. 512.—MALINS, V.-C., *distinguished*.

Luckraft v. Pridham (1877) 6 Ch. D. 205; 46 L. J. Ch. 744; 37 L. T. 204; 26 W. R. 33.—C.A. ESSEL, M.R., JAMES, BAGGALLAY and COTTON, JJ.; *affirming* HALL, V.-C.

[It was admitted in this case that *Perring v. Trail* was very like the present, and the 9 Geo. 2, c. 36, was not referred to.]

JAMES, L.J.—In the Act in that case there are words evidently pointing to 9 Geo. 2, c. 36. The particular kind of property, a bequest of which is made illegal by that statute only, is expressly referred to.—p. 213.

Corbyn v. French (*supra*, col. 323) and **Waterhouse v. Holmes** (1828) 2 Sim. 162.—SHADWELL, V.-C., *followed*.

Lynall's Trusts, In re (1879) 48 L. J. Ch. 684; 2 Ch. D. 211; 28 W. R. 146. HALL, V.-C.

[This was a bequest of stock towards paying off any debt, &c. chargeable upon an almshouse situated on land in mortmain, and was held out.]

Att.-Gen. v. Williams (1794) 2 Cox 387; 4 Bro. C. C. 526.—THURLOW, L.C., *followed*. **Hill v. Jones** (1854) 2 W. R. 657.—WOOD, V.-C.

Att.-Gen. v. Williams, approved.

Tatham v. Drummond (1864) 34 L. J. Ch. 1, De G. J. & S. 484; 10 Jur. (N.S.) 557, 1087; 1 L. T. 324.—WESTBURY, L.C.; *reversing* 33 L. J. Ch. 438; 3 N. R. 706; 10 L. T. 233; 12 V. R. 620.—WOOD, V.-C. *And see supra*, col. 386.

Att.-Gen. v. Lloyd (1747) 1 Ves. sen. 32; 3 Atk. 561.—HARDWICKE, L.C., *not followed*. **Thomas v. Howell** (1874) L. R. 18 Eq. 198; 3 L. J. Ch. 511; 30 L. T. 244; 22 W. R. 676.

MALINS, V.-C.—This case was a very peculiar case, and I am of opinion that if the question ad turned on the construction of the first codicil he decision would have been the other way. It is perfectly clear that the reason on which the gift was made having failed, the conditional gift could not be good. Then came the second codicil, by which the testator made an absolute gift of the realty to one person, and an absolute gift of the personality to the charity to which he ad previously given the whole, stating, as a

reason for the alteration in disposition, his having been advised that a gift of the realty would have been void under the Statute of Mortmain. This was a mistake, because the will was made before the Act of 9 Geo. 2, but the codicil was upheld. That does not reach this case, because here there is no complete alternative gift. I think, however, that if *Att.-Gen. v. Lloyd* had to be decided now, the decision would be the other way.—p. 211.

Bridger, In re, Brompton Hospital v. Lewis (1893) 63 L. J. Ch. 186; [1894] 1 Ch. 207; 7 R. 78; 70 L. T. 204; 42 W. R. 179.—C.A. LINDLEY, A. L. SMITH and DAVEY, L.JJ., *applied*.

Hume, In re, Forbes v. Hume (1895) 64 L. J. Ch. 267; [1895] 1 Ch. 422; 12 R. 101; 72 L. T. 68; 43 W. R. 191.—C.A. LORD HALSBURY, LINDLEY and A. L. SMITH, L.JJ.

Curtis v. Hutton (1808) 14 Ves. 537.—M.R., *approved*.

Corcoran, In re, Corcoran v. Riddell (1892) 62 L. J. Ch. 267; 3 R. 183; 67 L. T. 754; 41 W. R. 311.—NORTH, J.; and **Beaumont's Trusts, In re** (1863) 32 Beav. 191.—ROMILLY, M.R., *explained and distinguished*.

Hamilton, In re, Cadogan v. Fitzroy (1896) 65 L. J. Ch. 815; [1896] 2 Ch. 617; 75 L. T. 113.—C.A.

RIGBY, L.J.—In that case [*Corcoran, In re*], North, J. construed the will by saying that the securities were to be taken as they existed at a certain date—the date of the death of the tenant for life. That was the only gift that he had to deal with, and he treats it as if it were a gift of scheduled securities. The testator did not make such a gift; but he gave directions by which a schedule could have been made at the death of the tenant for life, and then he directs to be given to charities such part of his property as could be so given, and some of the investments at that time might, and some might not, be of a nature which could be so applied. What was said in the judgment was said in reference to that state of things—that is, a direction by the testator to transfer to charities certain definite securities. . . . *Beaumont's Trusts* is no more in favour of the respondents than *Corcoran, In re*. . . . The trustees of that will (of the original testatrix) were only responsible for the state of the property at the death of the tenant for life according to that will, and it was no concern of theirs how the will of the second testatrix was to be determined—that is to say, whether the property should come to her as pure or impure personality. She only gave what she could of the property coming to her under the former will, and that must be taken as the fund with which she was dealing. So understood, the decision was no doubt right; but that has nothing to do with the question here.—p. 820.

LINDLEY and LOPES, L.JJ. to the same effect.

Att.-Gen. v. Heelis (1824) 2 Sim. & S. 67; 2 L. J. (o.s.) Ch. 189; 25 R. R. 153.—V.-C.; **British Museum Trustees v. White** (1826) 2 Sim. & S. 594; 4 L. J. (o.s.) Ch. 1806; 25 R. R. 270.—V.-C.; **United States President v. Drummond** (1836) 7 H. L. Cas. 155, n.; **Whicker v. Hume** (1858) 28 L. J. Ch. 396; 7 H. L. Cas. 124; 4 Jur. (N.S.) 933.—H. L. (E.). CHELMSFORD, L.C.,

LORDS CRANWORTH and WENSLEYDALE; *affirming* (1852) 21 L. J. Ch. 406; 1 De G. M. & G. 506; 14 Beav. 509; 16 Jur. 391.—*L.J.* and *M.R.*, *discussed*.

Beaumont v. Oliveira (1869) 38 L. J. Ch. 62, 239; L. R. 4 Ch. 309; 20 L. T. 53; 17 W. R. 269.—SELWYN and GIFFARD, *L.J.*; *reversing* 19 L. T. 330.—STUART, V.-C. *And see supra*, col. 320.

Att.-Gen. v. Stewart (1817) 2 Meriv. 143; 16 R. R. 162.—GRANT, M.R.; and Whicker v. Hume, *approved*.

Jex v. McKinney (1889) 58 L. J. P. C. 67; 14 App. Cas. 77; 60 L. T. 287; 37 W. R. 577.—P.C. LORDS WATSON, FITZGERALD, HOBHOUSE, MACNAGHTEN and SIR W. GROVE.

Att.-Gen. v. Stewart and Whicker v. Hume, *approved*.

Att.-Gen. v. Mill (1831) 2 Dow & Cl. 393; 3 Russ. 320; 5 Bligh (N.S.) 594.—LORD LYNCHURST, *discussed and distinguished*. Canterbury (Mayor) v. Wyburn (1894) 64 L. J. P. C. 36; [1895] A. C. 89; 11 R. 331; 71 L. T. 554; 43 W. R. 430.—P.C.

LORD HOBHOUSE (for self and EARL of SELBORNE, LORDS WATSON, MACNAGHTEN, MORRIS and SHAND).—In that case [*Att.-Gen. v. Mill*] the testator was a native of Montrose. He spent many years in the Island of Carriacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years; then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scotch trustees for the benefit of indigent ladies in Montrose. His will, with four codicils—all in English form—was proved in England. In his will and contemporaneous deed he described himself as of the Island of Carriacou, now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England, and were administered under the direction of the Court of Chancery, and were the subject of a decree which paid no regard to the charitable gift. Subsequently an information was filed by the Att.-Gen. for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery and afterwards in the H. L., that the testator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws, and was void. It is now argued that the testator was a domiciled Scotchman, and that the case decides that a bequest of money in a Scotch will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scotch domicile is not warranted by anything to be found in the reports. . . . For some reason—doubtless a sufficient one—it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their lordships. It is time that Mr. J. Story (Conflict of Laws, sect. 446) and Mr. Westlake (Private International

Law, sect. 165) both treat the decision as covering the case of a foreign will. But, on examining the case, that appears to their lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority.—p. 40.

Barnaby v. Bardsley (1870) 28 L. J. Ex. 326; S. C. *nom. Barnaby v. Baresby*, 4 H. & N. 690.—*Ex. questioned*. Webster v. Southey (1887) 56 L. J. Ch. 785; 36 Ch. D. 9; 56 L. T. 879; 35 W. R. 622; 52 J. P. 36.—KAY, J. *See judgment at length*.

Att.-Gen. v. Jones (1849) 19 L. J. Ch. 266; 1 Mac. & G. 574; 1 H. & Tw. 493.—COTTENHAM, L.C., *explained*.

Myers v. Perigal (1852) 22 L. J. Ch. 431; 2 De G. M. & G. 599; 17 Jur. 145; 1 W. R. 57.—ST. LEONARDS, L.C.; *reversing* (1849) 18 L. J. Ch. 185; 16 Sim. 533; 13 Jur. 223.—SHADWELL, V.-C.

Att.-Gen. v. Jones, *considered*.

Christmas, In re, Martin v. Lacon (1886) 55 L. J. Ch. 378; 33 Ch. D. 332.—G.A. (*post*, col. 345).

Myers v. Perigal, *followed*.

Ware v. Cumberlege (1855) 24 L. J. Ch. 630; 20 Beav. 503; 1 Jur. (N.S.) 745; 3 W. R. 437.—ROMILLY, M.R., *overruled*. Edwards v. Hall (1855) 25 L. J. Ch. 82; 6 De G. M. & G. 74; 1 Jur. (N.S.) 1189; 4 W. R. 111; *affirming* (1852) 22 L. J. Ch. 1078; 11 Hare, 1.—WOOD, V.-C.

CRANWORTH, L.C.—I am aware that, in thus deciding that the shares in these companies are not within the statute [of mortmain], I differ from the M.R. in *Ware v. Cumberlege*. I do this with the less regret, because, after all, my decision rests quite as much on the necessity of adhering to prior decisions as on the conviction that those decisions were, in their origin, such as I should have come to. His honour did not think that *Myers v. Perigal* bound him, relating as that case did to a banking concern. I have already indicated my reasons for thinking that it does govern this case; indeed, the reasoning there is applicable *a fortiori* to this case.—p. 86.

Myers v. Perigal, *followed*.

Marsh v. Att.-Gen. (1861) 2 J. & H. 61; 7 Jur. (N.S.) 184; 3 L. T. 615; 9 W. R. 170.—WOOD, V.-C. *And see post*, col. 341.

Myers v. Perigal, *distinguished*.

Ashworth v. Munn (*supra*, col. 342).

Myers v. Perigal, *referred to*.

Watts. In re, Cornford v. Elliott (*post*, col. 344); Christmas, In re, Martin v. Lacon (*post*, col. 345).

Way v. East (1853) 23 L. J. Ch. 209; 2 Drew. 44.—KINDERLEY, V.-C., *not applied*.

Edwards v. Hall (*supra*), *approved*. Fisher v. Brierley (1860) 29 L. J. Ch. 477; 6 Jur. (N.S.) 615; 8 W. R. 485.—KNIGHT BRUCE and TURNER, L.J.J.; *reversing* 6 Jur. (N.S.) 159; 8 W. R. 199.—ROMILLY, M.R.

Edwards v. Hall, *followed*.

Somers-Cocks, In re, Wegg-Prosser v. Wegg-Prosser [1895] 2 Ch. 449; 65 L. J. Ch. 49 (*supra*, col. 320).

Shadbolt v. Thornton (1849) 18 L. J. Ch. 392; 17 Sim. 49; 13 Jur. 597.—SHADWELL, V.-C., *disapproved*.

Lucas v. Jones (1867) 36 L. J. Ch. 602; 1 L. R. 4 Eq. 73; 15 W. R. 738.—WOOD, V.C.

Marsh v. Att.-Gen. (*supra*) and Shadbolt v. Thornton, *observed on*.

Brook v. Badley (1868) 37 L. J. Ch. 884; 1 L. R. 3 Ch. 672.—CAIRNS, L.C.; *affirming* (1867) 36 L. J. Ch. 741; 16 L. T. 762; 16 W. R. 947.—ROMILLY, M.R.

Marsh v. Att.-Gen., *held overruled*.

Brook v. Badley, *followed*,
Ashworth v. Munn (*post*, col. 342).

Brook v. Badley, *explained*; Robson, In re, Emley v. Davidson (1881) 51 L. J. Ch. 337; 19 Ch. D. 156.—C.A. (*post*, col. 344), *approved and followed*; Watts, In re, Cornford v. Elliott (1885) 55 L. J. Ch. 332; 30 Ch. D. 947.—C.A. (*post*, col. 344); *referred to*, Miller v. Collins (1896) 1 Ch. 573; 65 L. J. Ch. 353.—C.A. (*post*, col. 345).

Sparling v. Parker (1846) 16 L. J. Ch. 57; 9 Beav. 460; 10 Jur. 448.—LANGDALE, M.R., *approved*.

Tomlinson v. Tomlinson (1823) 9 Beav. 459.—LEACH, M.R., *disapproved*.

Walker v. Milne (1849) 18 L. J. Ch. 288; 11 Beav. 507; 13 Jur. 938.—LANGDALE, M.R. *And see post*, col. 343.

Sparling v. Parker and Walker v. Milne, *approved*.

Ashton v. Langdale (Lord) (1851) 20 L. J. Ch. 234; 4 De G. & Sm. 402; 15 Jur. 568.—KNIGHT BRUCE, V.-C.

Ashton v. Langdale (Lord), *held overruled*.
Jervis v. Lawrence (*post*, col. 343).

Walker v. Milne, *approved*. *And see* col. 348.

Gardner v. L. C. & D. Ry. (1867) 36 L. J. Ch. 323; L. R. 2 Ch. 201; 15 L. T. 552; 15 W. R. 324.—CAIRNS and TURNER, L.JJ., *applied*.

Holdsworth v. Davenport (1876) 46 L. J. Ch. 20; 3 Ch. D. 185; 35 L. T. 319; 25 W. R. 20.—MALINS, V.-C. *And see post*, col. 348.

Holdsworth v. Davenport, *distinguished*.

Chandler v. Howell (1876) 46 L. J. Ch. 25; 4 Ch. D. 651; 35 L. T. 592; 25 W. R. 53.—HALL, V.-C. *And see post*, col. 348.

Gardner v. L. C. & D. Ry., *applied*. *And see post*, col. 347.

Holdsworth v. Davenport and Chandler v. Howell, *discussed*.

Mitchell's Estate, In re, Mitchell v. Moberly (1877) 6 Ch. D. 655; 37 L. T. 145; 25 W. R. 903. BACON, V.-C. *discussed* the cases at considerable length, and though he did not say the two last cases were irreconcilable, yet, if he had to choose between them, he held the decision of Malins, V.-C., to be preferable to that of Hall, V.-C.

Walker v. Milne (*supra*), *approved*.

Ashton v. Langdale (Lord) (*supra*) and Chandler v. Howell, *overruled*.

Attree v. Hawe (1878) 47 L. J. Ch. 157, 863; 9 Ch. D. 337; 38 L. T. 733; 26 W. R. 871.—

C.A. JESSEL, M.R., JAMES, BAGGALLAY and BRAMWELL, L.JJ.; *reversing*, (1877) 37 L. T. 399.—HALL, V.-C. *And see post*, col. 348.

Attree v. Hawe, *distinguished*.

Ashworth v. Munn (1880) 15 Ch. D. 363; 50 L. J. Ch. 107; 43 L. T. 553; 28 W. R. 965.

JAMES, L.J.—There are some expressions in the judgment which I prepared in . . . *Attree v. Hawe* which seem to indicate that we thought the cases had gone to the extent of saying that no share in a partnership which had land for the purposes of the partnership, or real property, or impure personality, as part of the assets or capital, was hit by the statute of Geo. 2; that expression was not really applicable to anything we then had before us to decide; it was expressed rather too generally, and I may say, speaking for myself, inadvertently. . . . It certainly had been decided in *Myers v. Perigal* (*supra*, col. 340) and other cases of exactly the same character that shares in a joint-stock company, whether incorporated or unincorporated, which has land either as the substratum of its business, or other real assets at part of the assets of the business, are to be dealt with for the purposes of the statute as pure personal estate, but that is because they are to be treated just as if they were shares in a corporation, and they have always been held to be unaffected by the statute. The great distinction between that class of cases and the case of a private partnership is this, that in all those cases the intent and meaning of the partners is that the partnership, whether it be large or small, is to be in the nature of a corporation, they are all of them intended to have perpetual existence, and they are all intended to exist with fluctuating bodies of members from time to time, just like a corporation. Then no partner is ever supposed to have anything to do with the land except as one of the society through the machinery provided by the act or deed of settlement, and is never intended to have anything to do with the land in any shape or form except to get the profits from the land or the profits from the business of which the land is a part, and it is always intended that every share should pass in the market as a distinct thing, and in point of beneficial ownership wholly unconnected with the land or with the real assets of the partnership property of the company. That was the class of cases with respect to which the decision I have referred to was made. The principle which was established in *Myers v. Perigal* was applied by this Court in *Attree v. Hawe* to what is called debenture stock in railways.—p. 368.

BRETT, L.J.—Now, the authorities seem to me to have gone to this length, that although the devise to a charity is in terms of money only, and although the only thing which by the devise will come to that charity is money, yet if in order to effectuate the devise in favour of that charity it may be necessary to deal with an interest in land of the testator—the devise is within the Statute of Mortmain. It appears to me that the construction of that statute has been carried as far as that, and that *Brook v. Badley* (*supra*, col. 341), before Lord Cairns, cannot be supported, and cannot be faithfully followed unless it is a decision to the full effect of that proposition. The decision in *Brook v. Badley* seems to me virtually, and indeed intentionally, to overrule *Marsh v. Att.-Gen.* (*supra*, col. 340),

and the case of *Brook v. Badley* is one we are bound to follow.—p. 371.

COTTON, L.J.—No doubt *Marsh v. Att.-Gen.* does seem to support the argument that as the testator could get nothing but money, although that money was to be produced by a sale of real estate, yet he could leave his interest such as it was to charity. But if that was the principle on which *Marsh v. Att.-Gen.* was decided, it was clearly inconsistent not only with the principle of the decision, but with the decision itself, of the L.C. in *Brook v. Badley*, and of course we are bound by that decision of the L.C. even although we did not think it right, which in my opinion it is. . . . Then how does the decision that the gift of a share in such a company as that in *Nyers v. Perigal* is not within the Act of Geo. 2 apply to such a case as this? There is the great distinction that the shares in that case from the constitution of the company were capable of being realised without winding up the concern, and therefore what the charity took was a share which it could sell in the market or might hold without any objection as to its being an interest in land, whereas, in the present case, the interest of the testator in this partnership property could only be realised by requiring the assets to be realised, that is, that this particular asset should be sold and a portion of the proceeds of sale paid to him. That involves, for the purpose of realising that which he gives to the charity, the necessity of dealing with land, and gives him, for the purposes of so dealing as to realise his interest, an interest or charge upon the land.—pp. 375, 376.

JAMES, L.J.—With regard to one thing that Cotton, L.J. has mentioned, I may say I do not consider the decision of a L.C. is absolutely binding upon us, because every L.C.'s decision was liable to be reheard not only by himself but by his successor, and there are instances known of it.—p. 377.

Ashworth v. Munn, distinguished.

Pickard, In re. Emsley r. Mitchell [1894] 3 Ch. 704. 64 L. J. Ch. 92.—C.A. (*post*, col. 349).

Thornton v. Kempson (1854) 23 L. J. Ch. 977; Kay 592; 2 W. R. 299.—WOOD, V.-C., *followed*.

Attree v. Hawe (*supra*), *discussed*.

Finch v. Squire (1804) 10 Ves. 41; 7 R. R. 37.—GRANT, M.R., *distinguished*.

HARRIS, In re, JACSON r. Governors of Queen Anne's Bounty (1880) 35 Ch. D. 561; 49 L. J. Ch. 687; 43 L. T. 116; 29 W. R. 119.—JESSEL, M.R. *And see post*, col. 344.

Finch v. Squire, *held overruled*.

Walker v. Milne (col. 341); Attree v. Hawe, and Harris, In re, JACSON r. Governors of Queen Anne's Bounty, *followed*.

Jervis v. Lawrence (1882) 52 L. J. Ch. 242; 22 Ch. D. 202; 47 L. T. 428; 31 W. R. 267.—BACON, V.-C.

Finch v. Squire, *discussed*; Payne r. Esdaile (1888) 58 L. J. Ch. 299; 13 App. Cas. 613; 59 L. T. 568; 37 W. R. 273; 53 J. P. 100.—H.L. (R.). LORDS HERSCHELL, MACNAGHTEN and FITZGERALD, *questioned*; Pickard, In re, Emsley r. Mitchell (*post*, col. 349).

Att.-Gen. v. Jones (1817) 3 Price, 368, *questioned*.

Tompson r. Browne (1885) 5 L. J. Ch. 64; 3 Myl. & K. 32.—PEPYS, M.R.

Att.-Gen. v. Jones and Tompson v. Browne, *referred to*.

Jeffries v. Alexander (1860) 31 L. J. Ch. 9; 8 H. L. Cas. 594; 7 Jur. (N.S.) 221; 2 L. T. 768.—H.L. (R.). CAMPBELL, L.C. LORDS ST. LEONARDS, WENSLEYDALE and KINGSDOWN. LORD CRANWORTH *dissenting*; assisted by the JUDGES; *reversing* S. C. *nom.* Alexander v. Brame (1855) 7 De G. M. & G. 525; 1 Jur. (N.S.) 1032.—KNIGHT BRUCE and TURNER, L.J.J., assisted by the JUDGES; *who varied* (1854) 19 Beav. 436.—ROMILLY, M.R.

Jeffries v. Alexander, *applied*.

Fox r. Lownds (1875) 44 L. J. Ch. 474; L. R. 19 Eq. 453; 23 W. R. 404.—JESSEL, M.R.

Jeffries v. Alexander, *considered*.

Robson, In re, Emley r. Davidson (1881) 19 Ch. D. 156; 51 L. J. Ch. 337; 45 L. T. 418; 30 W. R. 257.—C.A.

LINDLEY, L.J.—The C.A., in *Alexander v. Brame*, decided that the settlement of debts to charitable purposes did not avoid the statute: the H. L. never said the contrary, nor did any judge ever dissent from that proposition. So far from that, having read the case, it appears to me that we may take it as pretty well decided that a simple settlement of debts to charitable purposes does not come within the statute. The decision in the H. L. in *Jeffries v. Alexander* was, that what was there called a debt was not in substance a debt at all, but was the residue of a man's property, whatever he chose to make it amount to, after bequeathing legacies. The covenant in *Jeffries v. Alexander* was most extraordinary, as it amounted to this, that the settlor would leave property amounting to 60,000*l.*, after paying all his debts and legacies, to charitable purposes. . . . *Foe v. Lownds* is a case of a similar kind, and not like this, which is a case of a pure and simple covenant to pay 20,000*l.* . . . That [*Brook v. Badley* (*supra*, col. 341)] was a bequest of a legacy by the legatee to charitable purposes, and the legacy so bequeathed was treated by Lord Cairns as partly payable out of personality and partly out of real estate, and this was ascertained when the bequest to the charity took effect; so that the legacy bequeathed was not apportionable, and, therefore, the gifts failed.—p. 168.

JESSEL, M.R. and LUSH, L.J., to the same effect.

Harris, In re (*supra*, col. 343), *explained*.

Watts, In re, Cornford r. Elliott (1885) 20 Ch. D. 947; 55 L. J. Ch. 332; 53 L. T. 426; 33 W. R. 885.—C.A.

COTTON, L.J.—*Harris, In re*, has really no bearing on the present case. Why? I was relied on by an expression by the late M.R. that the statute did not apply to an interest which did not directly affect land. To say that only a direct interest in land is hit by the statute, would contradict its terms, for it says nothing about the interest being direct. The distinction is that what is given is not an interest in land, merely because the donee may by some legal proceedings acquire an interest in land. An ordinary debt is not an interest in land, though the creditors can by proceedings at law attach the debtor's lands, and I think that the observations of the late M.R. were intended only to

apply to such a case as that, the case of a gift of something which by itself gives no interest in land. The decision does not bear on the present case. The justices of the peace there had no power to seize the land or give any interest in it, but only to demand payment from certain persons. The fact that those persons could levy on the land thus sums which they were called upon to pay could not make those sums a charge upon or interest in land. In *Tobson, In re*, a debt was bequeathed, and at the time when it came to be enforced it had become payable out of land, but that did not alter its original character of a personal debt. None of these cases require an unnatural construction of the words of the statute. Here the question we have to answer is whether the testator's interest was an interest in land or not. It would be introducing too great a refinement to say that it was not. *Brook v. Badley* (*supra*, col. 341) is a strong case in favour of the respondent, for there it could not be said that the charity could have laid hold of any land. Lord Cairns there said that the question was whether what was given was an interest in or charge on land. The second point, whether the charity is not entitled to an apportionment, is a nice point, but it is covered by *Drum v. Badley*, and though sometimes a decision of the C. A. is overruled, this is only to be done with great caution. I think, however, that the decision in that case was right.—p. 952. BAGGALLAY and FRY, L.JJ. concurred.

Watts, In re, Cornford v. Elliott, applied.

Miller v. Collins (1896) 65 L. J. Ch. 353; [1896] 1 Ch 573; 74 L. T. 122; 44 W. R. 466.—C.A. LINDLEY and A. L. SMITH, L.JJ., KAY, L.J. dissenting; reversing 73 L. T. 530.—STIRLING, J.

Ion v. Ashton (1860) 28 Beav. 379; 2 L. T. 686; 8 W. R. 578.—ROMILLY, M.R., and **Knapp v. Williams** (1798) 4 Ves. 430, n., *questioned*.

Christmas, In re, Martin v. Lacon (1886) 55 L. J. Ch. 878; 33 Ch. D. 332; 55 L. T. 197; 34 W. R. 779.—C.A.; reversing (1885) 54 L. J. Ch. 1164; 30 Ch. D. 544; 53 L. T. 530; 34 W. R. 8.—CHITTY, J.

COTTON, L.J.—As regards *Knapp v. Williams*, it may be said in the first place that it is not exactly known how it got to be where it is in the note, or who gave the report of it. The note is very short, and although it appears from the note that nothing was charged except the tolls paid on a turnpike road, it must not be forgotten that Lord St. Leonards stated in *Myers v. Perigal* (*supra*, col. 340) this: "Some of the authorities cited have gone considerable lengths, as, for instance, *Knapp v. Williams*, where there was the bequest of sums secured by a mortgage of turnpike tolls; but in that case it is to be observed that there was an actual assignment of the real property on which the tolls were secured; there was, therefore, something more than mere savouring of realty." If that was the fact, the decision could not have been otherwise, because, of course, a mortgage of land is undoubtedly an interest in land within the meaning of the statute. But we have not been able to find whether in fact that was so. Lindley, L.J. has looked at and I have looked at the passages in the Acts of 10 Geo. 1, c. vi., and 11 Geo. 2, c. vi., under which the mortgages were issued, but we have not been able to see the first

Act, 3 Geo. 1. And although we do find that the trustees have power to deal with some land and real estate which was vested in them, we cannot find whether these mortgages did in fact comprise real estate, as Lord St. Leonards thought they did. But even if they comprised the tolls only, what did Lord Loughborough, in his judgment in *Knapp v. Williams* say? He said: "From the nature of the interest created by the Act, these tolls granted in perpetuity are certainly a hereditament; it is in its nature an interest affecting land." Now that shows the ground on which he arrived at that decision; and even if the mortgages did not in fact comprise real estate, yet it may be that the tolls were so connected with the land that, in the opinion of Lord Loughborough, they might be considered as an incorporeal hereditament connected with land, and therefore a hereditament within the meaning of the statute. But he goes on to say: "There is another species of tolls which gives no right at all in the land." He there points, in my opinion, to what the "duties" are in the present case. In that case Lord Loughborough considered that tolls for the use of a turnpike road, and toll-houses which were vested in trustees and were kept out of the tolls, were so far connected with the land as to be an incorporeal hereditament within the statute. But that does not apply to the present case, where the duties are of a very different nature. The connection between the right to receive the tolls, and the repairing and keeping up of the road in that case, was very different from the connection which there is in the present case between the right to receive the duties and the obligation which is thrown upon the Commissioners. Then there is *Ion v. Ashton*, where a bequest of a sum of money charged on the tolls of a harbour was held void under the Statute of Mortmain; but the M.R. expressly decided that question upon the authority of *Knapp v. Williams*. It may be added that the dock tolls in that case were so connected with the land as to come within *Knapp v. Williams*; but if they were not so connected, I think he was wrong in deciding that the case was governed by *Knapp v. Williams*.

... There is another case which I will refer to, because, although it does not directly bear on the question of what would come within the statute, yet it points to the distinction upon which, I think, this case ought to be decided—I mean *Att.-Gen. v. Jones* (*supra*, col. 340), where the question was whether a large sum of money which had been paid under an Act of Parliament for the purchase of the Skerries Lighthouse, and the profits arising from the tolls thereof was to be considered as arising from land or not. The Act directed that the money arising from the sale should be invested in land, and therefore it would retain its position of land if what it arose from was land. And it was held that the lighthouse had the tolls so attached to and dependent upon it that the whole must be considered together as real estate. The distinction pointed out in that case by the L.C., and which agreed with that stated by Bayley, J. in *Rae v. Coke* [(1826) 5 L. J. M. C. 8; 5 B. & C. 797], which was a question of how a lighthouse should be rated, was as follows: "The question then is, the house being clearly real property"—that is, the lighthouse—"for there is no doubt about that, whether the privilege of receiving tolls on condition of keeping up the light is not an incident

or addition to the income and the profit arising from the house, or whether it is a totally distinct and independent franchise, which in that case would be personality and not realty." And he decided that, as this particular lighthouse had to be kept in repair, and the right to receive the tolls was only an incident to the lighthouse being kept up and being maintained by the person obtaining the tolls, the right to receive the tolls was inseparably connected with the title and use of the house, and they must be regarded as realty. But he points out that there might be merely a personal franchise not so connected with any land, nor with the use of any land, as to be simply personality.—p. 883. LINDLEY and LOPES, L.JJ. concurred.

Gardner v. L. C. & D. Ry. (*supra*, col. 341), *followed*.

Yerbury's Estate, *In re*, Ker v. Dent (1889) 62 L. T. 55.—CHITTY, J. *And see post*, col. 348.

Gardner v. L. C. & D. Ry. *applied*.

Hallett, *In re*, Howarth v. Massey (1889) 5 Times L. R. 285.—NORTH, J. *And see post*, col. 350.

Knapp v. Williams and Christmas, In re, Martin v. Lacon (*supra*), *discussed and applied*.

Gardner v. L. C. & D. Ry. *distinguished*.

David, *In re*, Buckley v. Royal National Lifeboat Institution (1889) 59 L. J. Ch. 87; 43 Ch. D. 27; 62 L. T. 141; 38 W. R. 162.—C.A.; *affirming*, 58 L. J. Ch. 542; 41 Ch. D. 161.—NORTH, J.

COTTERIDGE, C.J.—Now that case [*Knapp v. Williams*] has been certainly open to the observations that have been made upon it by several judges who noticed it, and especially by . . . Cotton, L.J. in *Christmas, In re*, in which he goes at some length into the case, and expresses his view upon the case, but which does not appear to me, on the present argument, to express any decided opinion. If *Knapp v. Williams* is binding upon us, then there seems to be clearly an end of this case, . . . because the apparent meaning of *Knapp v. Williams*—subject, I quite admit, to the difficulties pointed out by my learned brother in his commentary in *Christmas, In re*—was that bonds not distinguishable from those in the present case were held to be within the Statute of Mortmain. But the case is interesting because Lord Loughborough draws the distinction (a distinction which I suppose is perfectly well established) that there are two sorts of toll—that there is a toll so intimately connected with the possession of land, and so entirely bound up with land and arising out of land, that the mortgage or grant of such a toll would be within the Statute of Mortmain; and the other, a toll clearly severable from the possession of land, and not arising out of its possession, which would not be within the Statute of Mortmain.—p. 89.

COTTON, L.J.—That case [*Gardner v. L. C. & D. Ry.*] entirely differs from the present case; because here there is power to charge generally the undertaking of this harbour; but to do so in this manner is to charge—what was in the view of the legislature I do not know—the particular sums of money arising from that undertaking; and in the direction which is given as to the application of this general fund, which comprised, as Mr. Vaughan Hawkins pointed out, certain sums of

money which came into the trustees' chest, the first direction is to pay the interest on these debentures, which is entirely different from the directions contained in the Railway Act, and entirely inconsistent with the views of the C. A. and which Turner, L.J. took, with reference to the directions contained in the Railway Acts. . . . In *Christmas, In re*, we came to the conclusion that the sum of money which was charged there was a sum of money in no way connected with the use of the land, that it was a sum to be paid by all the masters of ships who came within certain limits, not in any way using the land, and the payment was in no way connected with the use of the land. It could not be said, therefore, that the right to receive that was any interest in land.—pp. 91—92.

FRY, L.J.—*Knapp v. Williams and Christmas, In re*, have drawn and approved a distinction between two kinds of tolls, the one which is not connected with the land so as to make it an incorporeal hereditament; the other which is so connected with the land as to make it an incorporeal hereditament. Now, whether that distinction was rightly drawn in the particular case of *Knapp v. Williams* with regard to the particular tolls, is entirely immaterial for the purpose of our present inquiry. It is enough that the decisions which are binding upon us have drawn that distinction, and that compels us to inquire to which of the two kinds of tolls do the tolls in question belong.—p. 93.

See now Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

Walker v. Milne (*supra*, col. 341); **Gardner v. L. C. & D. Ry.** (*and see post*, col. 350); **Attree v. Howe** (*supra*, col. 341); **Holds-worth v. Davenport** (*supra*, col. 341); and **Chandler v. Howell** (*supra*, col. 341), *applied*.

Yerbury's Estate, In re, Ker v. Dent (*supra*, col. 347), *approved*.

David, In re, distinguished.

Parker, *In re*, Wignall v. Park [1891] 1 Ch. 682; 60 L. J. Ch. 195; 64 L. T. 257; 39 W. R. 346.

STIRLING, J., after referring to the earlier cases, said: It is to be observed that in *Walker v. Milne*, *Gardner v. L. C. & D. Ry.*, and *Attree v. Howe* all the judges rely on this—that a different construction of the security would enable the mortgagee to break up and destroy that which was intended by the legislature to be maintained as a going concern. The headnote to the report of *Attree v. Howe* [9 Ch. D. 337] says that *Chandler v. Howell* was overruled. It was not, however, expressly overruled; and the learned counsel for the appellants say in their argument: "*Chandler v. Howell* might well stand with a reversal of the present decision." The C. A. did, however, expressly approve the decision in *Walker v. Milne*; and it is, I think, to be inferred from the judgment that their lordships approved of the decision of Malins, V.-C. in *Holds-worth v. Davenport*. . . . As regards *David, In re*, it is to be observed that the mortgage there in question contained an assignment simply of the several rates, tolls, rents and other moneys arising and accruing by virtue of the Acts. There was no assignment of the undertaking nor anything equivalent to such an assignment; there was, therefore, wanting that

which formed the basis of the judgments in *Walker v. Milne*, *Gardner v. L. C. & D. Ry.* and *Attree v. Howe*. It was held that under these circumstances the mortgage created a specific charge on certain tolls which formed part of the subject matter of the security.—p. 691.

Attree v. Howe, principle applied.

David, in re, referred to.

Thompson, *In re*, Bedford v. Teal (1890) 59 L. J. Ch. 689; 45 Ch. D. 161; 63 L. T. 471; 89 W. R. 50.—C.A. COTTON, BOWEN and FRY, L.J.; reversing (1889) 59 L. J. Ch. 249; 61 L. T. 671; 38 W. R. 249.—STIRLING, J.

Thompson, in re, Bedford v. Teal, distinguished.

Holmes, *In re*, Holmes v. Holmes (1890) 60 L. J. Ch. 267; 63 L. T. 477.

KAY, J.—What Cotton, L.J. in effect says is, that the bond was one which, according to the true construction, charged merely the surplus of the borough fund after the other matters which had to be satisfied out of the fund were so satisfied. Whether all the reasoning in that case satisfies people's minds or not, of course this Court is bound by it in a similar case. Here there is not a charge on the borough fund or anything of the kind. The charge is on the city rate and the land of the corporation, as provided by the Act of Parliament. It is no answer to that to say, that there are certain things which are in the first instance to be paid out of the rents, which might or might not exhaust them.—p. 270. *And see post*, col. 350.

Attree v. Howe, discussed and applied.

Pickard, *In re*, Emsley v. Mitchell (1894) 64 L. J. Ch. 92; [1894] 3 Ch. 704; 7 R. 479; 71 L. T. 658.—C.A. LINDLEY, LOPES and DAVEY, L.J.; affirming 42 W. R. 375.—NORTH, J.

DAVEY, L.J.—I lay aside cases like *Ashworth v. Mann* (*supra*, col. 342), because those do not relate to the securities of a corporation of this description. *Ashworth v. Mann* related to the interest of a partner in a common law partnership, as to which different considerations arise. . . .

Taking this view of the case [that the debenture stock was a charge only on the fruits of the undertaking], it is unnecessary for us to express any decided opinion upon the point which was very much argued before us, whether *Finch v. Squire* (*supra*, col. 343) . . . has or has not been overruled, or, if it has not been overruled, whether it ought to be overruled. In the view which I have expressed of this case, I do not think that that question applies, because *Finch v. Squire* must be regarded as a case in the second category to which I have referred—namely, as a case in which there was a specific charge on specific property. But, as the point has been mentioned, I will just say this, that the reasoning of Sir W. Grant in *Finch v. Squire* seems to be of rather a refined character; and probably *Finch v. Squire* would not be decided as it was at the present day. On the other hand, I think it is scarcely right to say that it was overruled by *Attree v. Howe*, because, in my opinion, the decision in *Attree v. Howe* does not touch cases of the class represented by *Finch v. Squire*.—pp. 96–97.

See also the judgments of the other L.J.J.

Gardner v. L. C. & D. Ry., (*supra*, col. 341), discussed.

Cluff v. Cluff (1876) 2 Ch. D. 222; 24 W. R. 632.—HALL, V.-C., followed.

Hallett, in re, Howarth v. Massey (*supra*, col. 347), commented on.

Crossley, *In re*, Birrell v. Greenhough (1897) 66 L. J. Ch. 558; [1897] 1 Ch. 928; 76 L. T. 419; 45 W. R. 615; 61 J. P. 390.

KEKEWICH, J.—I venture to think that that case [*Gardner v. L. C. & D. Ry.*] is extremely important, but has been much misunderstood. The real meaning of that case in reference to this branch of the law is to be found in two or three words of Davey, L.J. in *Pickard, in re* (*supra*, col. 349), where he says: "They [that is, Turner, L.J. and Lord Cairns in *Gardner v. L. C. & D. Ry.*] in substance said this: 'Whatever may be the words used, it is a charge only on the fruits of the undertaking.' And that it is in effect precisely what Lord Cairns said in his celebrated judgment in *Gardner v. L. C. & D. Ry.*, as to the fruit-bearing tree. . . . There was no charge on the land, and in fact *Gardner v. L. C. & D. Ry.* is a distinct decision, that the debentures were not a charge on the surplus land. *Attree v. Howe*, therefore, dealing with debenture stock, is not of so much value as otherwise it might be. . . . The case [*Cluff v. Cluff*] ought not to have been reported, because there was no argument; nor, so far as I can make out, was there any one there to argue on behalf of the Freeholders' Charities. I suppose that the learned judge and the learned counsel thought that the point was not worth serious argument, and therefore the charities were not served, or it may be that the charities had an opportunity of appearing, and did not think fit to appear. It is an unsatisfactory decision, but it is an expression of judicial opinion, and I find it thus cited in Tudor's Charitable Trusts (3rd ed.) at p. 409: "It has also been held that Metropolitan Board of Works Consolidated Stock cannot be bequeathed to a charity—*Cluff v. Cluff*." . . . I do not think that I could decline to follow that unless I were satisfied that it were wrong, and that there were other decisions inconsistent with it. But I turn to the decision of Kay, J. in *Holmes, in re*, *Holmes v. Holmes* (*supra*, col. 349). I do not think that is precisely the same case, or that it has a direct bearing, but still I think the substance of his judgment is in accordance with that of Hall, V.-C. in the other case. *Attree v. Howe* and *Gardner v. L. C. & D. Ry.* were cited to Kay, J., but he did not proceed upon either of those cases, but on the principle that it was a charge on land. That case seems to me to be against the view that I am asked to take, that this sum of stock is pure personality. Then, besides that, I have *Hallett, in re, Howarth v. Massey*, before North, J. I confess that, as that case is stated in the Times Law Reports, it seems to me to be inconsistent with the decision of North, J. himself, affirmed by the C. A. in *Pickard, in re*, but there the stock in question was Leicester Corporation Three-and-a-Half per cent. Redeemable Stock, apparently not being a direct charge on land except as being the property of a corporation; and North, J. held that he was bound by numerous cases to hold that it was a charge on the land.—p. 560.

COALS.

Meredith v. Holman (1847) 16 M. & W. 798; 16 L. J. Ex. 126, *followed*.
Smith v. Wood (1889) 59 L. J. Q. B. 5; 24 Q. B. D. 23; 61 L. T. 870; 38 W. R. 138; 54 J. P. 324.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**

Roberts v. Woodward (1890) 59 L. J. M. C. 129; 25 Q. B. D. 412; 63 L. T. 200; 38 W. R. 770.—**POLLOCK, B. and SMITH, J., distinguished.**

Franklin v. Godfrey (1891) 63 L. J. M. C. 239; 10 R. 523; 43 W. R. 46.—**MATHEW and KENNEDY, JJ.**

COLONY.

LEGISLATIVE ASSEMBLY.—CONTEMPT.

Beaumont v. Barrett (1836) 1 Moore P. C. 59.—P.C. **SHADWELL, V.-C., PARKE, B., BOSANQUET and ERSKINE, JJ., overruled.**
Kielley v. Carson (1843) 4 Moore P. C. 63; 7 Jur. 137.

PARKE, B. (for self, **LYNDHURST, L.C., LORDS BROUGHAM, DENMAN, ABINGER, COTTENHAM and CAMPBELL, SHADWELL, V.-C., TINDAL, C.J., ERSKINE, J. and SIR S. LUSHINGTON**).—Their lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their lordships delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every legislative assembly, was not the only ground on which that judgment was rested, and, therefore, was in some degree extra-judicial; but besides, it was stated to be and was founded entirely on the *dictum* of Lord Ellenborough in *Burdett v. Abbott* [(1811) 14 East, 137. See "PARLIAMENT"], which *dictum* we all think cannot be taken as an authority for the abstract proposition, that every legislative body has the power of committing for contempt. The observation was made by his lordship, with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further. We all think, therefore, that the opinion expressed by myself in *Beaumont v. Barrett* ought not to affect our decision in the present case, and there being no other authority on the subject, we decide according to the principle of the common law, that the House of Assembly have not the power contended for.—p. 91.

Beaumont v. Barrett, commented on.

Kielley v. Carson, followed.

Fenton v. Hampton (1859) 11 Moore P. C. 347; 6 W. R. 341.—P.C. **POLLOCK, G.B., KNIGHT BRUCE, L.J., T. PEMBERTON LEIGH and TURNER, L.J.**

Beaumont v. Barrett, held overruled.

Kielley v. Carson and Fenton v. Hampton, approved.

Doyle v. Falconer (1866) 36 L. J. P. C. 34; L. R. 1 P. C. 328; 4 Moore P. C. (N.S.) 203; 15 W. R. 866.—P.C. **LORD WESTBURY, SIR J. COLVILLE and SIR E. V. WILLIAMS.**

Kielley v. Carson and Doyle v. Falconer, approved.

Barton v. Taylor (1886) 11 App. Cas. 197; 55 L. J. P. C. 1; 55 L. T. 158.—P.C.

LORD SELBORNE (for self, **LORDS BLACKBURN, MONKSWELL and HOBHOUSE and SIR R. COUCH**).—The nature, grounds and limits of that power (which undoubtedly exists) [i.e., the inherent power in every colonial legislative assembly to protect itself against obstruction, interruption or disturbance of its proceedings by the misconduct of any of its members in the course of those proceedings] have been several times considered at this board, especially in *Kielley v. Carson* and *Doyle v. Falconer*. It results from those authorities that no powers of that kind are incident to or inherent in a colonial legislative assembly, without express grant, except, "such as are necessary to the existence of such a body, and the proper exercise of the functions it is intended to execute" [4 Moore P. C. 88]. Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes protective and self-defensive powers only, and not punitive, are necessary. If the question is to be elucidated by analogy, that analogy is rather to be derived from other assemblies, not legislative, whose incidental powers of self-protection are implied by the common law, although of inferior importance and dignity to bodies constituted for purposes of public legislation, than from the British Parliament, which has its own peculiar law and custom, or from Courts of record, which have also their special authorities and privileges recognised by law. "If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House while sitting, he may be removed or excluded for a time, or even expelled . . . The right to remove for self-security is one thing, the right to inflict punishment is another. . . . If the good sense and conduct of the members of colonial legislatures prove insufficient to secure order and decency of debate, the law would sanction the use of that degree of that force which might be necessary to remove the person excluded from the place of meeting, and to keep him excluded." These words were used by Sir J. Colville, when delivering the judgment of this tribunal in *Doyle v. Falconer*, and their lordships adopt them. It does not, however, appear to be a just inference from the expressions "excluded for a time" and "to keep him excluded," that a power to exclude a member, and to keep him excluded for a length of time unlimited, or limited only by the discretion of the assembly, was considered in *Doyle v. Falconer*, or ought, on sound principles, to be now held by their lordships to be necessary to the existence of such a body or to the proper exercise of its functions.—p. 203.

Barton v. Taylor, distinguished.

Fielding v. Thomas (1896) 65 L. J. P. C. 103; [1896] A. C. 600; 75 L. T. 216.—P.C.

HALSBURY, L.C. (for self, **LORDS HERSHELL, WATSON, MACNAGHTEN, MORRIS, DAVEY and SIR R. COUCH**).—The authorities summed up in *Burdett v. Abbott*, and followed in the case of the *Sheriff of Middlesex* [11 A. & E. 273], establish beyond all possibility of controversy the right of the House of Commons of the United Kingdom to protect itself against insult and

violence by its own process without appealing to the ordinary Courts of law and without having its process interfered with by those Courts (p. 107). . . . No statute was there [*Barton v. Taylor*] relied on, but the legislative assembly itself in that case had, in pursuance of statutory powers, adopted certain standing rules or orders for the orderly conduct of the business of the assembly. The trespasses complained of were adjudged by this board not to be justifiable under the standing orders. It was then sought to justify the acts in question as being within a power incident to or inherent in a colonial legislative assembly. This Board refused to adopt that contention. . . . Their lordships are here dealing with a civil action, and they think it sufficient to say that the legislature could relieve members of the House from civil liability for acts done and words spoken in the House, whether they could or could not do so from liability to a criminal prosecution. No such question as that which arose in *Barton v. Taylor* arises here.—p. 109.

LEGISLATIVE POWERS.

L'Union St. Jacques de Montreal v. Béliele

(1874) L. R. 6 P. C. 31; 31 L. T. 111; 22 W. R. 933.—P.C. LORD SELBORNE, SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER, *approved*
Dow v. Black (1875) 44 L. J. P. C. 52; L. R. 6 P. C. 272; 32 L. T. 274; 23 W. R. 637.—P.C. SIR J. COLVILLE, JAMES and MELLISH, L.J.J. and SIR M. SMITH.

Dyke v. Walford (1846) 5 Moore P. C. 434; 12 Jur. 839.—P.C.; *approved*, Att.-Gen. (Ontario) v. Mercer (1883) 52 L. J. P. C. 84; 8 App. Cas. 767; 49 L. T. 812.—P.C. SELBORNE, L.C., SIR B. PEACOCK, SIR M. SMITH, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE; *referred to*, Higginson and Dean. In re. Att.-Gen., *Ex parte* (1898) 68 L. J. Q. B. 198; [1897] 1 Q. B. 325; 79 L. T. 873; 47 W. R. 285; 5 Manson 289.—WRIGHT and DARLING, J.J.; Barnett's Trusts, In re (1902) 71 L. J. Ch 408; [1902] 1 Ch. 847; 86 L. T. 346; 50 W. R. 681.—KEKEWICH, J.

Att.-Gen. (Ontario) v. Mercer (*supra*), *discussed and followed*, St. Catharine's Milling and Lumber Co. v. Reg. (1888) 58 L. J. P. C. 54; 14 App. Cas. 46; 60 L. T. 197.—P.C. EARL OF SELBORNE, LORDS WATSON and HOBHOUSE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COUCH; *applied*, Att.-Gen. (Brit. Columbia) v. Att.-Gen. (Canada) (1889) 58 L. J. P. C. 88; 14 App. Cas. 295; 60 L. T. 712.—P.C. HALSBURY, L.C., LORDS WATSON, FITZGERALD, HOBHOUSE and MACNAGHTEN.

Att.-Gen. (Ontario) v. Att.-Gen. (Dominion of Canada)

(1894) 63 L. J. P. C. 59; [1894] A. C. 189; 6 R. 409; 70 L. T. 538.—P.C. HENSCHALL, L.C., LORDS WATSON, MACNAGHTEN and SHAND, and SIR R. COUCH, *explained*.

Att.-Gen. (Canada) v. Att.-Gen. (Ontario, &c.) (1898) 67 L. J. P. C. 90; [1898] A. C. 700.—P.C. (*post*, col. 364).

St. Catherine's Milling and Lumber Co. v. Reg. (*supra*), *followed*.

Att.-Gen. (Canada) v. Att.-Gen. (Ontario, &c.) (*supra*), *affirmed*.

Ontario Mining Co. v. Seybold (1902) 72 O.C.

L. J. P. C. 5; [1908] A. C. 73; 87 L. T. 449.—P.C. HALSBURY, L.C., LORDS MACNAGHTEN, DAVEY, ROBERTSON and LINDLEY.

Citizens' Insurance Co. of Canada v. Parsons

(1881) 51 L. J. P. C. 11; 7 App. Cas. 96; 45 L. T. 721.—P.C. SIR B. PEACOCK, SIR M. SMITH, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE, *approved and distinguished*.

Dobie v. Temporalities Board (1881) 51 L. J. P. C. 26; 7 App. Cas. 136; 46 L. T. 1.—P.C. LORDS BLACKBURN and WATSON, SIR B. PEACOCK, SIR M. SMITH, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE. *And see* col. 355.

Citizens' Insurance Co. of Canada v. Parsons,

discussed, Russell v. Reg. (1882) 51 L. J. P. C. 77; 7 App. Cas. 829; 46 L. T. 889.—P.C. SIR B. PEACOCK, SIR M. SMITH, SIR R. COLLIER, SIR J. HANNEN and SIR R. COUCH; *followed*, Bank of Toronto v. Lambe (1887) 56 L. J. P. C. 87; 12 App. Cas. 575; 57 L. T. 377.—P.C. LORDS HOBHOUSE and MACNAGHTEN, SIR B. PEACOCK, SIR R. BAGGALLAY and SIR R. COUCH.

Russell v. Reg. and Citizens' Insurance Co. of Canada v. Parsons, *explained and approved*.

Hodge v. Reg. (1883) 53 L. J. P. C. 1; 9 App. Cas. 117; 50 L. T. 301.—P.C.

LORD FITZGERALD (for self, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE).—The appellants contended that the legislature of Ontario had no power to pass any Act to regulate the liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the provincial legislature, by sect. 91 of the British North America Act, 1867; and that it did not come within any of the classes of subjects assigned exclusively to the provincial legislatures by sect. 92. The class in sect. 91 which the Liquor Licence Act, 1877, was said to infringe was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell v. Reg.* was conclusive that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the provincial legislature. It appears to their lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the C. A. The sole question there was, whether it was competent to the Dominion Parliament, under its general powers to make laws for the peace, order and good government of the dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several provinces of the dominion, or to such parts of the provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority, under sect. 91, unless the subject fell within some one or more of the classes of subjects which by sect. 92 were assigned exclusively to the legislatures of the provinces. It was in that case contended that the subject of the Temperance Act properly belonged to No. 13 of sect. 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the provincial legislature, and it was on what seems to be a misapprehension

of some of the reasons of this Board in observing on that contention that the appellant's counsel principally relied. These observations should be interpreted according to the subject-matter to which they were intended to apply. Their lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that "Laws of this nature designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada." And again: "What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law." And their lordships' reasons on that part of the case are thus concluded: "The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subjects to which it really belongs. In the present case it appears to their lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects 'Property and Civil Rights' within the meaning of sub-sect. 13." It appears to their lordships that *Russell v. Reg.*, when properly understood, is not an authority in support of the appellant's contention, and their lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and *Citizens' Insurance Co. v. Parsons* illustrate is, that subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.—p. 5.

Hodge v. Reg. (supra), referred to.
Maritime Bank of Canada v. New Brunswick (Receiver-General) (1892) 61 L. J. P. C. 75; [1892] A. C. 437; 67 L. T. 126.—P.C. LORDS WATSON, HOBHOUSE, MACNAGHTEN and MORRIS, SIR R. COUCH and LORD SHAND.

Russell v. Reg. (supra) and *Toronto Municipal Corporation v. Virgo* (1895) 65 L. J. P. C. 4; [1896] A. C. 88; 73 L. T. 449.—P.C. LORDS WATSON, MACNAGHTEN, MORRIS and DAVEY and SIR R. COUCH, *followed*.

Citizens' Insurance Co. v. Parsons (supra), distinguished.

Dobie v. Temporalities Board (supra), col. 354, principle applied.

Att.-Gen. (Ontario) v. Att.-Gen. (Dominion of Canada) (1896) 65 L. J. P. C. 26; [1896] A. C. 348; 74 L. T. 533.—P.C. HALSBURY, L.C. LORDS HERSHELL, WATSON and DAVEY and SIR R. COUCH.

Att.-Gen. (Ontario) v. Att.-Gen. (Dominion of Canada), *followed*.

Att.-Gen. (Manitoba) v. Manitoba Licence Holders' Association (1901) 71 L. J. P. C. 28; [1902] A. C. 73; 85 L. T. 591; 50 W. R. 431.—

P.C. LORDS HOBHOUSE, MACNAGHTEN, DAVEY, ROBERTSON and LINDLEY.

Canadian Pacific Ry. v. Notre Dame de Bonsecours Parish (1899) 68 L. J. P. C. 54; [1899] A. C. 367; 80 L. T. 434.—P.C. HALSBURY, L.C. LORDS WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND and DAVEY, *distinguished*.

Madden v. Nelson and Fort Sheppard Ry. (1899) 68 L. J. P. C. 148; [1899] A. C. 626; 81 L. T. 276.—P.C.

HALSBURY, L.C. (for self, LORDS WATSON and MACNAGHTEN, SIR E. FRY and SIR H. STRONG).—It was [there] decided that, although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed, that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company, unless they create such and such works upon their roadway. That is manifestly and clearly beyond the jurisdiction of the provincial legislature.—p. 149.

For duties in respect of highways see "WAY."

BUILDER (LIABILITY).

Brown v. Laurie (1851) 1 Low. Can. Rep. 343, *adopted*.

Wardle v. Bethune (1872) 41 L. J. P. C. 1; L. R. 4 P. C. 33; 26 L. T. 81; 20 W. R. 374; 8 Moore P. C. (N.S.) 223.

SIR J. NAPIER (for self, SIR J. COLVILLE, SIR J. STUART and SIR M. SMITH).—The code, it is true, did not come into operation until the 1st of August, 1866, after the commencement of the action; but the articles referred to are declaratory, and in part, expressly founded on *Brown v. Laurie*, which was decided in 1851 by the Superior Court at Montreal, affirmed on appeal by the Court of Queen's Bench in 1854, and has since been considered to be the leading case on this branch of Canadian law. Mr. Lloyd contended that this authority, although binding on the Courts of Lower Canada, was open to review, and ought to be reviewed by this board. But their lordships are of opinion that a case decided so long ago by judges eminently conversant with the law of the country, and that has since been incorporated into the civil code, is not open to be reviewed on this appeal. . . . Their lordships are of opinion that *Brown v. Laurie* is a conclusive authority against the proposition that the work having been done according to the terms of the contract and under the superintendence of an architect selected by the employer, the builder is exempted from the liability which would otherwise attach to him. . . . It is important, moreover, to keep in mind that the authorities which exonerate the builder from responsibility for a breach of the warranty, when he acts under the guidance of an architect, are set aside by *Brown v. Laurie*, on account of the importance of protecting property and life, which

makes it strictly reasonable to maintain the responsibility of architect and builder alike.
—pp. 6—9.

CHINA SETTLEMENTS.

Ince v. Thorburn (1886) 55 L. J. P. C. 19; 11 App. Cas. 180; 54 L. T. 849.—P.C. HERSCWELL, L.C., LORDS BLACKBURN and ROBHOUSE, *discussed*.
Shanghai Municipal Corporation v. McMurray (1900) 69 L. J. P. C. 19; (1900) A. C. 206; 82 L. T. 101.—P.C. LORDS ROBHOUSE, MORRIS and DAVEY and SIR R. COUGH.

COLONIAL CHURCH.

Long v. Cape Town (Bishop) (1863) 1 Moore P. C. (N.S.) 411.—LORD KINGSDOWN, DR. LUSHINGTON, SIR E. RYAN and SIR J. COLERIDGE; and **Natal (Bishop)**, *In re* (1864) 3 Moore P. C. (N.S.) 116; 11 Jur. (N.S.) 353; 12 L. T. 188; 13 W. R. 549.—P.C. WESTBURY, L.C., LORDS CRANWORTH and KINGSDOWN, SIR J. ROMILLY and DR. LUSHINGTON, *considered*.

Natal (Bishop) (*or* Colenso) v. Gladstone (1866) 36 L. J. Ch. 2; L. R. 3 Eq. 1; 12 Jur. (N.S.) 971; 15 L. T. 465; 15 W. R. 29.

ROMILLY, M.B., after discussing the cases said: The effect therefore of these decisions is, as it appears to me, that though they have established that the letters-patent cannot create new ecclesiastical tribunals, or introduce into the colonies any of the ecclesiastical tribunals which subsist in this country, they have also established that every exercise of ecclesiastical authority, and every act of any member of the church in such colony professing to be a part of the Church of England, must in matters spiritual be governed by the laws of the Church of England, and must be tried by the application of those laws.—p. 24.

Long v. Cape Town (Bishop); Natal (Bishop); In re; and Natal (Bishop) v. Gladstone, *discussed*.

Jenkins, *Ex parte* (1868) 38 L. J. P. C. 6; L. R. 2 P. C. 258; 5 Moore P. C. (N.S.) 351; 19 L. T. 583; 17 W. R. 502.—P.C. LORD CHELMSFORD, SIR J. COLVILLE, SIR E. V. WILLIAMS and SIR R. PHILLIMORE.

Long v. Cape Town (Bishop), *approved*.
Brown v. Montreal Curé and Churchwardens (1874) 44 L. J. P. C. 1; L. R. 6 P. C. 157; 31 L. T. 555; 23 W. R. 184.

SIR R. PHILLIMORE (for self, LORD SELBORNE, SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER).—*In Long v. Cape Town (Bishop)*, their lordships said: "The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that, where any religious, or other lawful association, has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequences of such violation, the decision of such tribunal will be binding when

it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice." Their lordships will bear in mind these principles in the judgment which they are about to pronounce.—p. 13.

COMPENSATION.

Bagg v. Montreal (Mayor) (1875) 19 Low. Can. Jur. 136, *approved*.

Morrison v. Montreal Corporation (1877) 47 L. J. P. C. 21; 3 App. Cas. 148.—P.C. SIR B. PEACOCK (for self, SIR J. COLVILLE, SIR M. SMITH and SIR R. COLLIER).—It was contended on behalf of the respondents that, in order to maintain an action upon the ground of error on the part of the commissioners in respect of the amount of the indemnity, it must be shown that the award of the commissioners was erroneous with reference to the evidence which was adduced before them. It has, however, been held in the C. A. in Canada in *Bagg v. Montreal (Mayor)*, and also in the present case, one learned judge only dissenting, that whenever it can be shown that the commissioners have arrived at a wrong conclusion with respect to the value of the property or the amount of compensation, the party expropriated is entitled to maintain an action to obtain an augmentation of the indemnity. Their lordships are clearly of opinion that this is the proper construction of the statute.—p. 24.

Jones v. Stanstead, Sheffield and Chambley Ry. (1872) 41 L. J. P. C. 19; L. R. 4 P. C. 98; 8 Moore P. C. (N.S.) 312; 26 L. T. 456; 20 W. R. 417.—P.C. SIR J. COLVILLE, SIR R. PHILLIMORE, SIR M. SMITH and SIR R. COLLIER, *approved*.

Montreal Corporation v. Drummond (1876) 45 L. J. P. C. 33; 1 App. Cas. 384; 35 L. T. 106.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER.

Jones v. Stanstead, &c. Ry., *distinguished*.
Parkdale Corporation v. West (1887) 12 App. Cas. 602; 56 L. J. P. C. 66; 57 L. T. 602.—P.C. LORD MACNAGHTEN (for self, LORD ROBHOUSE, SIR B. PEACOCK and SIR R. COUGH.—Mr. Jeune . . . contended that their lordships were bound by that decision to hold that in the present case compensation was not a condition precedent. Their lordships consider that *Jones v. Stanstead, &c. Ry.* is not an authority for that contention. The circumstances of that case were very peculiar. The appellant, who was the plaintiff in the action, was the owner of a bridge over the river Richelieu, which had been built under the powers of an Act of Parliament, and had certain privileges and a sort of statutory monopoly within certain defined limits. Within those limits, under the powers of their Act, the railway company constructed a railway bridge: The plaintiff complained of the construction and use of the railway bridge as an invasion of his rights, and brought an action for the demolition of that bridge, which was said to be the proper mode of claiming damages in such a case. On appeal the plaintiff's case was mainly founded on the authority of *Reg. v. Cunliffe Ry.* [(1871) 40 L. J. Q. B. 169; L. R. 6 Q. B. 422. See "LANDS CLAUSES ACT"] which was supposed to be distinguishable from *Hammer Smith Ry. v.*

Brand [(1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171. See "RAILWAY"], but which was afterwards overruled in *Hopkins v. G. N. Ry.* [(1877) 46 L. J. Q. B. 265; 2 Q. B. D. 224. See "LANDS CLAUSES ACT"]. . . . It was pointed out in the judgment that it was not the construction of the railway bridge, but the use of it when constructed for the conveyance of traffic, which injuriously affected the privilege of the appellant, and gave him, if at all, the right to compensation, and their lordships expressed their opinion that it was not a reasonable construction of the statute under consideration to imply as a condition precedent that compensation must be paid for such consequential injuries before doing the work. And the appeal was consequently dismissed. Their lordships do not consider that this decision conflicts with the opinion they have expressed in the present case.—pp. 614, 615.

Parkdale Corporation v. West, followed.

North Shore Ry. v. Pion (1899) 59 L. J. P. C. 25; 14 App. Cas. 612; 61 L. T. 525.—P.C.

EARL OF SELBORNE, LORDS WATSON, BRAMWELL, HOBHOUSE AND SIR R. COUCH. See judgment, where the cases on the subject are discussed.

CROWN LANDS.

O'Shanassy v. Joachim (1876) 45 L. J. P. C. 19; 1 App. Cas. 82; 34 L. T. 265; 24 W. R. 792.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND SIR R. COLLIER; and *Barton v. Muir* (1874) 44 L. J. P. C. 19; L. R. 6 P. C. 184; 31 L. T. 593; 23 W. R. 427.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, SIR J. STUART, SIR M. SMITH AND SIR R. COLLIER, *distinguished*.
Tooth v. Power (1891) 60 L. J. P. C. 39; [1891] A. C. 284; 64 L. T. 698.—P.C.

LORD WATSON (for self, HALSBURY, L.C., LORDS HOBHOUSE, MACNAGHTEN, MORRIS AND FIELD).—Their lordships do not doubt that under those enactments [Crown Lands Alienation Act, 1861, and Lands Acts Amendment Act, 1875,] an infant of maturer years might personally apply for and complete a conditional purchase of Crown land. Nor do they question the authority of the colonial cases which were before this Board in *O'Shanassy v. Joachim*, in which very young children were held to have become purchasers, they residing with their parents upon the selection, and the parent making improvements and paying the purchase-money by way of advancement to them. It is quite consonant with legal principle that what is done in the name and in the interest of an infant by one who stands *in loco parentis* shall be held to have been done by the infant himself, so as to constitute compliance with the Act sufficient to create a valid interest in him; but it does not follow that what is done by a stranger, in name of an infant, for his own behoof, and with no intention of benefiting the infant, can be regarded as fulfilment by the latter of the statutory conditions. . . . The circumstances of the present case differ so widely from the facts with which this Board had to deal in *Barton v. Muir* as to render it unnecessary to enter upon a critical examination of the reasons assigned for its decision. In that case the defendant was of full age, and all the conditions prescribed by the Act were performed by him voluntarily and personally, and not by another

individual under cover of his name. Their lordships think it right to add that although, for obvious reasons, *Barton v. Muir* was relied on as an authority absolutely binding upon them by both parties at the bar, yet it would have been their duty had the necessity arisen, to consider for themselves whether the decision is one which they ought to follow. It was given *ex parte*; and that being the case, although great weight is due to the decision of this Board, their lordships are "at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law." These are the words used by Earl Cairns when delivering the judgment of the Board in *Ridsdale v. Clifton* [(1877) 46 L. J. P. C. 27; 2 P. D. 276. See "ECCLESIASTICAL LAW"], which contains a full exposition of the law upon this point.—p. 43.

Colless v. Minister for Lands (N. S. Wales)

(1898) 68 L. J. P. C. 9; [1899] A. C. 90; 79 L. T. 505.—P.C. LORDS WATSON, HOBHOUSE AND DAVEY AND SIR H. STRONG, *followed*.

Minister for Lands (N. S. Wales) v. Harrington (1899) 68 L. J. P. C. 60; [1899] A. C. 408; 80 L. T. 604.—P.C. HALSBURY, L.C., LORDS WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND AND DAVEY.

CUSTOMS.

Graham v. Pocock (1870) 39 L. J. P. C. 88; L. R. 3 P. C. 345; 6 Moore P. C. (N.S.) 152; 23 L. T. 527; 19 W. R. 31.—P.C. LORD CAIRNS, SIR J. COLVILLE AND SIR J. NAPIER, *approved and followed*.

Prince v. Reg. (1873) 43 L. J. P. C. 14; L. R. 5 C. P. 1; 30 L. T. 276; 22 W. R. 270.—P.C. SIR J. COLVILLE, SIR R. PHILLIMORE, SIR B. PEACOCK, SIR M. SMITH AND SIR R. COLLIER.

DONATIONS.

Hutchinson v. Gillespie (1884) 4 Moore P. C. 378.—P.C. LORD BROUGHAM, WIGRAM, V.-C., DR. LUSHINGTON AND MR. T. PIMBERTON LEIGH; and *Les Sœurs Hospitalières de St. Joseph v. Middlemiss* (1878) 47 L. J. P. C. 89; 3 App. Cas. 1102; 38 L. T. 899.—P.C. SIR J. COLVILLE, SIR B. PEACOCK AND SIR R. COLLIER, *approved*.

Symes v. Cuvillier (1880) 49 L. J. P. C. 54; 5 App. Cas. 138; 42 L. T. 198.—P.C.

SIR M. SMITH (for self, SIR J. COLVILLE AND SIR R. COLLIER).—Considering, then, that this ordinance enacts a new law on the point in question, it would not be of force in Canada unless it had been registered there. The appellants' counsel relied on the injunction of the ordinance requiring it to be obeyed "dans tout notre royaume, terres et pays de notre obéissance;" but a Royal Ordinance, published after the establishment of "Le Conseil Supérieur" in Canada by the Edict of 1663, did not take effect in that province, *proprio rigore*, until it was registered: *Hutchinson v. Gillespie, Les Sœurs Hospitalières de St. Joseph v. Middlemiss*.—p. 61.

EDUCATION.

Barrett v. City of Winnipeg (1892) 61 L. J. P. C. 58; [1892] A. C. 445; 67 L. T. 429.—P.C. LORDS WATSON, MACNAGHTEN,

MORRIS and HANNEN, SIR R. COUCH and LORD SHAND, *distinguished and explained*. Brophy v. Att.-Gen. of Manitoba (1895) 64 L. J. P. C. 70; [1895] A. C. 202; 11 R. 386; 72 L. T. 163.—P.C.

HERSCHLIL, L.C. (for self, LORDS WATSON, MACNAGHTEN and SHAND).—In *Barrett's Case* the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the province at the union. Their lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed, either by law or practice, was the right or privilege of establishing and maintaining for the use of members of their own Church such schools as they pleased. It appeared to their lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890.—p. 76.

INCOME TAX.

Tindal, In re (1897) 18 N. S. W. L. R. 378, *overruled*. Commissioners of Taxation v. Kirk (1900) 69 L. J. P. C. 87; [1900] A. C. 588; 83 L. T. 4.—P.C. HALSBURY, L.C., LORDS MACNAGHTEN, DAVEY, ROBERTSON and LINDLEY. *And see* "REVENUE."

MARRIAGE CONTRACT.

Jodoi v. Dufresne (1853) 3 Low. Can. Rep. 189, *referred to*. David v. Gagnon (1863) 14 Low. Can. Rep. 110, *approved*. Hamel v. Panet (1876) 46 L. J. P. C. 5; 2 App. Cas. 121; 35 L. T. 741.—P.C. LORD SELBORNE, SIR B. PEACOCK, SIR R. COLLIER and SIR J. HANNEN.

MALTA.

D'Amico v. Trigona (1888) 58 L. J. P. C. 20; 13 App. Cas. 806.—P.C. EARL OF SELBORNE, LORDS HOBHOUSE and MACNAGHTEN, SIR B. PEACOCK and SIR R. COUCH, *followed*. Trigona v. D'Amico (1891) 61 L. J. P. C. 8; [1892] A. C. 69.—P.C. EARL OF SELBORNE, LORDS HOBHOUSE and MORRIS and SIR R. COUCH.

MARTIAL LAW.

Elphinstone v. Bedreechund (or Berdachund) (1880) 1 Knapp F. C. 316.—P.C. LORD TENTERDEN, *followed*. Marais (D. F.) v. General Officer Commanding Lines of Communication (1901) 71 L. J. P. C. 42; [1902] A. C. 109; 85 L. T. 734; 50 W. R. 273.—P.C. HALSBURY, L.C., LORDS MACNAGHTEN, SHAND, DAVEY, ROBERTSON and LINDLEY and SIR H. DE VILLIERS.

PUBLIC OFFICERS.

Van Rooyen v. Reit (1838) 2 Moore P. C. 177.—LORD BROUGHAM, PARKE, B., BOSANQUET, J. and CH. JUDGE IN BKCY., *explained*. Palmer v. Hutchinson (1881) 50 L. J. P. C. 62; 6 App. Cas. 619; 45 L. T. 180.—P.C. SIR B. PEACOCK, SIR M. SMITH, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

Palmer v. Hutchinson, *distinguished*.

Hettihewage Siman Appu v. Queen's Advocate (1884) 53 L. J. P. C. 572; 9 App. Cas. 571; 51 L. T. 401.—P.C. LORD BLACKBURN, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

Appu v. Queen's Advocate, explained and limited.

Farnell v. Bowman (1887) 56 L. J. P. C. 72; 12 App. Cas. 643; 57 L. T. 318.—P.C.

SIR B. PEACOCK (for self, LORD HOBHOUSE, SIR R. BAGGALLAY and SIR R. COUCH).—Reference was also made by the learned judges below to some observations which were made in the Ceylon case of *Appu v. Queen's Advocate*, as if they were intended to lay down a universal principle that actions *ex delicto* cannot be brought against the Crown. But their lordships were speaking solely with reference to the law of Ceylon, as to which every one was agreed that there existed no practice of suing the Crown on torts, whereas there did exist a practice of suing on contracts. It was argued that certain words in an ordinance were to be excluded from application to any kind of suit by a subject against the Crown, because they were capable of application to actions on tort, which did not exist. It was in answering that argument that their lordships' observations were made, and it has no bearing whatever on the present controversy.—p. 76.

Farnell v. Bowman, referred to.

Straits Settlement Att.-Gen. v. Wemyss (1888) 57 L. J. P. C. 62; 13 App. Cas. 192; 58 L. T. 358.—P.C.

LORD HOBHOUSE (for self, LORDS WATSON, FITZGERALD, and MACNAGHTEN and SIR B. PEACOCK).—In *Farnell v. Bowman* attention was directed by this committee to the fact that in many colonies the Crown was in the habit of undertaking works which in England are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.—p. 64.

RATING.

Hanna v. Seymour Road Board (Victoria Case) (1865) 2 W. W. & A.B. 93, *approved*. Essenden Corporation v. Blackwood (1877) 45 L. J. P. C. 98; 2 App. Cas. 574; 36 L. T. 625; 25 W. R. 384.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER. *And see* "RATES and RATING."

RIVERS.

Boale v. Dickson (1863) 18 U. C. C. P. 337, *overruled*. Caldwell v. McLaren (1884) 53 L. J. P. C. 83; 9 App. Cas. 392; 51 L. T. 370.—P.C. LORD BLACKBURN, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

ROMAN CATHOLIC CHURCH.

Renouf, Ex parte (1845) 1 Rev. de Legislation, 310, *approved*. Verchères (Curé et Marguilliers) v. Corporation de Verchères (1875) 44 L. J. P. C. 34; L. R. 6 P. C. 330; 82 L. T. 178; 23 W. R. 712.—P.C.

SIR R. PHILLIMORE (for self, LORD HATHERLEY, SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER).—After this decision [*Ex parte Renouf*], it became impossible to deny that for certain purposes the consent of the parishioners was necessary, at all events in parishes in which there was not a custom to the contrary. But the principle upon which the decision is founded is important. It is clearly to the effect that in all questions of grave consequence affecting their parish the parishioners have a right to be consulted. This appears to their lordships to be the true doctrine derived from the reason of the thing and to be supported by the general analogies of the law relating to commons.—p. 38.

SCIRE FACIAS.

Reg. v. Clarke (1851) 7 Moore P. C. 77.—P.C. DR. LUSHINGTON, MR. T. PEMBERTON LEIGH, SIR J. JERVIS and SIR E. RYAN, commented on and explained.

Reg. v. Hughes (1860) 35 L. J. P. C. 23; L. R. 1 P. C. 81; 12 Jur. (N.S.) 105; 14 L. T. 808; 14 W. R. 441.—P.C.

LORD CHELMSFORD (for self, SIR J. COLVILLE and SIR E. V. WILLIAMS).—In the argument for the appellant, *Reg. v. Clarke* was relied upon. That was a proceeding in *scire facias* to annul a grant of Crown lands in New Zealand, where the judicial committee upon appeal recommended that judgment should be entered for the Crown. This, it was insisted, is an express decision that *scire facias* will lie although there is no record. In the judgment of the learned Chief Justice of the Supreme Court the case is treated as a conclusive authority in favour of the promoters of the *scire facias*. But it appears to their lordships that it cannot be properly regarded as a determination of the question. From the beginning to the end of that case there was nothing to raise any doubt as to the propriety of the proceeding by *scire facias*. No objection was taken to it in the colony. Not the slightest suggestion was offered upon the subject in the course of the argument upon the appeal. The hearing before the judicial committee was *ex parte*, the respondent not having appeared, and the attention of their lordships was not in any way called to the irregularity of the proceeding, in the validity of which they are supposed by their silence to have acquiesced. Even if the point occurred to their own minds they might very fairly have inferred, from the absence of all objection in the Supreme Court of New Zealand, that the proceeding by *scire facias* to annul grants of Crown land was proper in that colony, either from the grants being made records of the Court or from the judges having power to make rules as to the form and manner of proceeding, and having authorised the process of *scire facias* in the case of Crown grants.—p. 29.

VICTORIA.

Main v. Stark (1890) 59 L. J. P. C. 68; 15 App. Cas. 388; 63 L. T. 10.—P.C. EARL OF SELBORNE, LORDS WATSON, FIELD and SIR B. PEACOCK, referred to.

Reynolds v. Att.-Gen. for Nova Scotia (1896) 65 L. J. P. C. 16; [1896] A. C. 240; 74 L. T. 108.—P.C. LORDS WATSON, MORRIS and DAVEY, and SIR E. COUCH.

Musgrove v. Chun Teeong Toy (1891) 60 L. J. P. C. 28; [1891] A. C. 272; 64

L. T. 378.—P.C. HALSBURY, L.C., LORDS HOBHOUSE, HERSHELL, MACNAGHTEN and SHAND, SIR B. PEACOCK and SIR R. COUCH, referred to.

Poll v. Lord Advocate (1897) 1 Fraser 823.—COURT OF SESSION. See Commonwealth of Australia Act, 1900 (63 & 64 Vict. c. 12), s. 9. sub-s. 51 (xxv.).

WATER RIGHTS.

Brown v. Gagy (1863) 2 Moore P. C. (N.S.) 341; 3 N. R. 386; 10 Jur. (N.S.) 525; 10 L. T. 45; 12 W. R. 492.—P.C. *dismissed*.
Bell v. Quebec Corporation (1879) 49 L. J. P. C. 1; 5 App. Cas. 84; 41 L. T. 461.—P.C. SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER.

Miner v. Gilmour (1858) 12 Moore P. C. 131.—P.C.; and **Van Breda v. Silberbauer** (1869) 39 L. J. P. C. 8; L. R. 3 P. C. 84; 6 Moore P. C. (N.S.) 319; 22 L. T. 667; 18 W. R. 553.—P.C., *approved*.

French Hoek Commissioners v. Hugo (1885) 54 L. J. P. C. 17; 10 App. Cas. 336; 54 L. T. 92; 34 W. R. 18.—P.C. LORD BLACKBURN, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

Miner v. Gilmour, referred to.
Belfast Ropeworks Co. v. Boyd (1888) 21 L. R. Ir. 560.—C.A. ASHBOURNE, L.C., FITZGIBBON, BARRY and NAISH, L.J.J.; **Roberts v. Gwyrfai District Council** (1899) 68 L. J. Ch. 757; [1899] 2 Ch. 608; 81 L. T. 465; 48 W. R. 51.—C.A. LINDLEY, M. R., SIR P. FRANK and ROMER, L.J. *And see "WATER."*

Holman v. Green (1882) 6 Can. S. C. R. 707; 2 Cart. 147, *overruled on one point*.
Att.-Gen. (Canada) v. Att.-Gen. (Ontario, &c.) (1898) 67 L. J. P. C. 90; [1898] A. C. 700; 78 L. T. 697.—P.C. HALSBURY, L.C., LORDS HERSHELL, WATSON, MACNAGHTEN, MORRIS, SHAND and DAVEY, and SIR H. DE VILLIERS. *And see supra*, col. 353.

WILL.

Denysen v. Mostert (1872) 41 L. J. P. C. 41; L. R. 4 P. C. 236; 8 Moore P. C. (N.S.) 502; 20 W. R. 1017.—P.C. SIR J. COLVILLE, SIR M. SMITH and SIR R. COLLIER, *approved*.

Dias v. De Livera (1879) 49 L. J. P. C. 26; 5 App. Cas. 123; 42 L. T. 267.—P.C.

SIR R. COLLIER (for self, SIR J. COLVILLE, SIR B. PEACOCK and SIR M. SMITH).—The Supreme Court [of Ceylon] appear to have assumed that the mutual will of Don Adrian and Cornelia "spoke" from the death of the first dying, and that, even if Cornelia might, after the death of her husband, have revoked it, yet, as she did not, it operated from that date upon the whole of the joint property. Their lordships cannot assent to this view. A mutual will is, as was pointed out by this Board in *Denysen v. Mostert*, in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.—p. 52.

Simms v. Registrar of Probates (1900) 69 L. J. P. C. 51; [1900] A. C. 323; 82 L. T. 433.—P.C. HALSBURY, L.C., LORDS HOBHOUSE, MACNAGHTEN, MORRIS, DAVEY and ROBERTSON, *approved*.

Payne v. Ragem (1902) 71 L. J. P. C. 128; [1902] A. C. 552; 87 L. T. 84.—P.C. LORDS

MAGNAGHTEN, DAVEY, ROBERTSON and LINDLEY, SIR F. NORTH and SIR A. WILSON.

Martin v. Lee (1861) 14 Moore P. C. 142; 4 L. T. 657; 9 W. R. 522.—P.C. LORD CHELMSFORD, KNIGHT BRUCE, L.J., SIR E. RYAN and TURNER, L.J., *explained*.
McGibbon v. Abbott (1885) 54 L. J. P. C. 39; 10 App. Cas. 653; 54 L. T. 138.—P.C.

SIR B. PEACOCK (for self, LORDS WATSON, MONKSWELL and HOBHOUSE and SIR R. COUCH).—The doctrine of the English Courts of equity as to illusory or unsubstantial appointments under a power is not, and never was, any part of the old French law or of the law of Lower Canada, nor is it included in any of the Acts of chapter 4 of the Civil Code of Canada relating to substitutions. The question whether John could exclude any one of his children from a share must, in their lordships' opinion, be decided according to the law of Lower Canada, and not according to the English law. They do not understand *Martin v. Lee* as deciding that a will executed in Lower Canada by a person domiciled in Lower Canada, if written in English, must be interpreted with regard either to movable or immovable property in Lower Canada, according to the rules of English law, and have the same effect given to the phraseology as if that phraseology had been contained in a will executed in England by a person domiciled in England, or relating to land or other property in England. All that they understand that case to decide is that the word "children," used as it was in the will then to be interpreted, was not intended to have the more extensive meaning which may sometimes be given to the word "enfants" in the old French law. . . . It could never have been intended by their lordships to lay down a rule of construction which might render it necessary to apply the rule in *Shelley's Case* [(1811) 1 Co. Rep. 93] to a conveyance or devise written in the English language of lands in Lower Canada to a man for life, with a substitution "in favour of his heirs upon his death."—p. 4

Martin v. Lee, referred to.
Galliers v. Rycroft (1900) 69 L. J. P. C. 124 [1901] A. C. 130; 83 L. T. 179.—P.C. LORDS DAVEY, ROBERTSON and LINDLEY, SIR H. DE VILLIERS and SIR F. NORTH.

APPEAL TO PRIVY COUNCIL.

Christian v. Corren (1716) 1 P. Wms. 329.—P.C., *disapproved*.
Reg. v. Alloo Paroo (1847) 5 Moore P. C. 296.
LORD BROUQHAM (for self, LORD LANGDALE, DR. LUSHINGTON and T. PEMBERTON LEIGH).—*Christian v. Corren*, from the Isle of Man, really proves nothing. The argument is the argument of Mr. Peere Williams himself, for it is not the judgment of the Court. No doubt Peere Williams is a great authority as a reporter, a very learned person, and I believe a very accurate reporter he is generally allowed to be; but what he says there is no part of the judgment of the Court. He says, even if there be express words in the charter, excluding the right of the subject, those words shall not be held to deprive the subject of his common law right of appeal to the Crown, in order that justice may not fail. The Court, which was assisted in that case by Parker, C.J., in giving their judgment, proceeds upon no such ground. They only say, in this

case there is nothing to take away the general right of appeal, which is necessary to prevent a failure of justice. And Parker, C.J., in that case, observes that the Court of Chancery, even in the case of a proceeding of a copyhold Court, if anything were done against good conscience, would review it, and would direct that the Court should re-assemble for the purpose of acting more conscientiously. But it is certain that that case was not borne out by the judgment of the Court of Chancery, when an attempt was made in a case before Lord Jeffries, L.C. which had been very much considered at the Rolls by Mr. Sergeant Trevor, who was then M.R., and where such a power to interfere was wholly denied. *Ash v. Rogie* ((1685) 1 Vern. 367). It is quite unnecessary, however, to enter into that, because it is quite sufficient to observe, that the L.C.J., in granting that right of appeal which has been contended against, does not in the slightest degree bear out the generality of Mr. Peere Williams's argument.—p. 302.

Cuvillier v. Ayiwin (1832) 2 Knapp 72.—LEACH, M.R., *commented on*.

Marois, In re (1862) 15 Moore P. C. 189; 8 Jur. (N.S.) 268; 10 W. R. 326.—P.C. LORDS CHELMSFORD and KINGSDOWN, KNIGHT BRUCE, L.J., SIR E. RYAN, TURNER, L.J. and SIR J. COLBRIDGE.

Cuvillier v. Ayiwin, questioned.
Johnston v. St. Andrew's Church, Montreal (1877) 3 App. Cas. 159; 37 L. T. 556; 26 W. R. 359.—P.C. CAIRNS, L.C., SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER; and **Théberge v. Laundry** (1876) 46 L. J. P. C. 1; 2 App. Cas. 102; 35 L. T. 640; 25 W. R. 216.—P.C. CAIRNS, L.C., SIR B. PEACOCK, SIR R. COLLIER and SIR H. KEATING, *explained*.
And see col. 368.

Cushing v. Dupuy (1880) 49 L. J. P. C. 63; 5 App. Cas. 409; 42 L. T. 445.—P.C.

SIR M. SMITH (for self, SIR J. COLVILLE, SIR B. PEACOCK and SIR R. COLLIER).—The question in *Cuvillier v. Ayiwin* arose upon the Lower Canada Colonial Act (34 Geo. 3, c. 6), which enacted that the judgment of the Court of Appeal should be final in all cases under the value of 500*l.*, and an application for special leave to appeal in a case under that value was refused by a committee of the Privy Council. The remarks attributed to the M.R. in his judgment rejecting the petition are directed to one aspect only of the question—namely, the power of the Crown with the other branches of the legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it. In *Marois, In re* (*supra*), upon an application for leave to appeal from a judgment of the Court of Queen's Bench for Lower Canada, Lord Chelmsford, in giving the judgment of this Committee, after stating that in *Cuvillier v. Ayiwin* the very point was decided against the petitioner, said: "If the question is to be concluded by that decision, this petition

must be at once dismissed, but upon turning to the report of the case, their lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the M.B. is contained in a few lines; and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown." Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuivillier v. Aylwin* could be sustained or not, it is obvious that, at the least, they regard it as being open to review. In *Johnston v. St. Andrew's Church, Montreal*, upon an application for special leave to appeal against a judgment of the Supreme Court of Canada, the effect of the 47th section of the Act establishing that Court, which enacted that its judgment should be final and conclusive, saving any right which her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the L.C. in giving the judgment of this Committee, said: "Their lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a master of right is not continued, still that her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section." Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuivillier v. Aylwin*, where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the Crown. . . . It [*Théberge v. Landry*] was an application for special leave to appeal against a judgment of the superior Court of Quebec, upon an election petition, by which the applicant had been unseated by corrupt practices. By the Quebec Controversed Elections Act, 1875, the decision of controverted elections, which formerly belonged to the legislative assembly itself, was conferred upon the superior Court, and by sect. 90 of the Act it was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the superior Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject-matter, which concerned not merely ordinary civil rights, but rights and privileges always regarded as pertaining to the legislative assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the assembly to the superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council.—pp. 66, 67.

Cushing v. Dupuy (supra), followed.

Tennant v. Union Bank of Canada (1893) 63

L. J. P. C. 25; [1894] A. C. 31; 6 R. 382; 69 L. T. 774.—P.C. HERSCHILL, L.C., LORDS WATSON, HOBHOUSE, MACNAGHTEN, MORRIS and SHAND and SIR R. COUCH.

Johnston St. Andrew's Church, Montreal (supra), and Valin v. Langlois (1879) 49 L. J. P. C. 37; 5 App. Cas. 115, 41 L. T. 662.—P.C. LORD SELBORNE, SIR J. COOKE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER, applied.

Prince v. Gagnon (1882) 8 App. Cas. 103.—P.C. LORD FITZGERALD, SIR B. PEACOCK, SIR H. COUCH and SIR A. HOBHOUSE.

Théberge v. Landry (supra) and Valin v. Langlois, discussed.

*Kennedy v. Purcell (1888) 59 L. T. 279.—P.C. LORD HOBHOUSE (for self, LORD MACNAGHTEN, SIR B. PEACOCK and SIR R. COUCH).—Their lordships do not think that, for the present purpose, any useful or substantial distinction can be taken between the statutes which were respectively the subjects of discussion in *Théberge v. Landry* and *Valin v. Langlois* and those which are now in question. In all three cases there is the broad consideration of the inconvenience of the Crown interfering in election matters, and the unlikelihood that the colonial legislature should have intended any such result. In all three there is the creation of a special tribunal for the trials of petitions in the sense that the litigation was not left to follow the course of an ordinary lawsuit, but subjected to a special procedure and limitations of its own, and in all three there is the same expressions of the intention to make the colonial decision final. But such variance as there is between the two cited cases is only to this extent—that the Committee in the latter case must have thought that the question of the existence of the prerogative was still susceptible of argument, when the dispute went to the very root of the validity of a law passed by Parliament to take effect in a province. Their opinion on an *ex parte* hearing, and on the sole question whether or not there should be any further argument on the matter at all, cannot be put higher than that.—p. 280.*

Prince v. Gagnon (supra), considered.

'Cité de Montréal v. Séminaire de St. Sulpice de Montréal (1889) 59 L. J. P. C. 20; 14 App. Cas. 600; 61 L. T. 653.—P.C. LORDS WATSON and HOBHOUSE, SIR B. PEACOCK and SIR R. COUCH.

Théberge v. Landry, followed.

Moses v. Parker (1896) 65 L. J. P. C. 18; [1896] A. C. 245; 74 L. T. 112.—P.C. LORDS WATSON, HOBHOUSE, MACNAGHTEN and DAVEY and SIR R. COUCH.

Reg. v. Joy Kissen Mookerjee (1862) 1 Moore P. C. (N.S.) 272.—P.C., approved.
Falkland Islands Co. v. Reg. (1868) 1 Moore P. C. (N.S.) 299; 10 Jur. (N.S.) 807; 9 L. T. 103; 12 W. R. 220; 9 Cox C. C. 351.—P.C.

Falkland Islands Co. v. Reg., approved.
Dillet, in re (1887) 12 App. Cas. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241.—P.C. LORDS BLACKBURN, MONKSWELL and HOBHOUSE and SIR R. COUCH. And see post, col. 369.

Dillet, in re, approved.

Deeming, Ex parte [1892] A. C. 422.—P.C. HALSBURY, L.C., LORDS WATSON, HERSCHILL,

MACNAGHTEN, MORRIS and HANNEN, SIR R. COUCH and LORD SHAND.

Deeming, Ex parte (*supra*), *followed*.

Kops v. Reg. (1894) 64 L. J. P. C. 34; [1894] A. C. 650; 6 R. 523; 70 L. T. 890; 58 J. P. 668.
—P.C. HERSCHGILL, L.C., LORDS HOBHOUSE, MACNAGHTEN and MORRIS, and SIR R. COUCH.
See Commonwealth of Australia Constitution Act (43 & 64 Vict. c. 12), s. 73.

Dillet, In re (*supra*), *approved*.

Carew v. Crown Prosecutor in Japan (1897) 46 L. J. P. C. 95; [1897] A. C. 719; 77 L. T. 1.—P.C.

HALSBURY, L.C. (for self, LORDS HOBHOUSE and MORRIS, SIR R. COUCH, SIR J. DE VILLIERS and SIR H. STRONG).—The rule is accurately stated as follows in *Dillet, In re*. . . "Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."—p. 96.

Ram Sabuk Bose v. Monmohini Dossee (1874) L. R. 2 Ind. App. 71.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER, *approved*.

Mussocoe Bank v. Maynor (1882) 51 L. J. P. C. 72; L. R. 9 Ind. App. 70; 7 App. Cas. 321; 46 L. T. 633; 81 W. R. 17.—P.C. SIR B. PEACOCK, SIR R. COUCH and SIR A. HOBHOUSE. *And see* "WILL."

Rajunder Narian Rae v. Bijai Govind Sing (1839) 2 Moore Ind. App. 220; *and see* 1 Moore P. C. 117.—P.C.; and **Kisto Nanth Roy, Ex parte** (1869) 38 L. J. P. C. 21; L. R. 2 P. C. 274; 20 L. T. 333; 17 W. R. 521.—P.C. *approved*.

Maharajah Pertab Naran Singh v. Maharanee Subhao Koer (1878) L. R. 5 Ind. App. 171.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER.

Rajunder Narian Rae v. Bijai Govind Sing, *referred to*.

Venkata Narasimha Appa Row v. Court of Wards (1886) 11 App. Cas. 660.—P.C.

LORD WATSON (for self, LORD HOBHOUSE, SIR B. PEACOCK and SIR R. COUCH).—It is quite true that there may be exceptional circumstances which will warrant this board, even after their advice has been acted upon by her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases in which that may be competently done are explained by Lord Bringham in *Rajunder Narian Rae v. Bijai Govind Sing*. His lordship properly describes this privilege, when allowed, not as a right, but as an indulgence. At p. 184 of the first volume of Moore's Reports, his lordship says: "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard."—p. 663.

Mussumat Ameena Khatoor v. Radhabened Misser (1859) 12 Moore P. C. 470; 7 Moore Ind. App. 261.—P.C., *approved*.

Ponnamma v. Arumogam (1902) 71 L. J. P. C. 121; [1902] A. C. 561.—P.C. LORDS DAVEY and ROBERTSON, SIR A. SCOBLE and SIR J. BONSER.

COMMON.

PROFIT A PRENDRE.

Willingle v. Maitland (1866) 36 L. J. Ch. 61; L. R. 3 Eq. 103; 15 W. R. 83.—BOMILLY, M.R., *explained*.

Chilton v. London Corporation (1878) 7 Ch. D. 735; 47 L. J. Ch. 433; 38 L. T. 49; 26 W. R. 474.

JESSEL, M.R.—The right which Lord Touliday allowed in that case, which was heard on demurrer, was not a right in the inhabitants for their own benefit, but a right in the inhabitants as a corporation for the benefit of the poor of the parish, the right having been created by an alleged Crown grant, which was admitted for the purposes of the demurrer; but there is no such grant alleged here (p. 735). . . . Being therefore driven to see what *Willingle v. Maitland* decided—without attempting for a moment to say that I can or that I should wish to overrule it, it being decided by my predecessor in the year 1866—I must see what it did decide. Now what it decided was this, that a Crown grant to the inhabitants of a parish to take certain profits *à prendre* out of a royal manor was valid; and that the effect of the grant was to incorporate the inhabitants for the purpose of enabling them to exercise the rights. This is all *Willingle v. Maitland* decided.—p. 741.

Chilton v. London Corporation, *followed*.

Willingle v. Maitland, *decided*.

Gateward's Case (1607) 6 Co. Rep. 596; Cro. Jac. 152, *discussed*.

Constable v. Nicholson (1863) 32 L. J. C. P. 240; 14 C. B. (N.S.) 230; 16 W. R. 698.—C.P., *headnote corrected*.

Rivers (Lord) v. Adams (1878) 48 L. J. Ex. 47; 3 Ex. D. 361; 39 L. T. 39; 27 W. R. 381.

KELLY, C.B. (for the Court).—But the right claimed is a *profit à prendre* in the soil of another, and the authorities are uniform, from *Gateward's Case* to *Chilton v. London Corporation*, that such a custom is bad in law. See *Salby v. Robinson* [(1788) 2 Term Rep. 758] and *Constable v. Nicholson*; where other authorities are given. Many sound reasons are given in the authorities for this conclusion. It is only necessary to advert to some of those given in *Gateward's Case*. . . . That was not a case in which the inhabitants of a certain village generally claimed a *profit à prendre*, but the plea alleged that, by custom, all persons inhabiting any ancient messuages should, by virtue of their inhabitation, have a certain right of common. It was adjudged by all the justices that such custom was against law for several reasons. . . . The judgment in *Constable v. Nicholson* is correctly given in the headnote in the Law Journal Reports (except in the use by mistake of the word "easement" for "right") (p. 49). . . . We were much pressed

on behalf of the defendants with *Willingale v. Maitland*, but when that case is examined it has no bearing upon the exact question which is raised in the present case. . . . It is to be noticed that nothing whatever was granted to the inhabitants, neither land nor privilege of any sort: the only grant to the inhabitants was that the labouring poor should have the privilege as alleged, and under a grant from the Crown they may become a corporation, and ought to act as such for the purpose of performing this charitable trust. In the present case we are not dealing with a trust to be performed for the benefit of a limited body, but with the right of the inhabitants generally, and the case renders no assistance in considering without a grant to the inhabitants generally what ought to be presumed from user. The subsequent case of *Chilton v. London Corporation* . . . should be read in connection with the above case.—pp. 50, 51.

Gateward's Case, commented upon.

Rivers (Lord) v. Adams, discussed.
Goodman v. Saltash (Mayor) (1882) 52 L. J. Q. B. 193; 7 App. Cas. 633; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276.—H.L. (E.); reversing S. C. *nom.* *Saltash (Mayor) v. Goodman* (1881) 50 L. J. Q. B. 508; 7 Q. B. D. 106; 45 L. T. 120; 29 W. R. 639; 45 J. P. 844.—C.A. BRETT and COTTON, L.J.; BAGGALLAY, L.J. dissenting; which affirmed (1880) 49 L. J. C. P. 565; 5 C. P. D. 431; 42 L. T. 872; 44 J. P. 751.—GROVE and DENMAN, JJ.

SELBORNE, L.C. discussed a number of the earlier cases.

LORD BLACKBURN, who dissented from the majority, went very fully into the case.

LORDS WATSON and BRAMWELL to the same effect as the L.C.

LORD FITZGERALD, who also concurred, said: As to *Gateward's Case* I may say that I am no admirer of it, nor do I entirely appreciate its reasoning, or the wisdom of its conclusions. Probably if the same questions had arisen in the present time, unfettered by authority, it might be found very difficult to reach the same results. However that may be, we do not interfere with that case, or its authority, which is now well established in law. We leave it exactly as we found it.—p. 211.

Goodman v. Saltash (Mayor), applied.

Norwich Town Close Estate Charity, In re (1888) 40 Ch. D. 298; 60 L. T. 202; 37 W. R. 362.—C.A. COTTON, LINDLEY and BOWEN, L.J.; reversing 57 L. J. Ch. 358; 26 W. R. 853.—KEKEWICH, J.

Goodman v. Saltash (Mayor), discussed.

Christchurch Inclosure Act, In re (1888) 57 L. J. Ch. 564; 38 Ch. D. 520; 58 L. T. 827.—C.A.; affirmed, *nom.* Att.-Gen. v. Meyrick (1892) 62 L. J. Ch. 313; [1893] A. C. 1; 1 R. 54; 68 L. T. 174; 57 J. P. 212.—H.L. (E.). HERSCHELL, L.C., LORDS WATSON, MORRIS and FIELD.

LINDLEY, L.J. (for self, COTTON and BOWEN, L.J.).—Had it not been for the decision of the H. L. in *Goodman v. Saltash (Mayor)* we should have felt great difficulty in holding this trust to be a charitable trust. For, although the occupiers of these cottages may have been, and probably were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not. Moreover, the

trust is not for the inhabitants of a parish or district, but only for some of such persons. The trust is for a comparatively small and tolerably well-defined class of persons. The class consists of all the then and future occupiers of the cottages; and there may be several occupiers of one cottage. The class, however, though limited, is, as to its members, uncertain, and is liable to fluctuation, and the trust for the class is perpetual. This being the case, we are unable to distinguish this case from the trust which both Lord Selborne and Lord Cairns held to be a charitable trust, and therefore valid, in *Goodman v. Saltash (Mayor)*.—p. 569.

Att.-Gen. v. Meyrick and Reg. v. Inclosure Commissioners (1871) 23 L. T. 778.—Q.B., distinguished.

Simcoe v. Pethick [1898] 2 Q. B. 555; 67 L. J. Q. B. 919; 79 L. T. 432.—C.A.

A. L. SMITH, L.J.—There [*Att.-Gen. v. Meyrick*] lands, which originally belonged to the lord of the manor were allotted to him as trustee for the commoners. A railway having taken the land the question was as to the application of the purchase-money which was paid into Court. The H. L. held . . . that the lord of the manor held the land which had been allotted to him upon a trust, and that trust not exhausting the beneficial interest in the land, subject to it the lord had the beneficial interest. The grounds of the decision are concisely summed up by Lord Watson, who said: "Having regard to the position of these parties, and the intention of the legislature as appearing from the language of the Act, I am satisfied that the trust created by sect. 13 does not take away the whole beneficial interest of the lord of the manor, but merely constitutes a right of turbarry as a burden upon that in trust."—p. 562.

RIGBY, L.J.—In *Att.-Gen. v. Meyrick*, so far from the legal estate being taken away from the lord, the land in question, which originally belonged to him, was allotted to him on trust to allow the same to be used as a turf common for the occupiers of certain cottages, who, being a fluctuating body, were not capable of taking a conveyance of any interest in the lands. So also in *Reg. v. Inclosure Commissioners* the legal estate in the land in question clearly remained vested in the lord of the manor. . . . In this case the question is in whom the legal estate is vested.—p. 563. V. WILLIAMS, L.J. concurred.

RIGHT OF COMMONER TO DISTRAIN.

Hall v. Harding (1769) 1 W. Bl. 678; 4 Burr. 2426.—MANSFIELD, C.J., followed.

Cape v. Scott (1874) L. R. 9 Q. B. 269; 43 L. J. Q. B. 65; 30 L. T. 87; 22 W. R. 326.

BLACKBURN, J.—In *Hall v. Harding* cattle of a commoner had been distrained *damage feasant* by another commoner, and it was alleged that the owner of the cattle distrained had surcharged by putting on an excessive number of cattle; it was held that the distress could not be maintained, because a commoner must not take the remedy into his own hands where the cattle are on the common under a colour of right. At the end of the judgment the Court stated that "upon the whole the right of distress seemed to turn upon this, that wherever there is a colour of right for putting in the cattle, a commoner cannot distrain, because it would be judging for himself in a question that depends upon a

more competent inquiry. But where the cattle are put upon the common without any colour or pretence of right, the commoner may distrain them, and therefore he may distrain the cattle of a stranger." We think this doctrine binding upon us.—p. 274.

QUAIN and ARCHIBALD, JJ to the same effect.

ABATEMENT OF BUILDINGS.

Morewood v. Wood (1791) 4 Term Rep. 157.

—KENYON, C.J., *questioned*.

Perry v. Fitzhove (1846) 15 L. J. Q. B. 239; 8 Q. B. 757; 10 Jur. 799.—Q.B., *distinguished*.

Davies v. Williams (1851) 20 L. J. Q. B. 330; 16 Q. B. 546; 15 Jur. 752.

PATTESSON, J.—*Morewood v. Wood* is very much shaken, if not overruled, by *Macwell v. Martin* (1830) 8 L. J. (O.S.) C. P. 174; 6 Bing. 522.—p. 384.

WIGHTMAN, J.—In the present case there is an express allegation both of notice and request, which we think distinguishes this case from that of *Perry v. Fitzhove*, which was decided wholly upon a question as to the validity of pleas which omitted those most important allegations.—p. 386.

Perry v. Fitzhove, *followed*.

Jones v. Jones (1892) 31 L. J. Ex. 506; 1 H. & C. 1; 8 Jur. (N.S.) 1132.—BRAMWELL, B. (for the Court).

Perry v. Fitzhove, *explained*.

Davies v. Williams, *approved*.

Baten's Case (1611) 9 Co. Rep. 53 b, *discussed*.

Lane v. Capsey (1891) 61 L. J. Ch. 55; [1891] 3 Ch. 411; 65 L. T. 375; 40 W. R. 87.

CHITTY, J.—The respondents rely on *Perry v. Fitzhove* as showing conclusively that where a house is inhabited, as these houses are, the right of abatement does not exist; but though *Perry v. Fitzhove* at first sight also appears to be an authority for such a proposition, yet it is certain that in *Davies v. Williams* (where some of the same judges who decided *Perry v. Fitzhove* were again present) it was decided that the right to pull down a house which was a nuisance by obstructing a common right of common does exist, notwithstanding the fact that the house was inhabited, where, before proceeding to exercise the common law right of abatement, the commoner had given proper notice to those in the house, and had requested them to remove it; and the judgment there says that the case was distinguishable from *Perry v. Fitzhove* on the ground of notice and request to the occupier, and that there was nothing to take the case out of the general rule that a commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right as fully as he might otherwise, provided he does no unnecessary damage. . . . Another point argued for the respondents was, that there cannot be any right of abatement in the existing circumstances, because the applicants failed to obtain a mandatory injunction; and for that they referred to *Baten's Case*, the substance of which is, that if a party aggrieved has himself abated the nuisance, he could not have the actions which he then might have brought for the purpose of obtaining an abatement through the medium of the Court; and it was said to follow from this, that if the Court had refused the remedy in the first instance,

then the right to abate did not exist. I leave that point open, and only add that I am not satisfied that this inversion of the proposition as stated in *Baten's Case* is justified according to law, and though I do not mean to prejudice it, I will merely say that the reason given in the report of *Baten's Case* why, after abatement, a man shall not pursue his remedy by writ, is that the nuisance, when it is abated, is gone; but where the Court has declined to apply the special equitable remedy of a mandatory injunction, it does not follow as a mere matter of course that the right to abatement is gone. I leave that question unprejudiced, that it may be discussed in the right way and at the right time.—p. 57.

APPROVEMENT.

Lake v. Plaxton (1854) 24 L. J. Ex. 52; 10 Ex. 196.—EX.; and **Lascelles v. Ouslow** (Lord) (1877) 46 L. J. Q. B. 333; 2 Q. B. D. 433; 36 L. T. 459; 25 W. R. 465.—

MELLOR and LUSH, JJ., *considered*.

Robertson v. Hartopp (1889) 59 L. J. Ch. 553; 43 Ch. D. 484; 62 L. T. 585.—C.A.

PRY, L.J. (for self, COTTON and BOWEN, L.J.J.).—This is an action on behalf of all the commoners. The measure of the common which should be left for all ought, we think, according to sound reason, to be that amount which will be sufficient for the enjoyment of all then existing rights, if such rights are to be fully enjoyed. . . . But two cases were pressed upon us as inconsistent with this conclusion. One was *Lake v. Plaxton*, where it was held that the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on a question of sufficiency of common in a case where no deer had been turned on the waste for upwards of twenty years. The ground of this decision is not very clearly stated in the judgment: it may, perhaps, have turned on the peculiar nature of the Crown right. If otherwise, the case is one which may require further consideration. In *Lascelles v. Ouslow* (Lord) the Court held that the fact that, notwithstanding the inclosures complained of, there had been sufficient pasture for the average number of animals which had for the last ten years at least been turned out, was evidence that the inclosures had not interfered with the rights of the commoners. The case, perhaps, proceeds upon the view that in the absence of any other evidence, the actual user of the common for the last ten years might be regarded as some evidence of the extent of the rights of the commoners, and in that point of view the case may be correct. But some of the language or reasoning in the judgment appears to us open to criticism, and if the case goes beyond the view above suggested, we doubt whether it can be maintained. Neither of these cases was determined in the C. A., and there appears to be no earlier precedent for the novelty which, according to the argument of the appellants, has been introduced into the law of common by these cases.—p. 566.

RIGHTS OF LORD.

Geo v. Cother (1662) Shl. 106; 1 Keb. 390, 453, *commented on*.

Filewood v. Palmer (1729) Moseley 169.—KING, L.C.; and **Arlett v. Ellis** (1827) 7 B. & C. 346; 9 D. & R. 897; (1829) 9 B. & C. 671; 5 L. J. (O.S.) K. B. 391; 31 R. R. 214, 281, *referred to*.

Hall v. Byron (1877) 46 L. J. Ch. 297; 4

Ch. D. 667; 36 L. T. 367; 25 W. R. 317.

—HALL, V.-C. (who discussed the authorities), *followed*.

Beauchamp (Earl) v. Winn (or Wynn) (1873)

L. R. 6 H. L. 223; 22 W. R. 193.—

H.L. (E.). LORDS CHELMSFORD, COLON-

SAY and O'HAGAN; *affirming* (1869) 38

L. J. Ch. 556; L. R. 4 Ch. 562.—SELWYN

and GIFFARD, L.J., *principle applied*.

Robinson v. Duleep Singh (1879) 11 Ch. D. 798;

48 L. J. Ch. 758; 39 L. T. 313; 27 W. R. 21.

FRY, J.—With regard to the digging of gravel,

it is said that that is not within the Statute of

Merton, because the space is not inclosed. But

assuming that to be so, and very probably the

plaintiff is right in that contention, it remains

to be considered whether the lord may not dig

gravel, provided he does not interfere with the

substantial rights of the commoners. Now that

point has been the subject of adjudication. It

has been dealt with by Hall, V.-C. in *Hall v.*

Byron. The V.-C. then laid down the law thus:

"The law I consider to be that the lord may take

gravel, marl, loam, and the like, in the waste, so

long as he does not infringe upon the commoners'

rights, his right so to do being quite independent

of the right of approvement under the Statute of

Merton or at common law, and existing by reason

of his ownership of the soil, subject only to the

interests of the commoners. Bayley, J., in *Arlett*

v. Ellis, said, 'The lord has rights of his own

reserved upon the waste; I do not say sub-

servient to, but concurrent with, the rights of

the commoners. He has a right to stock the

common, and to every benefit to be derived from

the soil, not inconsistent with the rights of com-

moners. And, when it is ascertained that there

is more common than is necessary for the cattle

of the commoners, the lord, as it seems to me, is

entitled to take that for his own purposes.'" In

this very case, when it was before the C.A.,

James, L.J., seems to have taken the same view.

There is, further, *Filewood v. Palmer*, which

seems to show that Lord King, the L.C. of that

day, took the same view with regard to the rights

of the lord as to digging for brick-earth. Un-

doubtedly there is an *obiter dictum* of Windham,

J. in *Geo v. Cutler*, where he says: "The lord

may not dig pits in the common into which the

beasts of the commoners may fall." But that is

a mere *obiter dictum*, and is to be found only in

Siderfin's Report, and not in any other report of

the case.—p. 831.

The first instrument in the lease of the 5th of

November, 1866, which demises "all their"

(that is the Dean and Chapter's) "warren of

conies at Lakenheath, in the county of Suffolk,

as it is there marked out and described by its

proper metes, boundaries, and borders." My

first inquiry is this, by what principle ought I to

regulate myself in construing the words which I

have read? *Beauchamp (Earl) v. Winn* has

been relied on by both sides as furnishing a principle

of construction in favour of their respective

contentions. Lord Coke says, in a passage which

was cited in that case, that as the words *stagnum*

and *gurgies* pass the soil, "so it is of a forest,

park, chase, vivary and warren on a man's own

ground, by the grant of them, not only the

privilege, but the land itself passes, for they are

compound." Now it is to be observed that in

this lease there is not the word "warren" *sim-*

pliciter, but the words are "warren of conies,"

and it is no doubt more difficult to construe the

words "warren of conies," as passing the soil,

than it is so to construe the word "warren"

itself. Lord Colonsay made this observation:

"We have now to consider whether, as here

introduced, it" (that is, the word "warren")

"did or did not carry the soil. If it was a name de-

scriptive of a particular piece of land, and was so

known as descriptive of that piece of land, it might

carry it. It might be 'coney warren of Bromby,'

meaning that piece of land known as the coney

warren of Bromby. It would certainly carry

the soil if the word 'land' had been introduced.

Such a term as 'that cow park,' or any other

description of that kind, might carry a certain

piece of soil, but it does not follow from that

that a 'warren of conies' would carry it. That

is a very different thing." And Lord O'Hagan

in the same case said: "The authorities are very

few, and seem to me to result clearly in this,

that the term 'warren' may, under certain cir-

cumstances, and in certain collocations, be held

to pass the soil, and in others it may not." From

these passages and from the whole of the case, I

conclude that I ought to look at two things in

the construction of this instrument. I must first

inquire what was the ordinary meaning and

understanding of the expression "warren of

conies at Lakenheath" at the time when the

instrument was executed, and for that purpose I

must look at the antecedent usage in the neigh-

bourhood among the persons who were concerned

in or conversant with the property in question,

and then I must undoubtedly look at the whole

context and frame of the instrument in which

the words occur.—p. 833.

INCLOSURE.

Bromfield v. Kirber (1706) 11 Mod. 72.—

HOLT, C.J., *approved*.

Boulcott v. Winnill (1809) 2 Camp. 261;

11 R. R. 710.—ELLENBOROUGH, C.J., *dis-*

sented from.

Commissioners of Sewers v. Glasse (1874) 44

L. J. Ch. 129; L. R. 19 Eq. 134; 31 L. T. 495;

23 W. R. 102.

[JESSEL, M.R. said that he thought *Boulcott v.*

Winnill was a collusive action.—p. 132.]

JESSEL, M.R.—I was pressed very much with

a judgment, which I conceive is not very well

reported—of Holt, C.J.—in *Bromfield v. Kirber*.

... As I understand it, the L.C.J. there means

to affirm that doctrine [that common of vicinage

is confined to two commons]. He says: You

cannot go into a third common. At all events,

I hold that to be the law, and it is so stated, as

far as I am aware, in every book on the subject,

although there is a mistake in Comyns' Digest

[5th ed. vol. iii. p. 71], who puts in the words

"or more," which seems to be copied into some

of the text books. It appears to me that that is

the true state of the law. There was great in-

convenience about this common of vicinage, and

I conceive that there is no reason whatever for

extending it. Then, again, there is another

doctrine of common of vicinage. No doubt it

sprang from a very old case in Dyer 47, sect. 18,

upon which one judge said one thing and

another judge said another; but still the *dictum*

of the one judge was adopted, and the *dictum* of

the other judge was repudiated by the great

text writers since; that is, that if you have three

villages, each of which has a common, A., B. and C., and village B. lies between A. and C., village B. may intercommon either with A. or C., but with A. cannot intercommon with C. If that is the law, as I apprehend it is, it is quite clear that the end parish in this case could by no means intercommon with the parish at the other end (pp. 139, 140). . . . One cannot help seeing that these inclosures began after the decision . . . *Boulcott v. Winnill*, under the notion that if you bought up the rights of the Crown in the land so disafforested, there was an end to whatever right of common there had previously existed, and consequently the lord, in right of his soil, with the consent of his copyholders, who had other rights of common besides their right of pasturage, might inclose at his will and pleasure; and that, I think, has been the origin of the inclosures which have given rise to this suit.—p. 141.

Boulcott v. Winnill, approved.

Ramsey v. Cruddas (*post*, col. 379).

Farrer v. Billing (1818) 2 B. & Ald. 171.—

ABBOTT, C.J., *distinguished*.

Greathead v. Morley (1841) 10 L. J. C. P. 246; 3 Mun. & G. 139; 8 Scott (N.R.) 538.—TINDAL, C.J.

Greathead v. Morley, questioned.

Ewart v. Graham (1859) 29 L. J. Ex. 88; 7 H. L. Cas. 331; 5 Jur. (N.S.) 773; 7 W. R. 621.—H.L. (R.) with the JUDGES; *affirming* S. C. *nom.* *Graham v. Ewart* (1856) 26 L. J. Ex. 97; 1 H. & N. 550; 3 Jur. (N.S.) 163.—EX. CH. *which reversed* (1855) 25 L. J. Ex. 42; 11 Ex. 326.—EX.

WIGHTMAN, J. (for all the JUDGES, except WILLES, J.).—With respect to *Greathead v. Morley*, it is to be observed that the terms of the saving clause were in many respects so different from that now in question that it may, upon that ground, be capable of being distinguished from this; but even if it were not, we do not feel bound by that as an authority, as it and the reasoning contained in it are open to many objections.—p. 90.

CAMPBELL, L.C. said that great stress had been placed on *Greathead v. Morley*, and he did not desire to say that that case had not been well decided. It was unnecessary for him to do so, for he thought it clearly distinguishable. The language there was strictly confined to manorial enclosures; but here there was an absolute, unqualified and express reservation of the right of hunting, and shooting and fowling.—p. 90. LORD BROUGHAM concurred.

LORD CRANWORTH, in concurring, said that either *Greathead v. Morley* was distinguishable or it was wrongly decided.

LORD WENSLYDALE, who also concurred, said he only doubted whether this case was to be distinguished from *Greathead v. Morley*; but if it could not, he was prepared to say that that case was wrongly decided.—p. 91.

Ewart v. Graham, *distinguished*.

Bruce v. Helliwell (or *Hellewell*) (1860) 29 L. J. Ex. 297; 5 H. & N. 609; 2 L. T. 292.—EX.

Ewart v. Graham, followed.

Leconfield (Lord) v. Dixon (1867) 37 L. J. Ex. 33; L. R. 3 Ex. 30; 17 L. T. 288; 16 W. R. 157.—EX. CH.; *reversing* 36 L. J. Ex. 102; L. R. 2 Ex. 202; 16 L. T. 18; 15 W. R. 807.—EX.

Ewart v. Graham, adopted.

Musgrave v. Forster (1871) 40 L. J. Q. B. 207; L. R. 6 Q. B. 590; 24 L. T. 614; 19 W. R. 1141.—BLACKBURN, J. (for the Court).

Greathead v. Morley, held not overruled.

Ewart v. Graham, discussed.

Bruce v. Helliwell, distinguished.

Sowerby v. Smith (1874) 43 L. J. C. P. 290; L. R. 9 C. P. 524; 31 L. T. 309; 23 W. R. 79.—EX. CH. CLEASBY and POLLOCK, B.B. *dissenting*; *affirming* (1873) 42 L. J. C. P. 293; L. R. 8 C. P. 514.—C.P. HONYMAN, J. *dissenting*.

Sowerby v. Smith, approved and followed.

Leconfield (Lord) v. Dixon, commented on *Devonshire* (Duke) v. O'Connor (1890) 24 Q. B. D. 468; 59 L. J. Q. B. 206; 62 L. T. 917; 38 W. R. 420; 54 J. P. 740.—C.A.

ESHER, M.R.—The leading case, in my opinion, as to the rule of construction of such Acts is that of *Sowerby v. Smith*, which is a decision of a Court of co-ordinate jurisdiction with this Court; unless, therefore, there is something in the present case which prevents the application of the rule there laid down, the principles of the judgment in that case are binding upon us. . . . We have there a plain rule of construction, that inasmuch as the whole question depends upon the reservation clause, which is in derogation of the right of freehold given by the Act to the allottees of the land inclosed, that clause and any reservation contained in it must be construed most strictly against the lord of the manor. . . . Now is there any case which lays down a contrary rule? It is said that *Leconfield* (Lord) v. Dixon does so, and if that be so, we must say which of the two we agree with. If those cases are in conflict, it seems to me that the one lays down a clear and distinctly expressed rule of construction, whereas the other lays down no rule of construction at all, and I should, therefore, under such circumstances, prefer to follow *Sowerby v. Smith*. But if *Leconfield* (Lord) v. Dixon can be distinguished from *Sowerby v. Smith*, it ought, under such circumstances, to be distinguished. As to *Leconfield* (Lord) v. Dixon, I may say that if I had had to consider it after *Sowerby v. Smith*, and therefore to apply to it the rules of construction to be found in *Sowerby v. Smith*, I doubt whether I could have held that the reservation was sufficiently clear according to the rule laid down. But I do not desire to dissent from *Leconfield* (Lord) v. Dixon, which I think may be brought within the rule. . . . Now the words upon which the Ex. Ch. decided that case are not found in *Sowerby v. Smith*, nor are they to be found in the Act which we are now construing. I think, therefore, that *Leconfield* (Lord) v. Dixon may fairly be held to come within the class of cases in which the right, although not expressly reserved, is reserved by necessary implication, and that therefore it falls within one of the rules laid down in *Sowerby v. Smith*. As to *Ewart v. Graham* I entertain no doubt; although the right was not reserved in express terms, the language used raises a necessary implication of the reservation. . . . In that case the early case of *Greathead v. Morley* was considered, and the H. L. held that the decision in that case was not overruled; we must therefore consider the decision in *Greathead v. Morley*. Now, although in that case the rule is not laid down in such distinct terms as in *Sowerby v. Smith*, it seems

to me that the same rule is in effect laid down,—pp. 473—476.

FRY, L.J.—I shall not advert to the authorities beyond saying that I adopt the conclusion arrived at in the Court of Ex. Ch. in *Sowerby v. Smith*, as laying down the law for us to follow. If there be a difference between that case and *Leonfield (Lord) v. Dixon*, I do not hesitate to say that I prefer the reasons and the views expressed in *Sowerby v. Smith*. I think that that case does lay down a very clear, intelligible, and reasonable rule of construction, which is *prima facie* the rule of construction to be applied to these Inclosure Acts. I may further say that *Bruce v. Helliwell* creates in my mind no difficulty: it is, I think, entirely consistent with the rule of construction laid down in *Sowerby v. Smith*.—p. 479. BOWEN, L.J. concurred.

Devonshire (Duke) v. O'Connor, followed.

Eccroyd v. Coulthard [1898] 2 Ch. 358; 67 L. J. Ch. 458; 78 L. T. 702.—C.A.

LINDLEY, M.R.—Reference is made to *Att. Gen. v. Hammer* [(1858) 27 L. J. Ch. 837; 5 Jur. (N.S.) 693; 6 W. R. 804], in which it was decided that a Crown grant of minerals under the waste of the manor includes the minerals under the foreshore. I do not dissent from that case: but what we are dealing with is not a grant, but an Inclosure Act, and the idea is wholly new to me that it is the object of an Inclosure Act to deal with any property whatever, except property over which there are some common rights. . . . But the saving clause [in this case] unquestionably presents difficulties. It is not a new one. It has been commented upon and judicially expounded in *Devonshire (Duke) v. O'Connor*, where the C. A. held that a clause precisely the same as this in an Inclosure Act did not have the effect of preserving to the lord of the manor any rights which were merely territorial or incidental to his ownership over lands allotted, but only preserved manorial rights, or rights independent of those which he had formerly as owner of the soil. The right there in question was the lord's right of sporting over the waste of the manor. . . . I do not pause to criticise that decision. I accept it, and I am unable to draw any valid distinction between that case and this. I am unable to see any distinction material for the purpose of this decision between the right of shooting over the allotted land, and the right of landing and walking for fishing purposes over allotted land, and if one is not preserved by the saving clause I fail to see on what principle the other can be.—pp. 367—369.

CHITTY and COLLINS, L.JJ. to the same effect.

EXTINGUISHMENT.

Doidge v. Carpenter (1817) 6 M. & S. 46; 18 R. R. 299.—K.B., distinguished.

Baring v. Abingdon (1892) 62 L. J. Ch. 105; [1892] 2 Ch. 374; 67 L. T. 6; 41 W. R. 22.—C.A. LINDLEY, BOWEN and KAY, L.JJ.; affirming 7 Times L. R. 743.—STIRLING, J. See judgments at length.

Folkard v. Hemmett (1776) 5 Term Rep. 417, n.—DE GREY, C.J.; and *Wentworth v. Clay* (1676) Cas. temp. Finch, 263, approved.

Ramsay v. Cruddas (1892) 62 L. J. Q. B. 269; [1893] 1 Q. B. 228; 4 R. 218; 68 L. T. 864; 57 J. P. 406.—C.A. Esher, M.R., LOPES and KAY, L.JJ.

Baring v. Abingdon (*supra*), dictum of STIRLING, J. explained.

Wallis v. Hands (1893) 62 L. J. Ch. 586; [1893] 2 Ch. 75; 68 L. T. 428; 41 W. R. 471.—CHITTY, J.

Baring v. Abingdon, followed.

Ramsay v. Cruddas, distinguished.

Broome v. Wenham (1893) 68 L. T. 651.

WRIGHT, J.—This decision [*Baring v. Abingdon*] is said to have been impeached in effect by some observations of the M.R. in *Ramsay v. Cruddas*. But I think there is no inconsistency. The M.R. was dealing with the case of a copyholder, and the substance of his observations is that, where a man ceases to be a member of a class such as the copyholder of a manor, he ceases to have rights which belonged to him merely as a member of that class. That doctrine would apply to customary rights of copyholders as such to common within the manor, because their customary rights of common depend on the custom which applies only to copyholders. But it would not apply to common of pasture appendant to a freehold of the manor, because that common is incident to the land itself in the case of each freehold, and not incident to membership of the class of the freeholders of the manor. That was held in *Dunraven (Lord) v. Llewellyn* (1850) 19 L. J. Q. B. 388; 15 Q. B. 791.—Ex. Ch.—p. 653.

SCHEME.

Chislehurst Common Conservators v. Newton (1887) 70 L. J. Ch. 224, n.—CHITTY, J., followed.

Cook v. Mitcham Common Conservators (1900) 70 L. J. Ch. 223; [1901] 1 Ch. 387; 83 L. T. 519; 49 W. R. 201.—FARWELL, J.

COMPANY.

1. FORMATION AND CONSTITUTION.
2. CAPITAL.
3. DIRECTORS.
4. CONTRACTS.
5. DEBENTURES AND MORTGAGES.
6. MANAGEMENT.
7. MEETINGS OF SHAREHOLDERS.
8. AMALGAMATION AND RECONSTRUCTION.
9. SHARES.
10. STOCK EXCHANGE.
11. ACTIONS BY AND AGAINST.
12. WINDING UP.

1. FORMATION AND CONSTITUTION.

Classes of Companies.

McKay v. Rutherford (1849) 6 Moore P. C.; 13 Jur. 21.—P.C., discussed.

London and Manchester Direct Ry., in re, Barber, Ex parte (1849) 18 L. J. Ch. 242; 1 Mac. & G. 176.—COTTENHAM, L.C.

Reg. v. Whitmarsh, National Land Co., in re (1850) 19 L. J. Q. B. 469; 15 Q. B. 600; 15 Jur. 7.—Q.B., followed.

Bear v. Bromley (1852) 21 L. J. Q. B. 354; 18

Q. B. 271; 16 Jur. 450; 7 Rail. Cas. 507.—Q.B. *And see post*, col. 384.

Reg. v. Whitmarsh, followed.

London and Manchester Direct Ry., *In re*, *observed on*.

Moore v. Rawlings (1859) 28 L. J. C. P. 247; 6 C. B. (N.S.) 289; 5 Jur. (N.S.) 941.—C.P. *And see post*, col. 384.

Duvergier v. Fellows (1826) 5 Bing. 248; 2 M. & P. 384; 7 L. J. (O.S.) C. P. 15.—C.P.; *affirmed*, (1832) 1 Cl. & F. 39.—H.L. (E.). LORD TENTERDEN, *applied*.

Blundell v. Winsor (1837) 6 L. J. Ch. 364; 8 Sim. 601; 1 Jur. 589.—SHADWELL, V.-C.

Duvergier v. Fellows, distinguished.

Harrison v. Heathorn (1843) 12 L. J. C. P. 282; 6 Man. & G. 81; 6 Scott (N.R.) 736.—TINDAL, C.J. (for the Court).

Blundell v. Winsor and Harrison v. Heathorn, *considered*.

Mexican and South American Co., *In re*, Aston, *Ex parte* (1859) 28 L. J. Ch. 631; 5 Jur. (N.S.) 615; 7 W. R. 509.—ROMILLY, M.R., *affirmed*, 4 De G. & J. 320; 5 Jur. (N.S.) 779.—KNIGHT BRUCE and TURNER, L.J.J.

Arthur Average Association, *In re*, Cory and Hawkesley, *Ex parte* (or Hargrove & Co., *Ex parte*) (1876) 44 L. J. Ch. 569; L. R. 10 Ch. 542; 52 L. T. 525, 728; 23 W. R. 943.—JAMES and MELLISH, L.J.J., *referred to*.

London and Eastern Banking Corporation, *In re*, Longworth's Executors, *Ex parte* (1859) 29 L. J. Ch. 55; 1 De G. F. & J. 17; 6 Jur. (N.S.) 1; 1 L. T. 504.—CAMPBELL, L.C., KNIGHT BRUCE and TURNER, L.J.J.; *affirming* Johns. 465.—WOOD, V.-C., *commented on*.

South Wales Atlantic Steamship Co., *In re* (1876) 46 L. J. Ch. 117; 2 Ch. D. 763; 35 L. T. 294.—MALINS, V.-C.; *affirmed*, C.A. JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A. *And see post*, col. 382.

Arthur Average Association, *In re*, followed.

Lynes, *Ex parte*, Queen Average Association, *In re* (1876) 38 L. T. 90; 26 W. R. 432.—MALINS, V.-C.

Sykes v. Beadon (1879) 48 L. J. Ch. 522; 11 Ch. D. 170; 40 L. T. 243; 27 W. R. 464.—JESSEL, M.R., *disapproved*.

Arthur Average Association, doubted.

Smith v. Anderson (1880) 15 Ch. D. 247; 50 L. J. Ch. 39; 43 L. T. 329; 29 W. R. 21.—C.A. JAMES, BRETT and COTTON, L.J.J.

BRETT, L.J.—I cannot agree with the statement of the question by the M.R. in *Sykes v. Beadon*. He said that the point which he had to consider was whether there was an association or company formed for the purpose of gain either by the association or by the individual members thereof. But he omitted words which I think were purposely put into this statute for a definite object, namely, that the statute meant to deal, not with people who were associated together for the purpose of obtaining gain, but with people who were associated together for the purpose of carrying on a business having for its object the acquisition of gain. . . . As regards the *Arthur Average Association*, it is not perhaps absolutely necessary to

determine whether the case of a mutual assurance association is within the statute or not, but I cannot help saying that the reasoning which brings me to the conclusion that the present case is not within the statute, appears to me to lead to the same conclusion with regard to a case of mutual insurance.—pp. 278—280. *And see post*, col. 383.

Smith v. Anderson, applied.

Wigfield v. Potter (1881) 45 L. T. 612; 46 J. P. 486.—GROVE, LOPES and BOWEN, JJ. *And see post*, col. 383.

South Wales Atlantic Steamship Co., *In re*

(*supra*, col. 381); *dictum* of JAMES, L.J. *quoted*.

Smith v. Anderson, dictum disclaimed.

Padstow Total Loss and Collision Assurance Association, *In re*, Bryant, *Ex parte* (1882) 51 L. J. Ch. 344; 20 Ch. D. 137; 45 L. T. 774; 30 W. R. 826.—C.A. JESSEL, M.R., BRETT and LINDLEY, L.J.J.

[JAMES, L.J. seemed to be of opinion that an illegal association could be wound up.]

JESSEL, M.R.—It would seem that he only meant putting an end to it—he could hardly have meant a winding up under the Act, having regard to what he said as to contribution.—p. 347.

BRETT, L.J.—I have to confess, after fully considering this matter, and hearing it argued as it has been argued to-day, that the inclination of opinion which I expressed with regard to mutual insurance companies, in *Smith v. Anderson*, cannot be maintained. It was not a matter necessary to be decided in that case, as I took care to notice; but I took occasion then to express an inclination of opinion in that case which, after the full argument which I have heard to-day, I do not now maintain.—p. 352.

Padstow Total Loss, &c. Association, *In re*

followed. Jennings v. Hammond (1882) 51 L. J. Q. B. 493; 9 Q. B. D. 225; 31 W. R. 40.—FIELD and CAVE, JJ.

Padstow Total Loss, &c. Association, *In re*

followed. Jennings v. Hammond, *approved*. Shaw v. Benson (1883) 52 L. J. Q. B. 575; 11 Q. B. D. 563.—C.A. BRETT, M.R., LINDLEY and FRY, L.J.J.

Jennings v. Hammond and Shaw v. Benson,

applied. Phillips v. Davies (1888) 5 Times L. R. 98.—COLERIDGE, C.J. and MANISTY, J.

Padstow Total Loss, &c. Association, *In re*

distinguished, Bowling and Welby's Contract, *In re* (1895) 64 L. J. Ch. 427; [1895] 1 Ch. 663; 12 R. 218; 72 L. T. 411; 43 W. R. 417; 2 Manson 257.—C.A. LORD HALSBURY, LINDLEY, and A. L. SMITH, L.J.J.; *referred to*, Ilfracombe Permanent Building Society, *In re* (1900) 70 L. J. Ch. 66; [1901] 1 Ch. 102; 84 L. T. 146.—WRIGHT, J.

Padstow Total Loss, &c. Association, *In re*

not applied. Jennings v. Hammond and Shaw v. Benson, *referred to*.

Marrs v. Thompson (1902) 86 L. T. 759.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Smith v. Anderson (*supra*, col. 381), followed.

Wigfield v. Potter (*supra*, col. 382), *recognised*.

Crowther v. Thorley (1884) 32 W. R. 330; 48 J. P. 292.—C.A. COLERIDGE, C.J., BRETT, M.R. and BOWEN, L.J.; *reversing* 48 L. T. 644; 31 W. R. 564.—GROVE and SMITH, JJ.

Crowther v. Thorley, *distinguished*.

Thomas, *In re*, Poppleton, *Ex parte* (1884) 54 L. J. Q. B. 336; 14 Q. B. D. 379; 51 L. T. 602; 33 W. R. 583.

CAYE, J.—The main object of the society in *Crowther v. Thorley* was to buy freehold land and divide it amongst the members, and in my opinion the judgment proceeds upon the fact that the trustees carried on business in their own names and were themselves responsible. In this case the committee did not carry on business in their own name; they were appointed according to the rules of the society.—p. 337.

Smith v. Anderson; *Wigfield v. Potter*; and *Crowther v. Thorley*, *observed on and followed*.

Siddall, *In re* (1885) 29 Ch. D. 1; 54 L. J. Ch. 682; 52 L. T. 114; 33 W. R. 509.—C.A.

BAGGALLAY, L.J.—I do not propose to go into the details of this case, because I am of opinion that we are bound by the decision of the C. A. in *Crowther v. Thorley*, from which I cannot distinguish the present case. *Smith v. Anderson* is also binding upon this Court. I must confess that, if I had had to decide *Smith v. Anderson*, I possibly should not have entirely agreed with all that was decided in it. My views would to some extent have gone with those of the late Sir G. Jessel, whose decision was reversed. However, *Smith v. Anderson* stands, and also *Crowther v. Thorley*, which was decided by the other branch of this Court. . . . Mr. Byrne has evidently taken great pains in getting up the subject, and has not only drawn our attention very carefully to the nature and constitution of the association, and the rules by which it was governed, but to *Smith v. Anderson*, *Crowther v. Thorley*, and *Wigfield v. Potter*. It appears to me that *Crowther v. Thorley* approaches so closely in its circumstances to the circumstances of this case that, whatever may be my own private opinion as to the view which ought to be taken in this case, I am bound by that decision.—pp. 6, 7. BOWEN and FRY, L.Js. concurred. *And see post*, col. 384.

Bristol Athenæum, In re (1889) 59 L. J. Ch. 116; 43 Ch. D. 236; 61 L. T. 795; 38 W. R. 396.—KAY, J., *dictum dissented from*.

Russell Literary and Scientific Institution, *In re*, Figgins v. Baghino (1898) 67 L. J. Ch. 411; [1898] 2 Ch. 72; 78 L. T. 588.

NORTH, J.—The real difficulty I feel in Kay, J.'s decision is this. He says that the institution is not a joint-stock company, "because it is constituted by rules which do not permit of any dividend, division, or bonus among its members." Now it seems to me, with great deference, that is not a material matter. It is not of the essence of a joint-stock company that it should provide for a dividend or bonus among its members. The Act we are considering [Literary and Scientific Institutions Act, 1854],

does not refer to it. It says: "founded or established by the contributions of shareholders in the nature of a joint-stock company," and that the present company unquestionably was, though it is true the Bristol Athenæum was in the same way. . . . It seems to me, with great deference to the learned judge, that the test he applied . . . is one which cannot be sustained. . . . I have had the advantage of speaking to Stirling, J., who, I was told, had reserved judgment in a similar case [*Jones, In re*, (*Clegg v. Ellison*). See next case], and considering it with him. He and I both agree on the view I have expressed as to the meaning of the Act, and as to the decision upon which we have just been commenting—pp. 418—419.

Bristol Athenæum, In re (*supra*), *considered*.

Jones, *In re*, Clegg v. Ellison (1898) 67 L. J. Ch. 504; [1898] 2 Ch. 83; 78 L. T. 639; 46 W. R. 577.

STIRLING, J.—Upon this [sect 4 of Companies Act, 1862] it has been repeatedly held that associations of more than twenty persons may exist which do not require to be registered, and are not made illegal by the Act of 1862—see, for example, *Smith v. Anderson*, *Crowther v. Thorley*, and *Siddall, In re* (*supra*, col. 383). Yet it would be difficult, as I think, to deny to those associations the nature of joint stock companies. The Joint Stock Companies Registration Act, 1844 (7 & 8 Vict. c. 110), applies only to joint stock companies established for the purpose of profit, and it was repeatedly held [see *Reg. v. Whitmarsh*, *Bear and Bromley*, and *Moore v. Rawlins* (*supra*, col. 381)] that associations which very closely resemble joint stock companies did not require registration under the Act. On behalf of the Att.-Gen., some observations of Kay, L.J. (then Kay, J.) in *Bristol Athenæum, In re*, were properly relied on. The actual decision in that case was that the Bristol Athenæum, an association possessing a constitution somewhat similar to that of the Sheffield society, could not be wound up as an unregistered company under sect. 199 of the Companies Act, 1862, and with it I do not differ. Incidentally, however, his lordship did express the opinion that the Bristol Athenæum was not a joint stock company, and therefore not within the provisions of sect. 30 of the Act of 1854. No one can feel more strongly than I do the weight due to anything which fell from that learned judge. Since this judgment was written, North, J. has in a case now pending before him [*Russell Institution, In re* (*supra*)] arrived independently at a similar conclusion with regard to the construction of sect. 30 as that which I have endeavoured to express.—p. 507.

Foreign Company.

Bulkeley v. Schutz (1871) L. R. 8 P. C. 764; 6 Moore, P. C. (N.S.) 481.—P.O. SIR J. COLVILLE, SIR R. PHILLIMORE, SIR J. NAPIER, JAMES and MELLISH, L.Js., *approved and applied*.

Bateman v Service (1881) 50 L. J. P. C. 41; 6 App. Cas. 386; 44 L. T. 436.—P.O. SIR B. PEACOCK, SIR M. SMITH and SIR R. COUCH. *And see* Lloyd Generale Italiano, *In re* (1885) 54 L. J. Ch. 748; 29 Ch. D. 221; 33 W. R. 728.—PEARSON, J.

Registration.

Northumberland and Durham District Banking Co., In re (1858) 27 L. J. Ch. 356; 2 De G. & J. 357; 4 Jur. (N.S.) 419; 6 W. R. 527.—**KNIGHT BRUCE and TURNER, L.J.**, distinguished.

Hartfordshire Brewery Co., In re (1874) 43 L. J. Ch. 858; 22 W. R. 359.—**JESSEL, M.R.**, not followed.

Barnes's Banking Co., In re, Peel's Case (1867) 36 L. J. Ch. 757; L. R. 2 Ch. 674; 16 L. T. 780; 15 W. R. 1100.—**CAIRNS, L.J.**; **Pilbrow v. Pilbrow's Atmospheric Railway and Canal Propulsion Co.** (1848) 17 L. J. C. P. 166; 5 C. B. 440; 5 D. & L. 551; 5 Rail. Cas. 89.—**WILDE, C.J.**; and **Banwen Iron Co. v. Barnett** (1849) 19 L. J. C. P. 17; 8 C. B. 406; 14 Jur. 112.—**MAULE and WILLIAMS, JJ.**, discussed.

Nassau Phosphate Co., In re (1876) 45 L. J. Ch. 584; 2 Ch. D. 610; 24 W. R. 692.—**HALL, V.-C.** And see post.

Northumberland and Durham Banking Co., In re, distinguished. **Ennis and West Clare Ry., In re** (1879) 3 L. R. Ir. 94.—**CHATTERTON, V.-C.**; discussed and principle applied. **Wenlock (Baroness) v. River Dee Co.** (1887) 56 L. J. Ch. 899; 36 Ch. D. 674 (post, col. 443).

Northumberland, &c. Banking Co., In re, approved.

Nassau Phosphate Co., In re, discussed

Peel's Case (supra), distinguished.

National Debenture and Assets Corporation, In re (1891) 60 L. J. Ch. 533; [1891] 2 Ch. 505; 64 L. T. 512; 39 W. R. 707.—**KEKEWICH, J.**, affirmed, C.A. **LINDLEY, BOWEN and KAY, L.J.J.**

European Insurance Co., In re, Ramsay's Case (1876) 46 L. J. Ch. 411; 3 Ch. D. 388; 35 L. T. 654; 25 W. R. 279.—**C.A. JAMES and MELLISH, L.J.** and **BAGGALLAY, J.A.**, discussed and applied.

Peel's Case, referred to

Boaler v. Brodhurst (1892) 8 Times L. R. 398.—**STIRLING, J.**

Northumberland, &c. Banking Co., In re, and National Debenture and Assets Corporation, In re, discussed.

Young v. South African and Australian Exploration and Development Syndicate (1896) 65 L. J. Ch. 638; [1896] 2 Ch. 268; 74 L. T. 527; 44 W. R. 509.—**KEKEWICH, J.** (post, col. 475).

National Debenture, &c. Corporation, In re, commented on.

Ladies' Dress Association v. Fulbrook (1900) 69 L. J. Q. B. 705; [1900] 2 Q. B. 876; 49 W. R. 6; 7 Manson 465.—**C.A.** (post, col. 595). See Companies Act, 1900 (63 & 64 Vict. c. 48), s. 1.

National Debenture, &c. Corporation, In re, distinguished.

Nassau Phosphate Co., In re (supra), followed.

Laxen & Co., In re (No. 2) (1892) 61 L. J. Ch. 667; [1892] 3 Ch. 555; 67 L. T. 85; 40 W. R. 621.

V. WILLIAMS, J.—I confess I do not understand how the judgment of the C. A. in *National Debenture, &c. Corporation, In re*, can be reconciled with the decision of Lord Cairns in *Peel's* O.C.

Case (supra, col. 385). If I had to choose between the two decisions, I think that I should more readily follow that of Lord Cairns. . . . Fortunately, I am not placed in that position, but I wish to say, before I proceed to state how I intend to act, that as a matter of fact *Peel's Case* does not seem to have been cited to the C. A. in the argument in *National Debenture, &c. Corporation, In re*. That, perhaps, is not very important, because I cannot but think that a Court consisting of Lindley, Bowen and Kay, L.J.J., must have been familiar with that case, though it was not brought to their notice. In fact, Lindley, L.J. in his book on Companies (5th ed., p. 111) has given some attention to it, and I cannot but think that when he wrote his book he took a different view of the decision in that case from that which he took when giving judgment in *National Debenture, &c. Corporation, In re*. I do not, however, trouble about that, as the decision in *National Debenture, &c. Corporation, In re*, did not, in my opinion, determine the question which I have to determine now. In that case it was suggested that the memorandum of association had not been signed by the necessary seven persons. It was said that two of the signatures were not really the signatures of two different persons, but of one person who had signed twice, in two different names, so that the memorandum had really been signed by six, not by seven persons. The C. A., after hearing further evidence which was not before Kekewich, J., came to the conclusion that there was no ground for such a suggestion, and no difficulty arose as to the requisite number of persons having signed the memorandum. The Court, however, went on to decide this proposition of law, that the certificate of incorporation given by the registrar was not conclusive, so as to prevent any objection being taken on the ground that less than seven persons had in fact signed the memorandum, though the certificate had been given upon the assumption that seven persons had signed it . . . that question does not arise here. . . . I have heard nothing during the argument which makes me see why I should not hold that where an infant signs a memorandum of association, his signature is not the signature of a "person" within the meaning of sect. 6 of the Act of 1862. That was the ground of the decision of Hall, V.-C. in *Nassau Phosphate Co., In re*, . . . and upon that ground I decide this case.—pp. 669, 670.

Rival Companies.

Stockport District Waterworks Co. v. Manchester Corporation (1862) 9 Jur. (N.S.) 266; 7 L. T. 545; 11 W. R. 156.—**WESTBURY, L.C.**, followed.

Padsey Coal Gas Co. v. Bradford Corporation (1873) 42 L. J. Ch. 293; L. R. 15 Eq. 167; 28 L. T. 11; 21 W. R. 286.—**MALINS, V.-C.**

Name of Company.

Lee v. Haley (1869) L. R. 5 Ch. 155.—**GIFFARD, L.J.**, distinguished.

Hoby v. Grosvenor Library Co. (1880) 28 W. R. 386.—**HALL, V.-C.**, followed.

Hendriks v. Montagu (1881) 50 L. J. Ch. 456; 17 Ch. D. 638; 44 L. T. 879; 30 W. R. 160.—**C.A. JAMES, BRETT and COTTON, L.J.J.**; reversing 50 L. J. Ch. 257; 44 L. T. 80.—**JESSEL, M.R.** And see "TRADE."

Memorandum of Association.

Hutton v. Scarborough Cliff Hotel Co. (1865)
2 Dr. & Sm. 521; 11 Jur. (N.S.) 849; 13 L. T. 57; 13 W. R. 1059.—KINDERSLEY, V.-C.; [reported on another point, 2 Dr. & Sm. 514.—KINDERSLEY, V.-C.; and affirmed on appeal, 34 L. J. Ch. 643; 4 De G. J. & S. 472; 12 L. T. 289; 13 W. R. 631.—WESTBURY, L.C.], distinguished.
Harrison v. Mexican Ry. (1875) 44 L. J. Ch. 403; L. R. 19 Eq. 358. 32 L. T. 82; 23 W. R. 403.—JESSEL, M.R. *And see post*, col. 390.

Harrison v. Mexican Ry. distinguished.
Guinness v. Land Corporation of Ireland (1882)
22 Ch. D. 349; 52 L. J. Ch. 177; 47 L. T. 517; 31 W. R. 341.—C.A.

COTTON, L.J.—The question there [*Harrison v. Mexican Ry.*] dealt with was the mere question of giving priority to the dividends payable to a certain class of shareholders. That is a matter which the Act does not require to be dealt with in the memorandum, and it was not dealt with in the memorandum in that case. But there is an expression of the M.R. which was much relied on, and which occasions some little difficulty: "If the memorandum of association is silent upon the subject of the terms of the original contract under which the company was formed, then there is an implied condition that all the holders of shares are entitled to rank equally as regards dividend, without any preference or priority between themselves; but if it does clearly appear upon the articles of association that that was not the meaning of the original contract, then there is no such implication of law as to the meaning of the memorandum of association, that implication being rebutted by the clear terms of the contemporaneous instrument." I think that there the M.R. was referring to matters which the Act does not require to be stated in the memorandum. But in reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary. . . . I think that the M.R. did not intend to say anything which militates against my view of the law, though perhaps his observations require a little verbal correction.—p. 377.

BOWEN, L.J.—There is an essential difference between the memorandum and the articles. The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as of the shareholders. The articles of association are the internal regulations of the company. . . . *Harrison v. Mexican Ry.* was cited as showing that the M.R. was willing to read the two together, but the distinction is obvious that in that case the matter was one with which the creditors had no concern whatsoever.—p. 381.

Guinness v. Land Corporation of Ireland, distinguished.
Dale v. Martin (1883) 11 L. R. Ir. 371.—C.A.
LAW, L.C., MORRIS, C.J. and FITZGIBBON, L.J.

Hutton v. Scarborough Cliff Hotel Co.,
34 L. J. Ch. 643 (*supra*), approved.
Ashbury v. Watson (1885) 54 L. J. Ch. 121, 985; 30 Ch. D. 376; 33 W. R. 882.—C.A.
ESHER, M.R., BAGGALLAY and FRY, L.JJ.

Harrison v. Mexican Ry., followed.
Hutton v. Scarborough Cliff Hotel Co. ; Guinness v. Land Corporation of Ireland, and Ashbury v. Watson, distinguished.
South Durham Brewery Co., In re (1885) 55 L. J. Ch. 179; 31 Ch. D. 261; 53 L. T. 928; 34 W. R. 126.—C.A. LINDLEY, FRY and LOPES, L.JJ.

Guinness v. Land Corporation of Ireland, discussed.
Trevor v. Whitworth (1887) 57 L. J. Ch. 28; 12 App. Cas. 409; 57 L. T. 457; 36 W. R. 145.—H.L. (R.) (*post*, col. 406).

Hutton v. Scarborough Cliff Hotel Co., 2 Dr. & Sm. 521 (*supra*), dissented from.
British and American Trustee and Finance Corporation v. Couper (1894) 63 L. J. Ch. 425; [1894] A. C. 399; 6 H. L. 41; 70 L. T. 882; 42 W. R. 652; 1 Manson 256.—H.L. (R.). HERSCHELL, L.C., LORDS WATSON, MACNAGHTEN and MORRIS.

LORD MACNAGHTEN—The practical result of the decision [*Hutton v. Scarborough Cliff Hotel Co.*] has been that, except in cases coming within the rule laid down in *Harrison v. Mexican Ry.*—a decision which has not met with universal acceptance—no company limited by shares that has not taken power by its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders and its creditors. It seems to me that the decision in *Hutton v. Scarborough Cliff Hotel Co.* was not founded upon a sound view of the Companies Act, 1862, and I respectfully dissent from it. I have the less hesitation in expressing this opinion, because I find that Cotton, L.J. has disapproved of the chief ground on which the decision was based [*Guinness v. Land Corporation of Ireland*]. . . . Lindley, L.J. in a later case takes the same view. I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum. But I doubt whether it is necessary to have recourse to the doctrines of partnership.—p. 434. *See also* the other addresses at length. *And see post*, col. 389.

British and American Trustee and Finance Corporation v. Couper, approved.
Hutton v. Scarborough Cliff Hotel Co., 2 Dr. & Sm. 521, discussed.
Melliquam v. Taylor (1894) 63 L. J. Ch. 758; 64 L. J. Ch. 296; [1895] 1 Ch. 53; 8 R. 740, 750, n.; 71 L. T. 484, 679; 43 W. R. 297; affirmed, C.A. LORD HALSBURY, LINDLEY and RIGBY, L.JJ.

STIRLING, J. (after referring to Lord Macnaghten's judgment in *British and American Trustee and Finance Corporation v. Couper*) said: The law, then, is that under an ordinary memorandum of association, according to which the capital of a company is divided into shares of equal amount, the interests of the shareholders must be equal in all respects. Whether a company so constituted can issue preference shares is a question the final decision of which has not yet been given, although, perhaps, in the

present state of the authorities, it may be concluded, in the first instance, by *Hutton v. Scarborough Cliff Hotel Co.*—p. 761.

Hutton v. Scarborough Cliff Hotel Co. and Ashbury v. Watson (*supra*), *not applied*.
Hyderabad (Deccan) Co., In re (1896) 75 L. T. 23; 3 Manson 242.—STIRLING, J.

British and American Trustees and Finance Corporation v. Couper (*supra*), *applied*, London and New York Investment Corporation, In re (1895) 64 L. J. Ch. 729; [1895] 2 Ch. 860.—STIRLING, J. (*post*, col. 409); Barrow Hæmatite Steel Co., In re (1900) 69 L. J. Ch. 869; [1900] 2 Ch. 846.—COZENS-HARDY, J. (*post*, col. 409): Development Co. of Central and West Africa, In re (1902) 71 L. J. Ch. 310; [1902] 1 Ch. 547; 86 L. T. 323; 50 W. R. 456; 9 Manson 151.—SWINFEN-EADY, J.; Credit Insurance and Guarantee Corporation, In re (1902) 71 L. J. Ch. 775; [1902] 2 Ch. 601.—C.A. (*post*, col. 409); *explained*, Anglo-French Exploration Co., In re (1902) 71 L. J. Ch. 800; [1902] 2 Ch. 845, 51 W. R. 8; 9 Manson 432.—BUCKLEY, J.

Hutton v. Scarborough Cliff Hotel Co., 2 Dr. & Sm. 521 (*supra*, col. 387), *overruled*.
Malleson v. National Insurance and Guarantee Corporation (1893) 63 L. J. Ch. 286; [1893] 1 Ch. 200; 8 R. 91; 70 L. T. 157; 42 W. R. 249; 1 Manson 249.—NORTH, J.; and **Walker v. London Tramways Co.** (1879) 49 L. J. Ch. 23; 12 Ch. D. 705; 38 W. R. 163.—JESSEL, M.R., *referred to*.
Andrews v. Gas Meter Co. (1897) 66 L. J. Ch. 246; [1897] 1 Ch. 361; 76 L. T. 132; 45 W. R. 321.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.J.; *reversing* KEKEWICH, J.

LINDLEY, L.J.—The judgment against the validity of the preference shares is based upon the well-known case of *Hutton v. Scarborough Cliff Hotel Co.*, which came twice before Kindersley, V.-C., and which Kekewich, J. very naturally held to be binding on him. Kindersley, V.-C.'s first decision was that a limited company which had not issued the whole of its original capital could not issue the unallotted shares as preference shares unless authorised so to do by its memorandum of association or by its articles of association. This decision was affirmed on appeal, and was obviously correct; and would have been correct even if the whole of the original capital had been issued and the preference shares had been new and original capital. The company, however, afterwards passed a special resolution, altering the articles and authorising an issue of preference shares. This raised an entirely different question, and led to the second decision reported in 2 Dr. & S. 521. The V.-C. granted an injunction restraining the issue of the preference shares, and he held distinctly that the resolution altering the articles was *ultra vires*. He did so upon the ground, as we understand his judgment, that there was in the memorandum of association a condition that all the shareholders should stand on an equal footing as to the receipts of dividends, and that this condition was one which could not be got rid of by a special resolution altering the articles of association under the powers conferred by sects. 50 and 51 of the Act. The judgment of the V.-C. is a little obscure, because he treats the condition as a condition of the constitution of the company, and he may have meant by that expression, either

the constitution as fixed by the memorandum of association, or the constitution as fixed by the memorandum of association and the original articles. But unless he had meant the constitution of the company as fixed by the memorandum of association, his decision is unintelligible: for, so far as the constitution depended on the articles, it clearly could be altered by special resolution under the powers conferred by sects. 50 and 51 of the Companies Act, 1862. A company cannot deprive itself of this power (see *Malleson v. National Insurance and Guarantee Corporation* and *Walker v. London Tramways Co.*). The V.-C. further seems to have been of opinion that the condition could be excluded by contemporaneous articles of association, and his decision has been so understood by succeeding judges. Accordingly, in 1875, in *Harrison v. Merican Ry.* (*supra*, col. 387), Sir G. Jessel held that the condition of equality imported into the memorandum of association by Kindersley, V.-C.'s decision was negated by one of the articles of association filed with the memorandum, which article authorised the creation of additional capital by the issue of new shares, "in such manner, to such amount, and with and subject to such rules, regulations, privileges, and conditions," as the company should think fit. In our opinion it is impossible to uphold this decision, or the view of Kindersley, V.-C. himself, as to the effect of articles on the memorandum, if it is once conceded that it is a condition in the memorandum of association that there should be equality amongst the shareholders. If the condition is really one of the conditions of the memorandum, it is immaterial whether the condition is express or implied. If the memorandum of association really prescribed equality amongst all the shareholders, as Kindersley, V.-C. held that it did, the articles of association could not override the memorandum of association in that particular (see sect. 12 of the Act, and *Ashbury Railway Carriage Co. v. Riche* (1875) 44 L. J. Ex. 185; L. R. 7 H. L. 653 (*post*, col. 441); and *Guinness v. Land Corporation of Ireland* (*supra*, col. 387)). The departure thus made by Sir G. Jessel from the principle on which the V.-C. based the second decision in *Hutton v. Scarborough Cliff Hotel Co.* was sanctioned by the C. A. in 1885 in *South Durham Brewery Co., In re*, and again in 1887 in the *Bridgewater Navigation Co.* (*post*, col. 571)—a case, which, although reversed on another point [*Birch v. Cropper* (1889) 59 L. J. Ch. 122; 14 App. Cas. 525; *post*, col. 572] was not questioned on the point now under consideration. These decisions turned upon the principle that although by sect. 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised, are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which (unless provided for by the memorandum, as in *Ashbury v. Watson* (*supra*, col. 388)), may be determined by the company from time to time by special resolution pursuant to sect. 50 of the Act. This view, however, clearly negatives the doctrine that there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shows the contrary. That proposition is, in our opinion, unsound. Its

unsoundness was distinctly pointed out by Lord Macnaghten in *British and American Trustee, &c. Corporation v. Couper* (*supra*, col. 388). The view taken by Kindersley, V.-C. cannot, in our opinion, be supported by reference to the Companies Act of 1862; and it is inconsistent with the decisions to which we have referred, which, if wrong, can only now be set right by the H. L. It was, however, contended that this Court, at all events, had approved and followed the decisions of Kindersley, V.-C.; and *Ashbury v. Watson* was referred to on this point. In that case the memorandum of association stated that preferential shares might be created and what the preferential rights were to be; and it was held that these were conditions which could be properly introduced into the memorandum of association, and which, being introduced there, could not be afterwards departed from and be treated as articles of association capable of change. No doubt Fry, L.J., relied on *Hutton v. Scarborough Cliff Hotel Co.* to show that provisions about preference shares were conditions which could properly be inserted in the memorandum of association; but the propriety of the decision of Kindersley, V.-C. in that case was not before the Court, and we do not regard *Ashbury v. Watson* as conflicting with any of the other decisions of the C. A., in which Kindersley, V.-C.'s decision has been judicially considered. . . . For the reasons, however, which we have given we are of opinion that the second decision in *Hutton v. Scarborough Cliff Hotel Co.* was wrong, and ought not to be followed—pp. 248–250.

RIGBY, L.J. to same effect on *Hutton v. Scarborough Cliff Hotel Co.*

Hutton v. Scarborough Cliff Hotel Co. (*supra*), commented on.

Welton v. Saffery (1897) 66 L. J. Ch. 362; [1897] A. C. 299; 76 L. T. 505; 45 W. R. 508; 4 Manson 269.—H.L. (R.) (*post*, col. 516).

Andrews v. Gas Meter Co (*supra*), considered.

James v. Buena Ventura Nitrate Grounds Syndicate (1896) 65 L. J. Ch. 284; [1896] 1 Ch. 456; 74 L. T. 1; 44 W. R. 372.—C.A. LORD HERSCHELL, A. L. SMITH and RIGBY, L.J., *conceded*.

Allen v. Gold Reefs of West Africa (1900) 69 L. J. Ch. 266; [1900] 1 Ch. 656; 82 L. T. 210; 48 W. R. 452; 7 Manson 417.—C.A.; *varying* [1899] 68 L. J. Ch. 540; [1899] 2 Ch. 40; 80 L. T. 750; 47 W. R. 568.—KEKEWICH, J.

LINDLEY, M.R.—*Andrews v. Gas Meter Co.* is an authority that, under sect. 50 of the Companies Act, 1862, a company's articles can be altered so as to authorise the issue of preference shares taking priority over existing shares, although no power to issue preference shares was conferred by the memorandum of association or by the original articles. . . . It was urged that a company's articles could not be altered retrospectively, and reliance was placed on Rigby, L.J.'s observations in *James v. Buena Ventura, &c. Syndicate*. The word "retrospective" is, however, somewhat ambiguous, and the concurrence of Rigby, L.J. in *Andrews v. Gas Meter Co.* shows that his observations in *James v. Buena Ventura, &c. Syndicate* are no authority for saying that existing rights, founded and dependent on alterable articles, cannot be affected by their alteration.—p. 272.

ROMER, L.J. to the same effect.

V. WILLIAMS, L.J.—But I think that we are all agreed that cases might occur in which a man might have acquired, by contract or otherwise, special rights against the company which would exclude him from the operation of the altered article. It is in this sense that I understand the observations of Rigby, L.J. in *James v. Buena Ventura, &c. Syndicate*.—p. 274.

Governments Stock Investment Co., In re (1891) 60 L. J. Ch. 477; [1891] 1 Ch. 649; 64 L. T. 339; 89 W. R. 375.—CHITTY, J., *distinguihed*.

Foreign and Colonial Government Trust Co., In re [1891] 2 Ch. 395; 65 L. T. 78; 89 W. R. 699.

STIRLING, J.—I think that the business of the company is the investment of the assets of the company in the limited class of securities mentioned in clause (c) of sect. 3 of the memorandum of association; in that respect I take the same view as that which I understand to have been expressed by Chitty, J. in *Governments Stock Investment Co., In re*. . . . It would seem from the note [of that case] contained in the Weekly Notes [Nov. (1891) 48], that Chitty, J. had expressed an adverse opinion with regard to the meaning of sub-clause (d) of sect. 1, sub-sect. 5 [Companies (Memorandum of Association) Act, 1890]; but examination of the full report of that case, and communication with the learned judge, have satisfied me that Chitty, J. expressed no opinion whatever upon this point. It was not seriously contended before him, probably because the facts did not afford a basis for the argument, that the alteration proposed in *Governments Stock Investment Co., In re*, fell within sub-clause (d), and Chitty, J., expressed no opinion on the matter one way or the other.—p. 399.

Foreign and Colonial Government Trust Co., In re, followed.

Alliance Marine Assurance Co., In re (1891) [1892] 1 Ch. 800; 61 L. J. Ch. 176; 65 L. T. 554; 40 W. R. 330.

KEKEWICH, J.—In *Foreign, &c. Trust Co., In re*, Stirling, J., while confirming the alteration of the memorandum of association, expressed a strong opinion that the name of the company ought to be altered, because the name Foreign and Colonial Government Trust Company did not indicate to the public and to the persons dealing with the company, such an extension of the investments as was proposed. . . . Applying that to this marine insurance company, I say that persons dealing with this company under its existing name will not know that the company is undertaking these businesses of life, accident, and fire insurance. . . . I have been referred to several cases before Bristowe, V.-C., and one in Ireland, where marine insurance companies have enlarged their powers with the sanction of the Court, and apparently in those cases no such alteration was insisted on. I have looked to see what enlargements were made in those different cases, and I find that in some they were rather narrower than those submitted to me, but in some they were wider; and they were cases in which, according to my opinion, the name should have been altered. . . . It is not stated that Stirling, J.'s decision was before the other Courts, and having that decision before me . . . and indeed distinctly approving it, I ought not to allow the order for confirmation of the resolution to operate until the name has been altered.—p. 304.

Foreign, &c. Trust Co., In re (*supra*), *followed*.
National Boiler Insurance Co., In re (1891) 61 L. J. Ch. 501; [1892] 1 Ch. 306; 65 L. T. 849.—KEKEWICH, J.

Governments Stock Investment Co., In re (*supra*), *distinguished*.
Governments Stock Investment Co., In re (No. 2) (1892) 61 L. J. Ch. 381; [1892] 1 Ch. 597; 66 L. T. 608; 40 W. R. 387.

CHITTY, J.—This application is a very different one from that which I refused when this Court presented its former petition. The proposed alterations are two. The first, in short, is to enable the company to give security to its debenture-holders; and the second is to enlarge the scope of the investment clause by the addition of "bonds, debentures, debenture stock, obligations, mortgages, or securities of any companies or corporations formed or incorporated under British, foreign, or colonial law."—p. 383.

Mining Shares Investment Co., In re (1893) 62 L. J. Ch. 434; [1893] 2 Ch. 660; 3 L. 480; 68 L. T. 578; 41 W. R. 376.—**V. WILLIAMS, J., followed**.
Ocean Queen Steamship Co., In re (1893) 63 L. J. Ch. 193; [1893] 2 Ch. 666; 3 R. 625; 68 L. T. 828; 41 W. R. 570.—**V. WILLIAMS, J.**

Nockells v. Crosby (1925) 3 B. & C. 814; 5 D. & R. 751; 27 R. R. 497.—**K.B.** and **Pitchford v. Davies** (1890) 8 L. J. Ex. 157; 5 M. & W. 2.—**R.X., followed**.
Walstab v. Spottiswoode (1846) 15 M. & W. 505.—**POLLOCK, C.B.**

Walstab v. Spottiswoode, approved, **Hutton v. Thompson** (1851) 3 H. L. Cas. 161.—**H.L.** (E.).
TRURO, C. (*see post*, col. 597); *commented on*, **Baird v. Ross** (1856) 2 Macq. H. L. 61.—**H.L.** (SC.).
CRANWORTH, L.C. and **LORD BROUGHAM**.

Felgate's Case, United Kingdom Shipwrecking Co., In re, 11 L. T. 293; 13 W. R. 4.—**ROMILEY, M.R.**; *reversed*, (1865) 2 De G. J. & S. 456; 11 Jur. (N.S.) 52; 11 L. T. 613; 13 W. R. 305.—**KNIGHT BRUCE and TURNER, L.JJ.**

Articles of Association.

Phosphate of Lime Co. v. Green (1871) L. R. 7 C. P. 43; 25 L. T. 636.—**C.P.**; *distinguished*, **Ashbury Ry. Carriage, &c. Co. v. Mico** (1875) 44 L. J. Ex. 185; L. R. 7 H. L. 653.—**H.L.** (E.). (*post*, col. 441); *adopted*, **London Financial Association v. Kelk** (1884) 53 L. J. Ch. 1025; 26 Ch. D. 107; 50 L. T. 492.—**BACON, V.-C.** (*post*, col. 431); *discussed*, **Trevor v. Whitworth** (1887) 57 L. J. Ch. 26; 12 App. Cas. 409.—**H.L.** (E.). (*post*, col. 406); *applied*, **Ho Tung v. Man On Insurance Co.** (1901) 71 L. J. P. Q. 46; [1902] A. C. 232; 85 L. T. 617; 9 Manson 171.—**P.C.** **LORDS MACNAGHTEN, SHAND, DAVEY, ROBERTSON and LINDLEY**.

Eley v. Positive Government Security Life Assurance Co. (1876) 1 Ex. D. 88; 45 L. J. Ex. 451; 34 L. T. 190; 24 W. R. 338.—**C.A.** **CAIRNS, L.C., COLERIDGE, C.J.** and **MELLISH, L.J.**, *discussed*.

Baring-Gould and Sharpington Combined Pick and Shovel Syndicate, In re (1899) 68 L. J. Ch. 429; [1899] 2 Ch. 80; 80 L. T. 739; 47 W. R. 564.—**C.A.**; *reversing* **S. C.** (1898) 67 L. J. Ch. 622; [1898] 2 Ch. 633; 79 L. T. 185; 47 W. R. 23.—**STIRLING, J.**

LINDLEY, M.R.—Ever since **Eley v. Positive, &c. Assurance Co.**, which has been followed by a great number of other cases, it has been held that, when you come to look closely into this section [sect. 16 of the Companies Act, 1862], it does not mean that the articles are to be treated as agreements between the company on the one side and members on the other. I think that is pretty clearly established there. On the other hand, there are cases like **Jaars' Case** (*post*, col. 417), where it has been held that the articles are the terms upon which people can become members or directors, and the agreement may be got at partly through the articles, and partly through their conduct—that is also settled. They are agreements in a sense—there is no doubt about that. I do not understand now, and never did understand exactly, what the true effect of sect. 16 is, but I do understand this—that, having regard to the decisions beginning with **Eley v. Positive, &c. Assurance Co.**, the company cannot sue the member and the member cannot sue the company, as if there were an agreement between the company on the one side and the member on the other.—p. 433. **RIGBY and COLLINS, L.JJ.**, concurred.

Baring-Gould and Sharpington, &c. Syndicate, In re, applied.
Paine (or Payne) v. Cork Co. (1900) 69 L. J. Ch. 156; [1900] 1 Ch. 308.—**STIRLING, J.** (*post*, col. 481).

Promoters.

Lindsay Petroleum Co. v. Hurd (1874) L. R. 5 P. C. 221; 22 W. R. 492.—**P.C.** **SELBORNE, L.C., SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER, discussed**.
Erlanger v. New Sombrero Phosphate Co. (1878) 48 L. J. Ch. 75; 3 App. Cas. 1218; 39 L. T. 269; 27 W. R. 65.—**H.L.** (E.). **LORDS PENZANCE, HATFIELD, O'HAGAN, SELBORNE, BLACKBURN and GORDON; CAIRNS, L.C. dissenting; affirming** **S. C.** *nom.* **New Sombrero Phosphate Co. v. Erlanger** (1877) 46 L. J. Ch. 475; 5 Ch. D. 73.—**C.A.** **JESSEL, M.R., JAMES, L.J. and BAGGALLAY, J.A.** *And see post*, cols. 396, 399.

Lindsay Petroleum Co. v. Hurd and Erlanger v. New Sombrero, &c. Co., referred to.
Sharpe, In re, Bennett, In re (1891) 61 L. J. Ch. 193; [1892] 1 Ch. 154.—**C.A.** (*post*, col. 436).

Erlanger v. New Sombrero, &c. Co., discussed.
Ambrose Lake Tin and Copper Mining Co. In re (1880) 49 L. J. Ch. 457; 14 Ch. D. 390; 42 L. T. 604; 28 W. R. 783.—**C.A.** **JAMES, BRETT and COTTON, L.JJ., adhered to**. *And see post*, col. 398.

Tyrell v. Bank of London (1862) 31 L. J. Ch. 369; 10 H. L. Cas. 26; 8 Jur. (N.S.) 849; 6 L. T. 1; 10 W. R. 359.—**H.L.** (E.). **WESTBURY, L.C., LORDS CRANWORTH and CHELMSFORD; varying** 28 L. J. Ch. 921; 27 Beav. 273.—**M.R.**; and **Bentley v. Craven** (1855) 18 Beav. 75.—**M.R.**, *discussed*.
Cape Breton Co., In re (1885) 54 L. J. Ch. 822; 29 Ch. D. 795; 53 L. T. 181; 33 W. R. 788.—**C.A.** **COTTON and FRY, L.JJ., BOWEN, L.J. dissenting**. *And see post*, cols. 397, 398.

Cape Breton Co., In re, distinguished, **Lydney and Wigpool Iron Ore Co. v. Bird** (1886) 55 L. J. Ch. 383, 875; 53 Ch. D. 85; 55 L. T. 558; 34 W. R. 437, 749.—**C.A.** **COTTON, LINDLEY and LOPES, L.JJ.; reversing** (1885) 51 Ch. D. 328; 54 L. T. 242.—**PEARSON, J.** (*and see post*, col. 397);

followed, Ladywell Mining Co. v. Brookes (1887) 56 L. J. Ch. 684; 35 Ch. D. 400, 56 L. T. 677; 35 W. R. 785.—C.A. COTTON, LINDLEY and LOPES, L.J.; *affirmed on other grounds, nom. Cavendish-Bentinck v. Penn* (1887) 57 L. J. Ch. 552; 12 App. Cas. 652; 57 L. T. 773; 36 W. R. 441.—H.L. (E.). LORDS HERSCHELL, WATSON, FITZGERALD and MACNAGHTEN.

Cavendish-Bentinck v. Penn, distinguished, North Australian Territory Co., In re, Archer's Case (1891) 61 L. J. Ch. 129; [1892] 1 Ch. 322.—C.A. (*post*, col. 425); *considered*, Grant v. Gold Exploration and Development Syndicate (1899) 69 L. J. Q. B. 160; [1900] 1 Q. B. 233.—C.A. (*post*, col. 445); *distinguished*, Leeds and Hanley Theatre of Varieties, Ltd., In re (*post*, col. 399).

Lydney, &c. Iron Ore Co. v. Bird (*supra*), *considered*.

Faure Electric Accumulator Co., In re (1888) 58 L. J. Ch. 48; 40 Ch. D. 141; 39 L. T. 918; 37 W. R. 116.—KAY, J.

Lydney, &c. Iron Ore Co. v. Bird, explained, Faure Electric Accumulator Co., In re, *commented on*.

Metropolitan Coal Consumers' Association v. Scrimgeour (1895) 65 L. J. Q. B. 22; [1895] 2 Q. B. 604; 14 R. 729; 73 L. T. 137; 44 W. R. 35; 2 Manson 579.—C.A.

LINDLEY, L.J.—Now as regards the last-mentioned case [*Lydney, &c. Co. v. Bird*], although there are expressions which have been referred to by the appellants' counsel, and to which I stand, they have application of course to the circumstances of that case, and the circumstances of that case have not the slightest resemblance to the circumstances of the present case. The money there sought to be recovered was not money which was paid by the company for placing shares. There was a person named James Bird, who was a promoter of the company, and he secretly made a profit at the expense of the company of 10,800*l*. He was made liable for it. He said: "Well, but I have spent 5,000*l*. as a consideration, which I gave to William Bird for guaranteeing me that the shares should be taken up in this company," and we disallowed James Bird that bill. The whole thing was a juggle from beginning to end, and we disallowed it on the ground that it was an improper transaction, and so it was. It has nothing whatever to do with, and is far away and remote from, such a case as this, where there is no juggle and no impropriety at all. As regards *Faure Electric Accumulator Co., In re*, no doubt Kay, J. did apparently hold that these brokerage payments were illegal, being paid out of capital, certainly, and he made the directors there liable for them. If that decision is understood as going so far as to compel us to hold that these payments are illegal, I should say that I dissent from it, and it goes a great deal too far. I doubt very much, if you look at the facts, whether the L.J. did intend to go as far as that. I doubt whether he regarded the commissions there as ordinary commissions of a reasonable amount, payable in the ordinary course of business. I think he treated them rather as improper payments, rather in the shape of bribes; and of course, if he took that view, he was perfectly justified in holding the directors liable to replace the money which they had so misapplied.—p. 24.

LOPES and RIGBY, L.J.J. to the same effect. See Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8.

Erlanger v. New Sombbrero Phosphate Co.

(*supra*, col. 394), *discussed*.

Aaron's Reefs, Ltd. v. Twiss (1896) 65 L. J. P. C. 54. [1896] A. C. 273; 74 L. T. 794.—H.L. (IR.). HALSBURY, L.C., LORDS WATSON, HERSCHELL, MACNAGHTEN, MORRIS and DAVEY; *affirming* (1894) [1895] 2 Ir. R. 207.—C.A. WALKER, L.C., PORTER, M.R., FITZGERALD and BARRY, L.J.J. See judgments in the Irish Courts, where all the cases are reviewed.

Erlanger v. New Sombbrero Phosphate Co. and

Aaron's Reefs, Ltd. v. Twiss, *referred to*, Rochefoucauld v. Bosend (1896) 66 L. J. Ch. 74; [1897] 1 Ch. 196; 75 L. T. 502; 45 W. R. 272.—C.A. HALSBURY, L.C., LINDLEY and A. L. SMITH, L.J.J.; *applied*, Gallard, In re, Gallard, Ex parte (1897) 66 L. J. Q. B. 484; [1897] 2 Q. B. 8; 76 L. T. 327; 45 W. R. 556; 4 Manson 52.—V. WILLIAMS, J.; *discussed*, Components Tube Co. v. Naylor (1898) [1900] 2 Ir. R. 1.—O'BRIEN, C.J., PALLES, C.B. and MADDEN, J. See the judgments at length.

Erlanger v. New Sombbrero Phosphate Co., distinguished.

Salomon v. Salomon & Co. (1896) 66 L. J. Ch. 35; [1897] A. C. 22; 75 L. T. 426; 45 W. R. 193; 4 Manson 89.—H.L. (U.). HALSBURY, L.C., LORDS WATSON, MACNAGHTEN, MORRIS and DAVEY; *reversing* S. C. *nom. Broderick v. Salomon* (1895) 64 L. J. Ch. 689; [1895] 2 Ch. 323; 12 R. 393; 72 L. T. 755; 43 W. R. 612; 2 Manson 449.—C.A.

LORD MACNAGHTEN.—In that case the vendor, who got up the company with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false. The directors, who were virtually his nominees, purchased from him without being aware of the real facts; and, on their assurance that, in so far as they knew, all was right, the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and it was set aside at the instance of the liquidator, the L.C. (Earl Cairns) expressing a doubt whether, even in those circumstances, the remedy was not too late, after a liquidation order. But in this case, the agreement of July 20th was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were or were likely to be members of the company. In my opinion, therefore, *Erlanger v. New Sombbrero Co.* has no application.—p. 43.

LORD DAVEY.—Counsel relied on some dicta in *Erlanger v. New Sombbrero Co.*, a case which is often quoted and not infrequently misunderstood. Of course Lord Cairns' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and directors before the shares were offered for subscription, whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding and exercised no judgment of their own. It has nothing to do with the present case.—p. 53.

Salomon v. Salomon & Co., discussed and applied.

Wragg (R. J.), Ltd., *In re* (1897) 66 L. J. Ch. 419; [1897] 1 Ch. 796.—WRIGHT, J.; and C.A. (*post*, col. 499).

Carey, *In re*, Jeffreys, Ex parte [1895] 2 Q. B. 624; 73 L. T. 221; 43 W. R. 605; 2 Manson 198.—V. WILLIAMS, J.; *affirmed*, C.A. ESHER, M.R., KAY and A. L. SMITH, L.J.J., *commented on*.

Salomon v. Salomon & Co., explained and not applied.

Hirth, *In re*, Official Receiver, *Ex parte* (1899) 68 L. J. Q. B. 387; [1899] 1 Q. B. 612; 80 L. T. 63; 47 W. R. 243; 6 Manson 10.—C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.J.J. *And see* Bullock v. Ardern (1901) 17 Times L.R. 285.—C.A. A. L. SMITH, M.R., COLLINS and ROMER, L.J.J.

Cape Breton Co., *In re* (*supra*, col. 394), explained.

Olympia, Ltd., *In re* (1898) 67 L. J. Ch. 433; [1898] 2 Ch. 153; 78 L. T. 629; 5 Manson 139.—C.A.; *affirmed*, *nom.* Gluckstein v. Barnes, *post*, col. 398.

LINDLEY, M.R.—Upon principle it appears to me clear that there is nothing to prevent the company from claiming the profit secretly got from it by those whose duty it was not to make such profit without informing the company of what they were doing. A few words must be said respecting the authorities relied on by the defendant. *Salomon v. Salomon & Co.* is in no way opposed to this conclusion. That case turned on the fact that every member of the company knew everything of the circumstances upon which the liquidator afterwards relied in order to support the claim he made in the name of the company, but really on behalf of the creditors who, in the view taken by the House of Lords, had not been defrauded. Neither is this case covered by *British Seamless Paper Box Co., In re* (*post*, col. 425), for nothing was concealed from any one in that case. But what Sir G. Jessel there said is very pertinent in the present case. . . . The syndicate agreement and the two other agreements of even date remove all difficulty which in their absence might have been created by *Gover's Case* (*post*, col. 402), and by *Ladywell Mining Co. v. Brookes* (col. 395), so far as relates to the commencement of the character of promoter. The right to recover the profit without rescinding the contract of purchase is said to be inconsistent with, and indeed directly opposed to, the decision of this Court in *Cape Breton Co., In re*, which was affirmed by the H. L., but on different grounds. *Cape Breton Co., In re*, was followed by this Court in *Ladywell Mining Co. v. Brookes*, but in *Lydney, &c. Co. v. Bird* (*supra*, col. 394) it was pointed out that the decision in *Cape Breton Co., In re*, turned on the special combination of facts which had there to be considered. The report of *Cape Breton Co., In re*, shows that the great difficulty presented by it arose from the fact that the promoters had bought and paid for the property which they afterwards sold to a company. They did not, as here, pay for what they bought out of money got from the company to whom they re-sold it. Pearson, J. and the C. A. treated the vendors simply as persons who had sold their own property to a company afterwards promoted by them without disclosing the fact that the

property was theirs. This is the true explanation of the principal difficulty felt by Pearson, J. and Cotton and Fry, L.J.J. in *Cape Breton Co., In re*, whose judgments, however, were dissented from by Bowen, L.J. No one decided in that case that, as a general proposition, the mere fact that a contract for purchase by a company cannot be rescinded precludes the company from obtaining from the vendor, if he is a promoter, and still less if he is also a director, a secret profit made by him at its expense. So to hold would be contrary to well settled law and to many decisions, some of which were referred to in *Lydney, &c. Co. v. Bird*.—p. 442.

RIGBY and COLLINS, L.J.J. to same effect.

Salomon v. Salomon & Co. (*supra*) and Erlanger v. New Sombrero Phosphate Co. (*supra*, col. 394), distinguished.

Ambrose Lake Tin, &c. Co., *In re* (*supra*, col. 394), discussed.

Lagunas Nitrate Co. v. Lagunas Syndicate (1899) 68 L. J. Ch. 699; [1899] 2 Ch. 392; 81 L. T. 334; 48 W. R. 74; 7 Manson 165.—C.A.—LINDLEY, M.R., RIGBY and COLLINS, L.J.J. *See* the judgments at length.

Lagunas Nitrate Co. v. Lagunas Syndicate, statement of law approved.

National Bank of Wales, *In re*, Cory's Case (1899) 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99.—C.A. LINDLEY, M.R., SIR F. JEUNE and ROMER, L.J.; *affirmed*, *nom.* Dovey v. Cory (1901) 70 L. J. Ch. 753; [1901] A. C. 477 (*post*, col. 432).

Salomon v. Salomon & Co., referred to.

Bank of Ireland v. Corgy Spinning Co. (1899) [1900] 1 Ir. R. 219.—PORTER, M.R.

Lagunas Nitrate Co. v. Lagunas Syndicate, principle adopted.

Merchants' Fire Office v. Armstrong (1901) 17 Times L. R. 709.—C.A. RIGBY, COLLINS and ROMER, L.J.J.

Olympia, Ltd., *In re* (*supra*, col. 397), affirmed.

Gluckstein v. Barnes (1900) 69 L. J. Ch. 835; [1900] A. C. 240; 82 L. T. 393; 7 Manson 321.—H.L. (E.). HALSBURY, L.C., LORDS MACNAGHTEN and ROBERTSON.

Olympia, Ltd., *In re* (or Gluckstein v. Barnes), discussed and distinguished.

Cape Breton Co. *In re* (col. 394), Ladywell Mining Co. v. Brookes (col. 395), and New Sombrero Phosphate Co. v. Erlanger (col. 394), dicta of LORD CAIRNS, followed.

Lady Forest (Murchison) Gold Mine, *In re*, (1901) 70 L. J. Ch. 275; [1901] 1 Ch. 582; 84 L. T. 559; 8 Manson 438.

WRIGHT, J.—There were two matters which lay at the root of the judgments in the C. A. and the H. L. in *Olympia, Ltd., In re*. One was the conclusion at which the L.J.J. and the law lords arrived—that is, that from the beginning, from the date of the earliest agreement for acquisition on the part of the vendors, there was also a commencement of the promotion of the company which was ultimately promoted. . . . The second ground upon which the C. A. proceeded was an express and fraudulent representation made by the vendors to the vendee company. Now, neither of these circumstances is present here.—p. 277.

New Sombbrero Phosphate Co. v. Erlanger (col. 394), *applied*, *Burland v. Earle* (1901) 71 L. J. P. C. 1; [1902] A. C. 83.—P.C. (*post*, col. 471); *Leeds and Hanley Theatre of Varieties, Ltd., In re* (1902) 72 L. J. Ch. 1; [1902] 2 Ch. 809; 87 L. T. 488; 51 W. R. 5.—C.A. V. WILLIAMS, ROMER and STIRLING, L.JJ.

Olympia, Ltd., In re, dicta applied.
Leeds, &c. Theatre of Varieties, Ltd., In re (supra).

Prospectus.

Stainbank v. Fernley (1839) 8 L. J. Ch. 142; 9 Sim. 566; 3 Jur. 262.—SHAWWELL, V.-C., *approved*.

Burnes v. Pennell (1849) 2 H. L. Cas. 497; 13 Jur. 897.—H.L. (SC.). LORDS CAMPBELL and BROUGHAM.

Burnes v. Pennell, distinguished.

National Exchange Co. of Glasgow v. Drew (1855) 2 Macq. 103.—H.L. (SC.). CRANWORTH, L.C., LORDS BROUGHAM and ST. LEONARDS.

Seymour v. Bagshaw (1855) 29 L. J. Ex. 62, n.; 18 C. B. 908.—JERVIS, C.J.; and **Bedford v. Bagshaw** (1859) 29 L. J. Ex. 59; 4 H. & N. 538.—EX., *overruled*.

Scott v. Dixon (1859) 29 L. J. Ex. 62, n.—Q.B. and **Gerhard v. Bates** (1853) 22 L. J. Q. B. 364; 2 El. & Bl. 476; 17 Jur. 1097; 1 C. L. R. 868; 1 W. R. 393.—Q.B., *explained and adopted*.

Barry v. Croskey (1861) 2 J. & H. 1.—WOOD, V.-C., *approved*.

Peek v. Gurney (1873) 43 L. J. Ch. 10; L. R. 6 H. L. 877; 22 W. R. 29.—H.L. (E.). LORDS O'BRIEN, COLONSAY and CARRS.

LORD CHELMSFORD.—*Bedford v. Bagshaw* is a case where the defendant and others forming the board of management of a joint-stock company for the purpose of getting the shares of the company inserted in the official list of the stock exchange, untruthfully represented that two-thirds of the scrip had been paid upon. The shares being in consequence of that representation inserted in the official list, the plaintiff knowing the requirements of the stock exchange, on the faith that two-thirds of the scrip had been paid upon, purchased shares in the company. The jury found that the representation was made fraudulently. The Court of Ex. held that the defendant was liable for the damages sustained by the plaintiff, although the representation was not made to him directly. Two of the learned judges, Martin and Bramwell, BB., considered the case to be concluded by a former decision, in a case of *Seymour v. Bagshaw*, against the same defendant. The proceedings in that case, however, hardly appear to recommend it as an authority. The action was tried by Jervis, C.J., who told the jury that if the plaintiff was induced, by seeing the shares quoted in the official list of the stock exchange, to purchase them, and if they believed that the insertion of the shares in the list was procured by the false and fraudulent representation of the defendant, the plaintiff was entitled to recover. A bill of exceptions was tendered to the C.J.'s ruling. In the Ex. Ch. judgment was pronounced by consent, without argument, for the purpose of going at once to the H. L. This is stated in the C. B. Reports (18 C. B. 908), but Bramwell, B. says (4 H. & N. 547—548), that the judgment in the Ex. Ch. did not pass *sub silentio*. [Note.—But see the

fuller report in 29 L. J. Ex. 64, where the words of the learned Baron are: "*I have got a very strong impression on my mind that the judgment of the Court of Exchequer did not pass sub silentio*" Martin, B. had previously said that the parties did not think fit to argue it, and therefore the judgment was affirmed." The apparent difference probably arose thus, the counsel did not argue the question, but the judges among themselves might have discussed it.] No other trace, however, of the manner in which the case was disposed of is to be found, except in the short notice of it in the C. B. Reports. On the case being called on in the H. L., the counsel for Bagshaw, the plaintiff in error, said he did not think he could usefully occupy the time of the House by arguing it, and he at once submitted to a judgment for the defendant in error. How, under these circumstances, this case could be considered as a conclusive authority by the judges who decided *Bedford v. Bagshaw*, it is hard to understand. But the cases themselves cannot, in my opinion, be supported. The actions were brought upon the allegations of a false representation made to the plaintiff. But no representation at all was made which reached either his eyes or his ears. From his knowing the rules of the stock exchange he assumed that a certain representation had been made, and acted upon it. According to the judgment, it was his knowledge of the rules which led him to appropriate the representation to himself, and therefore it could not be taken to be made to any one who was ignorant of these rules. The decisions, and the grounds upon which they proceeded, appear to me to be extraordinary, and I cannot bring my mind to agree with them. In *Scott v. Dixon*, which is to be found in the note to *Bedford v. Bagshaw* in the Law Journal, an action was brought against a director of a banking company for falsely, fraudulently, and deceitfully publishing and representing to the plaintiffs that a dividend was about to be paid out of the profits which were sufficient for payment of the dividend, and that the shares were a safe investment for the money. The plaintiffs bought their shares upon the faith of a report made by the directors to the shareholders which contained the false representations. Copies of this report were left at the bank, and were to be had by sharebrokers or any persons applying for it who were desirous of information with regard to the affairs of the bank, with a view to the purchase of shares. The plaintiffs purchased at the bank, through their broker, a copy of the report. The Court of Queen's Bench held that there being positive evidence that the report was to be bought by any person who thought of becoming a purchaser of shares, and that it came into the hands of the plaintiffs in this manner, and by the perusal of it they were induced to buy shares in the bank, there was a publication to the plaintiffs in the sense of the declaration; I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares, and the representation must be regarded as having been made, not indirectly, but directly, to each person who obtained the report from the bank, where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director. *Gerhard v. Bates* is supposed to be an authority

in support of the argument that a prospectus, containing untrue representations, may be made the ground of an action by a purchaser of shares, who has been deceived and induced by the representations to become a shareholder. That case, however, establishes no such proposition, but rather, as I read it, the contrary. . . . Lord Campbell, in giving judgment for the plaintiff, said "Had it been alleged that the defendant, meaning to deceive and injure the plaintiff, and to induce him to purchase shares in the company under the belief that it was a safe and profitable undertaking, fraudulently delivered to the plaintiff the prospectus containing the false representation, whereby the plaintiff was induced to purchase the shares, there can be no doubt that the count would have been sufficient. The allegations which it does contain appear to us to be equivalent." And he afterwards adds, "if the plaintiff had only averred that having seen the prospectus he was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant and the act of the plaintiff from which the loss arose;" a remark which has a direct application to the present case. *Gerhard v. Bates*, therefore, is no authority for holding that upon a prospectus addressed to the public by the directors of a company, any one of the public who has been led to take shares upon the faith of the representations thus published, can maintain an action against them. The observations of Lord Campbell rather indicate a contrary opinion—pp. 36–38.

LORD CAIRNS discussed and approved of *Barry v. Croskey*.

Peek v. Gurney, explained.

Cargill v. Bower (1878) 47 L. J. Ch. 649; 10 Ch. D. 502; 38 L. T. 779. 26 W. R. 716.—FRY, J. See "PRINCIPAL AND AGENT."

Barry v. Croskey and Peek v. Gurney, distinguished.

Andrews v. Mockford (1896) 65 L. J. Q. B. 302; [1896] 1 Q. B. 372; 73 L. T. 726.—C.A. ESHER, M.R., A. L. SMITH and RIGBY, L.JJ.

A. L. SMITH, L.J.—In my opinion, without discussing the effects of these cases [*Barry v. Croskey* and *Peek v. Gurney*], neither decision governs the present one, which is a case of continued systematic fraud from its commencement to its end. The third proposition enunciated by Wood, V.-C. in *Barry v. Croskey*, and approved by Lord Cairns in *Peek v. Gurney*, in my judgment covers the case.—p. 306.

RIGBY, L.J.—I think there is nothing in *Peek v. Gurney*, or in any other case, which meets the present one. . . . *De Berenger's Case* [*Ree v. De Berenger* (1814) 3 M. & S. 67; 15 R. R. 415.—K.B.] has nothing to do with this case. It was said that Lord Russell had differed from the decision in that case; but I see no ground for that suggestion, for he merely said that nothing that had been stated by Wood, V.-C. in *Barry v. Croskey* about *De Berenger's Case* could in his opinion alter the liability of persons who, being owners of property, procure false statements to be made about that particular property in order to induce members of the public to purchase that property from them.—p. 307.

Peek v. Gurney, applied.

Davoren v. Wootton [1900] 1 Ir. R. 273.—C.A. ASHBOURNE, L.O., FITZGIBBON, WALKER and HOLMES, L.JJ.

Cornell v. Hay (1873) 42 L. J. C. P. 136; L. R. 8 C. P. 328; 28 L. T. 475; 21 W. R. 580.—KEATING and HONYMAN, JJ.; **Charlton v. Hay** (1874) 31 L. T. 437; 23 W. R. 129.—BLACKBURN and MELLOR, JJ.; **Coal Economising Gas Co., In re, Gover, Ex parte** (1875) 45 L. J. Ch. 83; 1 Ch. D. 182; 33 L. T. 619; 24 W. R. 125.—C.A. JAMES and MELLISH, L.JJ. and BRAMWELL, B.; BRETT, J. *dissenting*; and **Craig v. Phillips** (1876) 46 L. J. Ch. 49; 3 Ch. D. 722; 35 L. T. 198.—BACON, V.-C., *discussed*.

Twycross v. Grant (1877) 46 L. J. C. P. 636. 2 C. P. D. 469; 36 L. T. 812; 25 W. R. 701.—C.A. COCKBURN, C.J. and BRETT, L.J.; KELLY, C.B. and BRAMWELL, L.J. *dissenting*. See judgments at length.

Gover's Case and Twycross v. Grant, discussed.

Craig v. Phillips (1877) 47 L. J. Ch. 239. 7 Ch. D. 249; 37 L. T. 772; 26 W. R. 293.—C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.JJ.

Gover's Case and Twycross v. Grant, discussed.

Sullivan v. Mitcalfe (1880) 49 L. J. C. P. 813; 5 C. P. D. 453; 44 L. T. 8; 29 W. R. 181.—C.A. [BAGGALLAY and THESIGER, L.JJ. held (BRAMWELL, L.J. *dissenting*), that the wider view of sect. 38 of the Companies Act, 1867, taken in *Twycross v. Grant*, by Cockburn, C.J. and Brett, L.J., and in *Gover's Case*, by Brett, J., ought to prevail over the narrower construction of Bramwell, L.J. See the judgments at length.]

Sullivan v. Mitcalfe, followed, *Jury v. Stoker* (1882) 9 L. R. Ir. 385.—SULLIVAN, M.R.; *affirmed*, C.A. LAW, L.C. DEASY and FITZGIBBON, L.JJ.; *applied*, *Cackett v. Keswick* (*post*, col. 404).

Charlton v. Hay, not applied.

Sullivan v. Mitcalfe; Twycross v. Grant, and Gover's Case, distinguished.

Howard v. Escombe (1887) 3 Times L. R. 316.—FOLLOCK, B.

Gover's Case, not applied, *Aaron's Reefs, Ltd. v. Twiss* (1896) 65 L. J. P. C. 54; [1896] A. C. 273, 74 L. T. 794.—H.L. (IR.) (*supra*, col. 396); *referred to*, *Olympia, Ltd., In re* (1898) 67 L. J. Ch. 433; [1898] 2 Ch. 153.—C.A. (*supra*, col. 397).

Twycross v. Grant, applied.

Hatchard v. Mège (1887) 56 L. J. Q. B. 397; 18 Q. B. D. 771; 56 L. T. 662; 35 W. R. 576; 51 J. P. 227.—DAY and WILLES, JJ.

Arkwright v. Newbold (1881) 50 L. J. Ch. 372; 17 Ch. D. 301; 44 L. T. 393; 29 W. R. 455.—C.A. JAMES, COTTON and LUSH, L.JJ.; *reversing* (1880) 49 L. J. Ch. 684; 42 L. T. 759; 28 W. R. 828.—FRY, J., *approved*.

Smith v. Chadwick (1884) 9 App. Cas. 187; 50 L. T. 697; 32 W. R. 637; 48 J. P. 644.—H.L. (E.). SELBORNE, L.C., LORDS BLACKBURN, WATSON and BRAMWELL, the last-named judge giving different reasons; *affirming* (1882) 51 L. J. Ch. 697.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ. *And see post*, col. 404.

Smith v. Chadwick, applied, *Bellairs v. Tucker* (1884) 13 Q. B. D. 562.—DENMAN and MANISTY, JJ.; *Edginton v. Fitzmaurice* (1885) 55 L. J. Ch. 650; 29 Ch. D. 459; 53 L. T. 369; 33 W. R. 911; 50 J. P. 52.—

C.A. COTTON, BOWEN and FRY, L.J.J.: Hughes v. Twisden (1886) 55 L. J. Ch. 481; 54 L. T. 470; 34 W. R. 498—NORTH, J.; *discussed and followed*, Arnison v. Smith (1889) 41 (Ch. D. 348; 61 L. T. 63; 37 W. R. 739; 1 Meg. 338.—C.A. HALSBURY, L.C., COTTON and LINDLEY, L.J.J.: *dicta disapproved*, Derry v. Peek (1889) 58 L. J. Ch. 864; 14 App. Cas. 337; 61 L. T. 265; 38 W. R. 33; 54 J. P. 148; 1 Meg. 292.—H.L. (E.). HALSBURY, L.C., LORDS WATSON, BRAMWELL, FITZGERALD and HERSCHELL; *reversing* S. C. *nom.* Peek v. Derry (1887) 57 L. J. Ch. 347; 37 Ch. D. 541; 59 L. T. 78; 36 W. R. 899.—C.A. COTTON, L.J., SIR J. HANNEN and LOPES, L.J.; *which reversed*, STIRLING, J.

Derry v. Peek (*supra*), *explained and applied*. Glasier v. Rolls (1889) 58 L. J. Ch. 825, 820; 42 Ch. D. 436; 38 W. R. 113; 1 Meg. 418.—C.A., *reversing* 60 L. T. 591; 1 Meg. 196.—KEKEWICH, J.

LOPES, L.J.—It is unnecessary to express any opinions as to whether the decisions of Kekewich, J. would have been right if the decision of the C. A. in *Peek v. Derry* had not been reversed in the H. L. The H. L. have held that if a statement is untrue in fact, but believed to be true, though without any reasonable grounds for such belief, no action for deceit will lie. There must be moral delinquency, actual dishonesty. Lord Herschell and the other lords adopt the first three definitions of fraud necessary to support an action of deceit which I gave in *Peek v. Derry*; the fourth, he and the other learned lords reject. The fourth definition was, if the statement is untrue in fact, but believed to be true, without any reasonable grounds for such belief. It is on this definition of fraud that the learned judge in the Court below acted. The H. L., as I read the opinions of the learned lords, have held that the inaccuracy of a statement, however unreasonable, if honest and *bona fide*, will not support an action for deceit—I presume because it does not contain the necessary element of dishonesty.—p. 823. COTTON and FRY, L.J.J. to the same effect.

Derry v. Peek, discussed.

Angus v. Clifford (1891) 60 L. J. Ch. 448; [1891] 2 Ch. 449; 65 L. T. 274; 39 W. R. 498.—C.A.; *reversing* (1890) 63 L. T. 684; 39 W. R. 252.—ROMER, J.

LINDLEY, L.J.—Speaking of *Derry v. Peek* broadly, I take it that it has settled once for all the controversy which was well known to have given rise to very considerable differences of opinion as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and, as I understand *Derry v. Peek*, it settles that question in this way, that an action for a negligent, as distinguished from a fraudulent, misrepresentation [in a company's prospectus] cannot be supported. I think it is perfectly impossible to read the judgments which were delivered in that case, especially Lord Herschell's, to which I will allude presently, without seeing that that is the broad proposition of the law which *Derry v. Peek* has settled, and settled for good.—p. 451. See judgment at length, and also judgments of Bowen and Kay, L.J.J.

Derry v. Peek, explained, Low v. Bouverie (1891) 60 L. J. Ch. 594; [1891] 3 Ch. 82; 65 L. T. 533; 40 W. R. 50.—C.A. LINDLEY, BOWEN and KAY, L.J.J.; *discussed*, Scholes v. Brook (1891) 63 L. T. 337.—ROMER, J.; *affirmed*, 64 L. T. 474.—C.A. LINDLEY, LOPES and KAY, L.J.J.

Derry v. Peek, applied.

Angus v. Clifford (*supra*), *explained and distinguished*. Knox v. Hayman (1892) 67 L. T. 137.—C.A. LINDLEY, LOPES and KAY, L.J.J.

Derry v. Peek, explained.

Tomkinson v. Balkis Consolidated Co. (1891) 60 L. J. Q. B. 558; [1891] 2 Q. B. 614; 64 L. T. 816; 39 W. R. 693.—C.A. ESHER, M.R., LOPES and KAY, L.J.J.; *affirmed, nom.* Balkis Consolidated Co. v. Tomkinson [1893] 63 L. J. Q. B. 184; [1893] A. C. 396 (*quod*, col. 522).

Derry v. Peek, considered, Le Lievre v. Gould (1893) 62 L. J. Q. B. 853; [1893] 1 Q. B. 491; 68 L. T. 626; 41 W. R. 468; 57 J. P. 484.—C.A. ESHER, M.R., BOWEN and A. L. SMITH, L.J.J.; Oliver v. Bank of England (1902) 71 L. J. Ch. 388; [1902] 1 Ch. 610; 86 L. T. 248; 50 W. R. 340; 7 Com. Cas. 89.—C.A. V. WILLIAMS, STIRLING and COZENS-HARDY, L.J.J., Sheffield Corporation v. Barclay (1902) 72 L. J. K. B. 8; [1903] 1 K. B. 1; 87 L. T. 479.—ALVERSTONE, C.J.

Drinquier v. Wood (1898) 68 L. J. Ch. 181; [1899] 1 Ch. 393; 79 L. T. 548; 47 W. R. 252; 6 Manson 76.—BYRNE, J., *approved*.

Smith v. Chadwick (*supra*, col. 402), *adhered to*.

Greenwood v. Leather Shod Wheel Co. (1899) 69 L. J. Ch. 131; [1900] 1 Ch. 421; 81 L. T. 595; 7 Manson 210.—C.A. LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.J.; *affirming* 80 L. T. 462.—KEKEWICH, J. See Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (5).

Greenwood v. Leather Shod Wheel Co.; Smith v. Chadwick, and Derry v. Peek (*supra*), *applied*.

Cackett v. Keswick (1901) 85 L. T. 14; 50 W. R. 10.—FARWELL, J.; *affirmed*, 71 L. J. Ch. 641; [1902] 2 Ch. 456; 87 L. T. 111; 51 W. R. 68; 9 Manson 388.—C.A. V. WILLIAMS, ROMER and STIRLING, L.J.J.

Smith v. Chadwick (*supra*), *test applied*.

Broome v. Speak (1902) 71 L. J. Ch. 716; 50 W. R. 614.—BUCKLEY, J.

Cackett v. Keswick, *proposition of law in, followed*.

Watts v. Bucknall (1902) 71 L. J. Ch. 903; [1902] 2 Ch. 628; 87 L. T. 428; 51 W. R. 44; 9 Manson 426.—BYRNE, J.

Colt v. Wollaston (1723) 2 P. Wms. 154; *followed*, Green v. Barrett (1826) 1 Sim. 45; 5 L. J. (o.s.) Ch. 6.—LEACH, V.-C.; *discussed and applied*, Ramshire v. Bolton (1869) 38 L. J. Ch. 594; L. R. 8 Eq. 294; 21 L. T. 51; 17 W. R. 986.—MALINS, V.-C.

Ogilvie v. Currie (1868) 37 L. J. Ch. 541; 18 L. T. 593; 16 W. R. 767.—CAIRNS, L.C., *observed on*.

Hill v. Lane (1870) 40 L. J. Ch. 41; L. R. 11 Eq. 215; 23 L. T. 547; 19 W. R. 194.—STUART, V.-C.

2. CAPITAL.

Reduction.

Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan (1868) L. R. 6 Eq. 91; 16 W. R. 1107.—GIFFARD, V.-C., *approved*

Hull Flax Co. v. Wellesley (1860) 30 L. J. Ex. 5; 6 H. & N. 38.—EX; and **New Zealand Banking Corporation, In re, Sewell's Case** (1868) L. R. 3 Ch. 131; 18 L. T. 2; 16 W. R. 381.—CAIRNS, L.J., *distinguished*.

Bank of Hindustan v. Alison (1870) 40 L. J. C. P. 1, 117; L. R. 6 C. P. 54, 222; 23 L. T. 854; 19 W. R. 505.—C.P. and EX. CH.

Bank of Hindustan v. Alison, discussed.

Bank of Hindustan, China and Japan, In re, Campbell's Case, Hippisley's Case (1873) 43 L. J. Ch. 1; L. R. 9 Ch. 1; 29 L. T. 519; 22 W. R. 113.—SELBORNE, L.C., JAMES and MELLISH, L.J.J.; *reversing* 42 L. J. Ch. 711. L. R. 16 Eq. 417; 28 L. T. 622; 21 W. R. 730.—WICKENS, V.-C.

London, Hamburg and Continental Exchange Bank, In re, Evans's Case (1867) 36 L. J. Ch. 501; L. R. 2 Ch. 427; 16 L. T. 253; 15 W. R. 543.—TURNER and CAIRNS, L.J.J., *approved*.

Natal Investment Co., In re, Snell's Case (1869) L. R. 5 Ch. 22; 21 L. T. 445; 18 W. R. 30.—GIFFARD, L.J. *And see post*, col. 407.

Snell's Case, discussed and distinguished.

United Service Co., In re, Hall's Case (1870) 39 L. J. Ch. 730; L. R. 5 Ch. 707; 23 L. T. 331; 18 W. R. 1058.—JAMES, L.J.

Campbell's Case and Snell's Case, approved.
County Palatine Loan and Discount Co., In re, Teasdale's Case (1874) 43 L. J. Ch. 578; L. R. 9 Ch. 54; 29 L. T. 707; 22 W. R. 286.—JAMES and MELLISH, L.J.J. *And see post*, col. 408.

Teasdale's Case, dictum questioned.

Hope v. International Financial Society (1876) 4 Ch. D. 827; 46 L. J. Ch. 200; 35 L. T. 924; 25 W. R. 203.—C.A.

JAMES, L.J.—I am reported to have said in *Teasdale's Case* that the power to purchase shares would be good. I am not quite sure that that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case—p. 336.

BAGGALLAY, J.A. discussed *Teasdale's Case* and *Campbell's Case*. BRETT, J.A. concurred.

Hope v. International Financial Society, distinguished.

Snell's Case, approved.

Dronfield Silkstone Coal Co., In re (1880) 50 L. J. Ch. 387; 17 Ch. D. 76; 44 L. T. 361. 29 W. R. 768.—C.A. COTTON, JAMES and LUSH, L.J.J. *And see post*, col. 407.

Campbell's Case (supra), applied.

Taylor v. Pilsen Joel and General Electric Light Co. (1884) 53 L. J. Ch. 856; 27 Ch. D. 268; 50 L. T. 480; 33 W. R. 134.—PEARSON, J.

Snell's Case, simile, no longer law.

Bellerby v. Rowland and Marwood's Steamship Co. (*post*, col. 407).

Dronfield Silkstone Coal Co., In re, discussed but followed.

Taylor v. Pilsen, &c. Electric Light Co., commented on.
Balgooley Distillery Co., In re, Weekes's Case (1886) 17 L. R. Ir. 239.—C.A. ASHBOURNE, L.C., FITZGIBBON, BARRY and NAISH, L.J.J.

Teasdale's Case and Hope v. International Financial Society, discussed.

Dronfield Silkstone Coal Co., In re, reasoning in, disapproved.

Balgooley Distillery Co., In re, referred to.
Trevor v. Whitworth (1887) 57 L. J. Ch. 28; 12 App. Cas. 409; 57 L. T. 457; 36 W. R. 145.—H.L.(E.). LORDS HERSCHELL, WATSON, FITZGERALD and MACNAGHTEN; *reversing* C.A. COTTON, BOWEN and FRY, L.J.J. *See judgments at length.*

Trevor v. Whitworth, applied. Walker and Hacking, Ltd., *In re* (1887) 59 L. T. 763.—STIRLING, J.; Almada and Tritto Co., *In re* (1888) 57 L. J. Ch. 706; 38 Ch. D. 423.—C.A. (*post*, col. 513); Mersina and Adana Construction Co., *In re* (1889) 5 Times L. R. 680.—STIRLING, J.

Balgooley Distillery Co., In re, and Dronfield Silkstone Coal Co., In re, distinguished.

Trevor v. Whitworth, discussed.

General Finance Co., In re (1889) 23 L. R. Ir. 173.—CHATTERTON, V.-C.

Trevor v. Whitworth, discussed. Lee v. Neuchatel Asphalte Co. (1889) 58 L. J. Ch. 408; 41 Ch. D. 1; 61 L. T. 11, 37 W. R. 321; 1 Meg. 140.—C.A. COTTON, LINDLEY and LOPES, L.J.J.; Sharpe, *In re*, Bennett, *In re* (1891) 61 L. J. Ch. 193; [1892] 1 Ch. 154.—C.A. (*post*, col. 436).

Teasdale's Case, followed.

Trevor v. Whitworth, discussed.

Eichbaum v. City of Chicago Grain Elevators (1891) 61 L. J. Ch. 28; [1891] 3 Ch. 459; 40 W. R. 153.—STIRLING, J. *And see post*, col. 408.

Trevor v. Whitworth, distinguished.

Denver Hotel Co., In re (1892) 62 L. J. Ch. 450; [1893] 1 Ch. 435; 2 R. 330; 68 L. T. 8; 41 W. R. 339.—C.A.

LINDLEY, L.J. (for self. BOWEN and A. L. SMITH, L.J.J.).—No doubt a surrender of shares in consideration of a payment in money or money's worth by the company is a purchase by it of its own shares, and is *ultra vires*, as pointed out by Lord Macnaghten in *Trevor v. Whitworth*. But, as we understand this transaction, the company is giving nothing in the shape of money or other available assets for the shares which it acquires. . . . The capital might be in excess of the wants of the company within the words of sect. 3 of the Companies Act, 1867. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard Lord Macnaghten's judgment in *Trevor v. Whitworth* as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the Companies Acts, 1861 and 1877, it is *ultra vires* of a limited company to buy its own shares, even if its memorandum and articles expressly authorise it to do so. But he was not contemplating preferring

one shareholder to another of the same class as himself.—p. 455.

Trevor v. Whitworth, observations of LORD HERSHELL, applied.

Borough Commercial and Building Society, *In re* (1893) 62 L. J. Ch. 456; [1893] 2 Ch. 212; 49 L. T. 96; 41 W. R. 313.—V. WILLIAMS, J.

Trevor v. Whitworth, discussed.

Denver Hotel Co., *In re*, dicta of LINDLEY, L.J. disapproved.

British and American Trustee, &c. Corporation v. Cooper (1894) 63 L. J. Ch. 425; [1894] A. C. 399.—H. L. (E.) (*supra*, col. 388).

Trevor v. Whitworth, distinguished.

Gill v. Arizona Copper Co. (1900) 2 Fraser & Neave, COURT OF APPEALS.

[On the ground that it had no application to the case of a transfer of fully paid up shares in a company, either to the company itself or to its nominee.]

Trevor v. Whitworth, applied.

Dronfield Silkestone Coal Co., *In re* (*supra*, col. 405), discussed.

Bellerby v. Rowland and Marwood's Steamship Co. (1901) 70 L. J. Ch. 616; [1901] 2 Ch. 265; 84 L. T. 651; 8 Mans. 411. See next case.

KEKEWICH, J.—There is a strong current of opinion in favour of upholding surrenders in connection with forfeiture for due cause, even though the forms of forfeiture have not been complied with; and more than one judge has inclined to, if he has not expressed, the opinion that, to use the language of Fitzgibbon, L.J. in *Balquhoy Distillery Co., In re* (*supra*, col. 406), "Shares might be given by a shareholder gratuitously for the advantage of the company." In a concise summary, which indicates the absence of finality, Mr. Palmer in his work on Company Law (3rd ed.), p. 67, says: "Possibly a surrender to the company by way of donation may be free from objection." But it must be taken to have been conclusively settled by the H. L. in *Trevor v. Whitworth*, that a company under the Act of 1862, has no power to purchase its own shares, and that such a transaction cannot be sanctioned even by the memorandum of association. . . . In *Snell's Case* (*supra*, col. 405), Giffard, L.J., upheld a surrender of shares on which there was a liability for calls; and if that decision can properly be treated as unimpeached, it is undoubtedly in conflict with my opinions, which I should therefore be bound to abandon. *Snell's Case* was cited in *Trevor v. Whitworth*, and according to the reporter, commented on at length, but it is not noticed by either of the learned lords who took part in the judgment of the House. It seems to me, however, that the L.J.'s decision is not only inconsistent with much that was said, but is directly in conflict with the actual result. In saying this I am of course assuming the soundness of my view that the surrender of shares not fully paid up is really a transaction of sale and purchase; and *Snell's Case* does not say that it is not. . . . That case [*Dronfield Silkestone Coal Co.'s Case*] was necessarily discussed at length in *Trevor v. Whitworth*, and the grounds of the decision of the C. A. were not regarded with favour. But Lord Macnaghten took occasion to point out that, while disapproving of the grounds, he thought the decision

itself was sound. In short, he held that the liquidator had no equity to place Mr. Ward's name on the register when it had been off for seven years, during which the company had been prosperous and the shareholders who remained had received dividends largely increased by Ward's retirement. Lord Macnaghten cites Lord Cairns's decision in *Snell's Case* (*supra*, col. 485), and fully approves it.—p. 619.

Trevor v. Whitworth, principle applied.

Observations of LORD MACNAGHTEN distinguished, by COLLINS, M.R. and STIRLING, L.J.

Teasdale's Case (*supra*, col. 405) and **Eichbaum v. City of Chicago Grain Elevators** (*supra*, col. 406), commented on.

Bellerby v. Rowland and Marwood's Steamship Co. (1902) 71 L. J. Ch. 541; [1902] 2 Ch. 14; 86 L. T. 671; 50 W. R. 566; 9 Mans. 291.

—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.J.; affirming, on this point, KEKEWICH, J. (*supra*). And see *post*, col. 485.

Crédit Foncier of England, In re (1871) 40 L. J. Ch. 187; L. R. 11 Eq. 356; 23 L. T. 801; 19 W. R. 405.—BACON, V.-C., *not followed*.

Ebbw Vale Steel, Iron and Coal Co., In re (1877) 46 L. J. Ch. 241; 4 Ch. D. 827; 36 L. T. 308.—JESSUP, M.R., *followed*.

Kirkstall Brewery Co., Limited and Reduced, *In re* (1877) 46 L. J. Ch. 424; 5 Ch. D. 535; 37 L. T. 312.—BACON, V.-C.

Crédit Foncier of England, In re, not followed.

Patent Ventilating Granary Co., *In re* (1878) 48 L. J. Ch. 728; 12 Ch. D. 254; 41 L. T. 82; 27 W. R. 836.—FRY, J.

Ebbw Vale Steel, &c. Co., In re, questioned.

Bannatyne v. Direct Spanish Telegraph Co. (1886) 56 L. J. Ch. 107; 34 Ch. D. 287; 55 L. T. 716; 35 W. R. 125.—C.A. COTTON and FRY, L.Js. And see *post*, col. 409.

Bannatyne v. Direct Spanish Telegraph Co., followed.

Direct Spanish Telegraph Co., In re (1886) 56 L. J. Ch. 335; 34 Ch. D. 307; 55 L. T. 804; 35 W. R. 209.—KAY, J., *applied*.

Barrow Haematite Steel Co., *In re* (1888) 58 L. J. Ch. 148; 39 Ch. D. 582; 59 L. T. 600; 37 W. R. 249.—NORTH, J. See judgment at length. And see *post*.

Bannatyne v. Direct Spanish Telegraph Co., discussed.

Hyderabad (Deccan) Co., *In re* (1896) 75 L. T. 23; 3 Mans. 242.—STIRLING, J.

Direct Spanish Telegraph Co., In re, applied.

Quebrada Ry. Land and Copper Co., *In re* (1889) 58 L. J. Ch. 332; 40 Ch. D. 363; 60 L. T. 482; 1 Meg. 122.—NORTH, J.

Barrow Haematite Steel Co., In re, and Quebrada, &c. Co., not followed.

Union Plate Glass Co., *In re* (1889) 58 L. J. Ch. 767; 42 Ch. D. 513; 61 L. T. 327; 37 W. R. 792.—KAY, J. And see *post*.

Barrow Haematite Steel Co., In re, in part not followed.

Solway Steamship Co., *In re* (1889) 61 L. T. 659.—CHITTY, J.

Union Plate Glass Co., *dissented from*.

Barrow Hematite Steel Co., *adhered to*.
Gatling Gun, Ltd., in re (1890) 59 L. J. Ch. 279; 43 Ch. D. 628; 62 L. T. 312; 38 W. R. 317.
—NORTH, J.

Barrow Hematite Steel Co., in re; Quebrada, & Co., in re (*supra*); Gatling Gun Co., in re; and American Pastoral Co., in re (1890) 62 L. T. 625.—NORTH, J., *followed*.

Union Plate Glass Co., in re, *not followed*.
Agricultural Hotel Co., in re (1890) 60 L. J. Ch. 208; [1891] 1 Ch. 396; 63 L. T. 748; 39 W. R. 218.—KECKWICH, J.

Agricultural Hotel Co., in re, *referred to*.

Newbery-Yauntin (Patents) Gold Extraction Co., in re (1892) 61 L. J. Ch. 961, n.; [1892] 3 Ch. 127, n.; 67 L. T. 118, n.; 48 W. R. 698, n.—STIRLING, J.; and Continental Union Gas Co., in re (1891) 7 Times L. R. 476.—CHITTY, J., *approved*.

Pinkney & Sons' Steamship Co., in re (1892) 61 L. J. Ch. 691; [1892] 3 Ch. 125; 67 L. T. 117; 40 W. R. 698.—KECKWICH, J.

Continental Union Gas Co., in re, *observed on*.

James Colmer, Ltd., in re (1897) 66 L. J. Ch. 326. [1897] 1 Ch. 524; 76 L. T. 323; 45 W. R. 343.

ROMER, J.—I cannot help thinking that the decision of Chitty, J., in *Continental Union Gas Co., in re*, was based on the principle supposed to be established by *Hutton v. Scarborough Cliff Hotel Co.* (*supra*, col. 387), and would not have been given if at the time the last-mentioned case had been overruled—as it has since been, by *Andrews v. Gas Meter Co.* (*supra*, col. 389).—p. 327.

Bannatyne v. Direct Spanish Telegraph Co.

(*supra*, col. 408) and Floating Dock of St. Thomas, in re (1895) 64 L. J. Ch. 361; [1895] 1 Ch. 691; 13 R. 491; 43 W. R. 344.
—CHITTY, J., *applied*.

London and New York Investment Corporation, in re (1895) 64 L. J. Ch. 729; [1895] 2 Ch. 860; 13 R. 749; 73 L. T. 280; 44 W. R. 137; 2 Manson 541.—STIRLING, J.

Bannatyne v. Direct Spanish Telegraph Co.,

principle applied.

Credit Assurance and Guarantee Corporation, in re (1902) 2 Ch. 178; 86 L. T. 650; 50 W. R. 620.—FARWELL, J.; *reversed*, 71 L. J. Ch. 775; [1902] 2 Ch. 601; 87 L. T. 216; 51 W. R. 20.—C.A. V. WILLIAMS, ROMER and MATHEW, L.JJ.

Abstainers and General Insurance Co., in re

(1891) 60 L. J. Ch. 510; [1891] 2 Ch. 124; 64 L. T. 256; 39 W. R. 574.—NORTH, J., *followed*.

Barrow Hematite Steel Co., in re (1900) 69 L. J. Ch. 869; [1900] 2 Ch. 846; 83 L. T. 897.—COZENS-HARDY, J.; *affirmed on the facts*, (1901) 71 L. J. Ch. 15; [1901] 2 Ch. 746; 85 L. T. 498; 50 W. R. 71; 9 Manson 35.—C.A. ALVERSTONE, C.J., V. WILLIAMS and ROMER, L.JJ.

3. DIRECTORS.

Quorum.

Thames-Haven Dock and Ry. v. Rose

(1842) 12 L. J. C. P. 90; 2 D. (N.S.) 104; 5 Scott (N.R.) 524; 3 Railw. Cas. 177;

4 Man. & G. 552.—C.P.; and *Kirk v. Bell* (1851) 16 Q. B. 290.—Q.B., *considered*.
Alma Spinning Co., in re, *Bottomley's Case* (1880) 50 L. J. Ch. 167; 16 Ch. D. 681; 43 L. T. 620; 29 W. R. 133.—JESSEL, M.R.

Howbeach Coal Co. v. Teague (1860) 29 L. J. Ex. 137; 5 H. & N. 151; 6 Jur. (N.S.) 275; 8 W. R. 264.—EX., *disapproved*.

Murray v. Bush (1873) 42 L. J. Ch. 586; L. R. 6 H. L. 37; 29 L. T. 217; 22 W. R. 280.—LORDS CHELMSFORD, COLONSAY, CAIRNS and HATHERLEY: *Thames-Haven Dock and Ry. v. Rose*; *Kirk v. Bell*; and *Bottomley's Case*, *discussed*.

York Tramways Co. v. Willows (1882) 8 Q. B. D. 685; 51 L. J. Q. B. 257; 46 L. T. 296; 30 W. R. 624.—C.A.

COLERIDGE, C.J.—In *Howbeach Coal Co. v. Teague* the directors never had been lawfully appointed, and there was no proper quorum: the minority of the subscribers to the memorandum of association could not bind the shareholders: the body making the call was incompetent. In the case before us, for the reasons which I have given, it seems to me that a number of directors competent to make a call existed. In *Bottomley's Case*, a proper number of directors had been appointed; but this number had been reduced by death and insolvency, and the vacancies had not been filled up; and Jessel, M.R., as it seems to me, properly held that the number of directors having been reduced below the lawful number, they could not bind the shareholders by their acts. I am unable to agree with the view taken by Jessel, M.R., of *Kirk v. Bell*: the judges of the Court of Q. B. there proceeded upon a different ground, and they decided that there was not a quorum competent to transact the extraordinary business of the company. In my view *Kirk v. Bell* and *Bottomley's Case* are not in point for our decision. . . . That case [*Thames-Haven Dock and Ry. v. Rose*] shows that the business of the company does not come to a standstill because the proper number of directors does not exist. I am aware that that case is different from the case before us in its facts, but the judges of the Court of C. P. overruled the cogent argument addressed to them, and some of them at least were of opinion that the enactment as to the number of directors was directory only.—p. 697.

BRETT, L.J.—If the facts had been the same as in *Howbeach Coal Co. v. Teague*, it would have been necessary for us to consider whether that case could be supported; but in that case only three of the subscribers to the memorandum of association appointed the directors, whereas in the case before us four of the subscribers elected three directors, and the others were elected by these three: the directors, therefore, were elected by a majority of the subscribers: and I know of no rule of law preventing the majority of a body from binding the minority. . . . I think that the reasoning of Lord Cairns in *Murray v. Bush* applies. I prefer to follow the doctrine laid down by him rather than that laid down by Lord Chelmsford in the same case. I think that the defendant was bound by his acting as director: in this point of view also it must be taken that he joined in the allotment to himself, and I think that he is estopped from denying his liability. I feel more strongly upon this point than the L.C.J. appears to do. As to this question,

and with regard to the cases cited before us, I wish to say that I am unable to agree with *Houbesch Coal Co. v. Teague*, but I agree with *Harvard's Case* (post, col. 414) and *Fowler's Case* (post, col. 415). These cases show that the defendant must be taken to have allotted to himself and to have accepted the shares.—p. 699. HOLKER, L.J. concurred.

York Tramways Co. v. Willows, discussed.
Faure Electric Accumulator Co. v. Phillipart (1888) 58 L. T. 525.—HAWKINS, J.

Houbesch Coal Co. v. Teague (supra), sustained.
London and Southern Counties Freehold Land Co., in re (1885) 55 L. J. Ch. 224; 31 Ch. D. 223; 54 L. T. 44; 34 W. R. 163.—CHITTY, J.

Houbesch Coal Co. v. Teague, not applied.
Briton Medical and General Life Association v. Jones (1880) 61 L. T. 384.—POLLOCK, B. See post, col. 438.

Houbesch Coal Co. v. Teague, discussed.
Dawson v. African Consolidated Land and Trading Co. (1897) 67 L. J. Ch. 47; [1898] 1 Ch. 6; 77 L. T. 392; 46 W. R. 132.—C.A.

LINDEY, M.R.—I do not understand how *Houbesch Coal Co. v. Teague* can be cited as an authority to the effect that such an article as art. 114 only applies to outsiders dealing *bona fide* with the company without notice. It applies to and covers all such transactions, and there is nothing that I can discover in the judgments in *Houbesch Coal Co. v. Teague* which warrants the contention that this clause does not apply to calls and things of that kind as between the company on the one side and the shareholders on the other side. *Houbesch Coal Co. v. Teague* is intelligible up to a certain point; and as to the rest of it, it is so reported that I confess I do not thoroughly understand it. But the defect which the Court put their finger down upon in *Houbesch Coal Co. v. Teague* was, that the persons there who made the call had been improperly appointed by three out of seven of the subscribers to the memorandum of association. That was wrong, and the validating clause there—art. 60, which was similar in its terms to art. 114 here—did not cure that radical defect in their appointment. The Court having held that, upset the call, and declared the call was invalid. So far it is plain enough—that was the *ratio decidendi*, and that I follow perfectly well. Then comes a part of the case I do not follow with equal ease. Granting that the appointment of these gentlemen was altogether wrong, as it obviously was, and granting that the validating clause there did not apply, I do not see myself that it necessarily follows that what they did, although they had been improperly appointed, would not be validated; and I do not say that any of the judges, in giving judgment in that case, addressed himself to that point.—p. 51. CHITTY and V. WILLIAMS, L.J.J. concurred.

Hallows v. Fernie (1867) 36 L. J. Ch. 267; L. R. 3 Eq. 520; 15 L. T. 602; 15 W. R. 503.—WOOD, V.-C.: affirmed, L. R. 3 Ch. 467; 18 L. T. 340; 16 W. R. 873.—CHELMSFORD, L.C. (see post, col. 508), dictum followed and approved.

D'Arcy v. Tamar Kit Hill and Callington Ry. (1866) 36 L. J. Ex. 37; L. R. 2 Ex. 158;

14 L. T. 626; 14 W. R. 968.—EX., *distinguished*.

Great Northern Salt and Chemical Works, in re, Kennedy, Ex parte (1890) 44 Ch. D. 472; 59 L. J. Ch. 288; 62 L. T. 231; 2 Mog. 46.

STIRLING, J.—What is required of them [the subscribers to the memorandum of association] is, that they shall determine the number of directors and the names of the first directors; and it seems to me that if all of them do in any way show their determination on the subject, that ought to be treated as valid. This appears to have been the opinion of Lord Hatherley, when V.-C., who says in *Hallows v. Fernie*: "I very much doubt whether it is necessary that these persons should meet together. If any one of the subscribers to the contract"—that is, the memorandum of association—"raises a question, he may be entitled to say, 'I will not have this decided without a meeting of us all'; but if they all concur (as in this case), it seems to me hypercritical to say the appointment was irregular." That seems to me, if I may say so, excellent sense; and in the absence of any authority which compels me to another conclusion, I shall act on it. Now the authority which was relied on on the other side is the well-known case of *D'Arcy v. Tamar, &c. Ry.* That was a case in which, there being more than three directors, three constituted a quorum, and the secretary, in order to affix the seal of the company to a document which was to bind the company, got three of the directors to attest the affixing of the seal, they not having met together, but being casually picked up, one after the other. It was held that that would not do. But, to my mind, that case is clearly distinguishable on two grounds. First of all, in that case only a quorum acted—and that is open to very serious objection. It is pointed out by Lord Bramwell, who took part in the decision, that if a quorum of three, not meeting together and not being regularly summoned, were to act, another quorum of three might meet in a different place and come to exactly an opposite conclusion, and therefore the government of the company by means of quorums so picked up would be impossible. It is also open to this serious observation, that the minority have no means of stating whether they assent to or dissent from the act proposed, and have no means of bringing their views before their colleagues if they do dissent. These are very serious objections to the validity of the procedure where only a quorum assent to the act; but where the whole body of directors act, or assent to the act, even though they do not meet, the validity of the act is not open to the same objections. Besides that, the reasoning of the various members of the Court was based upon this, that they found from the Companies Clauses Act, 1845, an obligation upon the directors, acting as directors, to meet and act jointly and as a board. I find here in Table A. no such obligation as regards the subscribers to the memorandum of association when they act simply for the purpose of nominating the first directors. I think, therefore, the case cited does not govern the present.—pp. 480—482.

D'Arcy v. Tamar, &c. Ry., distinguished.
Bonelli's Telegraph Co., in re, Collie's Claim (1871) 40 L. J. Ch. 567; L. R. 12 Eq. 246; 25 L. T. 526; 19 W. R. 1022.—BACON, V.-C.: County of Gloucester Bank v. Rudry, Merthyr.

&c. Co. (1895) 64 L. J. Ch. 451; [1895] 1 Ch. 629.—C.A. (*post*, col. 437)

D'Arcy v. Tamar, &c. Ry., *followed*.
Collie's Claim, *questioned*.

Haycraft Gold Reduction and Mining Co., In re (1900) 69 L. J. Ch. 497; [1900] 2 Ch. 280; 83 L. T. 166; 7 Manson 243.

COZENS-HARDY, J.—It was laid down by the Court of Ex. in *D'Arcy v. Tamar, &c. Ry.* that directors must act together as a board, and that it is not sufficient to procure the separate authority of the number of directors sufficient to form a quorum. That case turned upon the Companies Clauses Consolidation Act, 1845, but it seems to me to be equally applicable to a limited company under the Act of 1862. In *Collie's Claim*, Bacon, V.-C. seems to have treated the decision of the Court of Ex. as turning upon the common law rule of pleading, and although it was not perhaps necessary to the decision of the case before him, he certainly regarded an agreement which on the face of it was signed by four directors at different dates and not as a board as a contract binding the company. I cannot follow the criticisms of the V.-C., and I prefer the view of the law taken by the Court of Ex. My attention was, however, drawn to *Southern Counties Bank v. Rider* (*post*, col. 437), decided by the C.A. I do not think the decision in that case can be taken as laying down any general principle which I am bound to follow—neither the case in the Court of Ex. nor the case before Bacon, V.-C. was cited. It does not touch the question whether a notice given without any kind of board meeting having been held is valid.—p. 500.

Haycraft Gold Reduction and Mining Co., In re, *followed*. State of Wyoming Syndicate, In re (1901) 70 L. J. Ch. 727; [1901] 2 Ch. 431; 84 L. T. 868; 49 W. R. 650.—WRIGHT, J.: *approved*, National Co. for Distribution of Electricity by Secondary Generators, In re (1902) 71 L. J. Ch. 702; [1902] 2 Ch. 34; 87 L. T. 6; 9 Manson 814.—C.A. V. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ. *And see post*, col. 565.

D'Arcy v. Tamar, &c. Ry. (*supra*), *not followed*. Duck v. Tower Galvanising Co. (1901) 70 L. J. K. B. 625; [1901] 2 K. B. 814, 84 L. T. 847.

ALVERSTONE, C.J.—That the debenture, if valid, creates a charge on the assets of the company has been well established ever since the decisions in *Standard Manufacturing Co., In re* (*post*, col. 448), and *Opera, Ltd., In re* (*post*, col. 448), in 1891. It was there decided that all such charges prevail as against an execution creditor if the debenture is valid. . . . I asked counsel for the execution creditor whether he knew of any decided case in which it had been held that informality did or would alter the privilege of a debenture-holder who was holder of a debenture that was valid to all appearance. He has fairly and freely stated that he could find no such case except *D'Arcy v. Tamar, &c. Ry.* On the other hand, from the decision in *Royal British Bank v. Turgand* (*post*, col. 437), to that in *Mahony v. East Holyford Mining Co.* (*post*, col. 437), it has been held that it is not incumbent upon the *bona fide* holder of a document purporting to be issued by a company to inquire whether the persons purporting to sign as directors have been duly appointed.

There is therefore ample authority to show that no informality will alter the privilege possessed by a *bona fide* holder for value upon a document that purports to be in order.—p. 628. LAW-RANCE, J. concurred.

Bolton Partners v. Lambert (1888) 58 L. J. Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434.—C.A. COTTON, LINDLEY and LOPES, L.JJ., *followed*.

Portuguese Consolidated Copper Mines, In re, Badman and Bosanquet's Cases (1890) 45 Ch. D. 16; 63 L. T. 423; 39 W. R. 25; 2 Meg. 249.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

Bolton Partners v. Lambert and Portuguese Consolidated Copper Mines, In re, *distinguished*.

Athy Guardians v. Murphy (1895) [1896] 1 Ir. R. 65.—CHATTERTON, V.-C.

Portuguese Consolidated Copper Mines, In re, *followed*.

Molnoux v. London, Birmingham and Manchester Insurance Co. (1902) 71 L. J. K. B. 848; [1902] 2 K. B. 589; 87 L. T. 324, 51 W. R. 36.—C.A. COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

Bolton Partners v. Lambert, *distinguished*. Dibbins v. Dibbins (1896) 65 L. J. Ch. 724; [1896] 2 Ch. 348; 75 L. T. 137; 44 W. R. 595.—GUTTY, J.; *applied*, Tiedemann and Ledermann Frères, In re (1899) 6 L. J. Q. B. 852; [1899] 2 Q. B. 66; 81 L. T. 191.—OHANELL and DARLING, JJ.; *referred to*, Fleming v. Bank of New Zealand (1900) 69 L. J. P. C. 120; [1900] A. C. 377; 83 L. T. 1.—P.C. LORDS DAVEY, ROBERTSON, LINDLEY, SIR H. DE VILLIERS and SIR F. NORTH: *distinguished*, Ford v. Newth (1901) 70 L. J. K. B. 459; [1901] 1 K. B. 683; 84 L. T. 354; 49 W. R. 345; 65 J. P. 391.—DARLING and CHANNELL, JJ.

Qualification.

Abercorn's (Marquis) Case, National Insurance and Investment Association, In re, (1862) 31 L. J. Ch. 828; 4 De G. F. & J. 78; 8 Jur. (N.S.) 951; 7 L. T. 225; 10 W. R. 548.—TURNER and KNIGHT BRUCE, L.JJ.; *reversing* 6 L. T. 118, 235.—ROMILLY, M.R., *distinguished*.

Great Northern and Midland Coal Co., In re, Currie's Case (1863) 32 L. J. Ch. 421; 3 De G. J. & S. 367; 8 L. T. 472.—KNIGHT BRUCE and TURNER, L.JJ. *And see post*, col. 417.

Abercorn's Case, *applied*. Currie's Case, *distinguished*. Llanharry Hematite Iron Ore Co., In re, Stock's Case (1864) 33 L. J. Ch. 731; 4 De G. J. & S. 426; 10 Jur. (N.S.) 790; 12 W. R. 814.—KNIGHT BRUCE and TURNER, L.JJ. *See post*, col. 416.

Abercorn's Case, *distinguished*. International Contract Co., In re, A. Levita's Case (1867) L. R. 3 Ch. 36; 17 L. T. 137; 16 W. R. 95.—ROLT, L.J. *See post*, col. 439.

Abercorn's Case; Peninsular West Indian and Southern Bank, In re, Anstett's Case (1866) L. R. 2 Eq. 435; 15 L. T. 140; 14 W. R. 1010.—WOOD, V.-C.; and A. Levita's Case, *distinguished*. Great Oceanic Telegraph Co., In re, Harward's

Case (1871) 41 L. J. Ch. 283; L. R. 13 Eq. 30; 25 L. T. 690.—MALINS, V.-C.

Stock's Case (*supra*), distinguished.
La Mancha Irrigation and Land Co., In re, Lord Claude Hamilton's Case (1873) 42 L. J. Ch. 465; L. R. 8 Ch. 548; 28 L. T. 652; 21 W. R. 256, 518.—JAMES and MELLISH, L.J.; reversing 27 L. T. 807.—MALINS, V.-C.

Empire Assurance Corporation, In re, Leeke's Case (1871) 40 L. J. Ch. 254; L. R. 6 Ch. 469; 23 L. T. 724; 19 W. R. 604.—JAMES and MELLISH, L.J.; discussed.
Empire Assurance Corporation, In re, Dougan's Case (1873) 42 L. J. Ch. 460; L. R. 8 Ch. 840 (*post*, col. 478).

Abercorn's Case (*supra*) and **Leeke's Case**, explained.

Metropolitan Public Carriage and Repository Co., In re, **Brown's Case** (1873) 43 L. J. Ch. 153; L. R. 9 Ch. 102; 29 L. T. 562; 23 W. R. 171.—C.A. And see *post*, col. 418.

SELBORNE, L.J.—In that case (*Abercorn's Case*) the naked question was raised, whether, from the acceptance of the office of director, and the consequently authorised representation to the world that the person so accepting was a director, such representation being continued over a certain period of time, a contract with the company to take shares would be inferred. In that particular case the option was either to have shares or insure in the company. But the shares might be acquired in various ways, and the L.J. held that from the mere acceptance of the office of director without more, they could not infer a contract to become a shareholder.—p. 155.

JAMES, L.J.—In the case of *Leeke* it certainly was not my intention nor the intention of the L.J. to overrule the decision in *Lord Abercorn's Case*. We never even referred to it. There may be an expression, taken by itself, separate from the context, which may appear to give colour to the proposition that I intended to say that becoming a director involved an agreement to take the qualifying shares. If so, it is only another instance of the inaccuracy of language to which we are all liable.—p. 156.

MELLISH, L.J. to the same effect.

Llanharry Hematite Iron Ore Co., In re, Tothill's Case (1865) 35 L. J. Ch. 120; L. R. 1 Ch. 85 (*post*, col. 489), distinguished.
British and American Telegraph Co., In re, Fowler's Case (1872) 42 L. J. Ch. 9; L. R. 14 Eq. 316; 27 L. T. 748; 21 W. R. 87.—BACON, V.-C.

Fowler's Case, questioned.
New Buxton Lime Co., In re, **Duke's Case** (1876) 1 Ch. D. 620; 45 L. J. Ch. 389; 33 L. T. 776; 24 W. R. 341.

JESSEL, M.R.—With the greatest respect for the learned judge who decided *Fowler's Case*, I should have great difficulty in following it. It is distinguishable from the present case, but I must say it seems to me to be opposed to the true sense of the Act of Parliament. . . . It might have been held that he ought to have taken five more shares, but, as it seems to me, there was nothing to justify the Court in fixing him with twenty-five additional shares, and I should have thought that both good law and good sense would have been satisfied by adopting Mr. Fowler's view of the transaction.—p. 622.

Harward's Case (col. 414) and **Fowler's Case**, approved.

York Tramways Co. v. Willows (1882) 51 L. J. Q. B. 257; 8 Q. B. D. 685 (*supra*, col. 410).

Brown's Case and **Leeke's Case** (*supra*), applied.

Australian Direct Steam Navigation Co., In re, **Miller's Case** (1876) 3 Ch. D. 166.—JESSEL, M.R.; affirmed, (1877) 5 Ch. D. 70.—C.A. JAMES and MELLISH, L.J.; and BAGGALLAY, J.A.

Universal Non-Tariff Fire Insurance Co., In re, Ritao's Case (1876) 34 L. T. 644.—MALINS, V.-C.; reversed, (1877) 4 Ch. D. 774.—C.A. JAMES, L.J., BAGGALLAY and BRAMWELL, J.A.

Kent Ry. Extension Co., In re, Kincaid's Case (1870) 40 L. J. Ch. 19; L. R. 11 Eq. 192; 23 L. T. 460; 19 W. R. 122.—BACON, V.-C., followed.

Teme Valley Ry., In re, **Forbes' Case** (1875) 44 L. J. Ch. 356; L. R. 19 Eq. 353.—JESSEL, M.R.

Kincaid's Case and **Forbes' Case**, approved.
Portal v. Emmens (1876) 46 L. J. C. P. 179; 1 C. P. D. 201, 664; 35 L. T. 882; 25 W. R. 235.—C.P.D. See *post*, col. 488.

Forbes' Case and **Lord Claude Hamilton's Case** (*supra*), applied.

Stephenson's Case, British Colonial and Foreign Property Insurance Corporation, In re (1876) 45 L. J. Ch. 438.—JESSEL, M.R.

Forbes' Case and **Stephenson's Case**, distinguished.

East Norfolk Tramways Co., In re, **Barber's Case** (1877) 5 Ch. D. 963; 26 W. R. 3.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.J.

BAGGALLAY, L.J.—Mr. Crossley has relied on cases somewhat similar in their circumstances to the present, in which a person having agreed to become a director was held to have thereby agreed to take the shares which it was necessary for a director to hold, but in all those cases the party was a person who was not disqualified from being elected.—p. 969.

Brown's Case (*supra*), not applied.

Percy and Kelly Nickel Cobalt and Chromite Iron Mining Co., In re, **Hamley's Case** (1877) 46 L. J. Ch. 543; 5 Ch. D. 705; 37 L. T. 349; 25 W. R. 600.—JESSEL, M.R.

Hamley's Case and **Barber's Case**, followed.
Percy and Kelly Nickel, &c. Co., In re, **Jenner's Case** (1877) 47 L. J. Ch. 201; 7 Ch. D. 132; 37 L. T. 807; 26 W. R. 291.—C.A. JAMES, BAGGALLAY and THESIGER, L.J.

Hamley's Case, **Jenner's Case**, **Stock's Case** (col. 414), **Forbes' Case**, **Kincaid's Case** and **Miller's Case** (*supra*), distinguished.

Esparto Trading Co., In re (1879) 48 L. J. Ch. 573; 12 Ch. D. 191; 28 W. R. 146.—HALL, V.-C.

Miller's Case, **Harward's Case**, **Brown's Case** and **Esparto Trading Co., In re**, distinguished.

Columbia Chemical Factory Manure and Phosphate Works, In re, **Hewitt's Case**, **Brett's Case** (1882) 25 Ch. D. 283; 53 L. J. Ch. 343; 49 L. T. 479; 32 W. R. 334.—C.A.

COTTON, L.J. (for self, **LINDLEY** and **FRY, L.J.**).—In *Miller's Case* the director's name was registered for the shares required for his qualification. In *Harward's Case* and *Brown's Case* the shares

were allotted to the director by the allotment committee; and in *Leake's Case* the shares were both allotted and registered. In *Esparto Trading Co., In re*, the shares, though not registered in the name of the director, were treated in the books of the company as belonging to him, and he was debited with the sum payable on allotment.—p. 295.

Hewitt's Case and Brett's Case, distinguished.

Portuguese Consolidated Copper Mines, *In re*, *Inchiquin* (Lord), *Ex parte* [1891] 3 Ch. 28; 60 L. J. Ch. 556; 64 L. T. 841; 39 W. R. 610.—C.A. LINDLEY, L.J.—There is no difficulty in the authorities except in *Hewitt's Case* and *Brett's Case*, where the Court came to the conclusion that after a period of some three months a reasonable time [within which to obtain qualification shares] had not elapsed. But the facts of that case were not like the facts of this. The articles were not like those here.—p. 36.

BOWEN, L.J. to the same effect. FRY, L.J. concurred.

Currie's Case (supra, col. 414), followed.

Whall Buller's Consols, In re, Jobbing, Ex parte (1888) 57 L. J. Ch. 833; 38 Ch. D. 42; 58 L. T. 823; 36 W. R. 723.—C.A. COTTON, LINDLEY and BOWEN, L.J., *applied*.

Ballina Light Ry., *In re* (1888) 21 L. R. Ir. 497.—CHATTERTON, V.-C.

Wheal Buller Consols, In re, and Medical Attendance Assurance Association, In re, Onslow's Case (1887) 3 Times L. R. 42, 551.—C.A. COTTON, LINDLEY and LOPES, L.J., *applied*.

Anglo-Austrian Printing and Publishing Co., *In re*, *Isaacs' Case* (1892) 61 L. J. Ch. 481; [1892] 2 Ch. 158; 66 L. T. 593; 40 W. R. 518.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Isaacs' Case, principle applied. Bread Supply Association, *In re*, *Konrath's Case* (1893) 62 L. J. Ch. 376; 3 R. 288; 68 L. T. 434.—KEKEWICH, J.; *distinguished*, *Printing Telegraph and Construction Co. of the Agence Havas, In re*, *Cammell, Ex parte* (1894) 63 L. J. Ch. 536; [1894] 2 Ch. 394; 7 R. 191; 70 L. T. 705; 1 Manson, 274.—C.A. LINDLEY, LOPES and KAY, L.JJ.; *followed*, *Herwynia Copper Co., In re*, *Richardson's Case* (1894) 63 L. J. Ch. 567; [1894] 2 Ch. 403; 7 R. 214; 70 L. T. 709; 42 W. R. 593; 1 Manson 286.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Isaacs' Case, distinguished.

Moore Bros. & Co., *In re*, *Bartholomew's Case* (1899) 68 L. J. Ch. 302; [1899] 1 Ch. 627; 80 L. T. 104; 47 W. R. 401; 6 Manson 290.—C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.JJ.; *reversing* (1898) 67 L. J. Ch. 677; 79 L. T. 70; 5 Manson 243.—WRIGHT, J.

V. WILLIAMS, L.J.—As I understand, the judgment of Wright, J. is based merely upon an application of the principle on which *Isaacs' Case* was decided; but in *Isaacs' Case* there was an offer by the company to persons who should become directors. There was a statement of the terms upon which persons could become directors, and the persons with those terms before them afterwards chose to become directors; and the

decision only was that by becoming directors they accepted those terms, and therefore contracted to take the shares in accordance with those terms. There is nothing of the sort here, because there is no offer of any sort or kind by the company which could be said to be accepted by the directors by their becoming directors, because they were already directors at the moment when this prospectus was issued.—p. 306.

Isaacs' Case, discussed. Baring-Gould and Sharpington Combined Pick and Shovel Syndicate, *In re* (1899) 68 L. J. Ch. 429; [1899] 2 Ch. 80.—C.A. (supra, col. 398); *followed*, *Salton v. New Beeston Cycle Co. (No. 1)* (1899) 68 L. J. Ch. 370; [1899] 1 Ch. 775; 80 L. T. 521; 47 W. R. 462; 6 Manson 238.—COZENES-HARDY, J. *And see post*, col. 421.

Brown's Case (supra, col. 415); Inehiquin's Case (supra, col. 417); Isaacs' Case, and Cammell's Case (supra, col. 417), principle applied.

Molineux v. London, Birmingham and Manchester Insurance Co. (1902) 71 L. J. K. B. 848; [1902] 2 K. B. 589; 87 L. T. 324; 51 W. R. 36.—C.A. COLLINS, M.R., MATHEW and COZENES-HARDY, L.JJ.

Fulbrook v. Richmond Consolidated Mining Co. (1878) 48 L. J. Ch. 65; 9 Ch. D. 610; 27 W. R. 377.—JESSET, M.R., *considered*. *Bainbridge v. Smith* (1889) 41 Ch. D. 462; 60 L. T. 879; 37 W. R. 594.—C.A. COTTON and LINDLEY, L.JJ. *And see post*.

Fulbrook v. Richmond Consolidated Mining Co., discussed.

Cooper v. Griffin (1892) 61 L. J. Q. B. 563; [1892] 1 Q. B. 740; 65 L. T. 660; 40 W. R. 420.—C.A. LORD HERSCHELL, LINDLEY and KAY, L.JJ.

LORD HERSCHELL.—The first question is, what is the meaning in art. 67 of the expression "in his own right"? The meaning of a similar article was considered by the late M.R. in *Fulbrook v. Richmond Consolidated Mining Co.* . . . His lordship held the words were not introduced to show that the director must be beneficial owner, but to negative his holding the shares in a representative character. This decision, which was in 1878, remained undisputed till 1889, when it was discussed in *Bainbridge v. Smith*. Cotton, L.J. expressed dissent from the construction adopted by the M.R. Lindley, L.J., said that though he should have hesitated to accept that construction if the matter had been *res integra*, he considered that as the words were in common use, and had acquired in consequence of that decision a conventional meaning, which had been accepted and acted upon, it would not be safe now to put a construction on them *de novo*. So stands the case upon the authorities. I do not intend to express any opinion whether, treating the matter as *res integra*, the view of the M.R. was right; but I agree with Lindley, L.J., that, having regard to the constant transactions both as to framing articles of association and as to dealings under them, it would be very inconvenient to interfere with a decision which has remained unquestioned for so many years. To do so would be an injustice to persons who have acted on the faith of the decision.—p. 567. *And see post*.

Pulbrook v. Richmond Consolidated Mining Co. and Cooper v. Griffin, *followed*
Howard v. Sadler (1892) [1893] 1 Q. B. 1; 5 R. 45; 68 L. T. 120; 41 W. R. 126.—COLLIERIDGE, C.J. and WILKS, J.

Pulbrook v. Richmond Consolidated Mining Co., *distinguished*.
Dashwood v. Cornish (1897) 13 Times L. R. 337.—C.A. ESHER, M.R., LOPES and CHITTY, L.JJ.

Pulbrook v. Richmond Consolidated Mining Co., *followed*.
Bainbridge v. Smith (*supra*), *applied*.
Sutton v. English and Colonial Produce Co. (1902) 71 L. J. Ch. 685; [1902] 2 Ch. 502; 87 L. T. 438; 50 W. R. 571.—BUCKLEY, J.

Disqualification.

Foster v. Oxford, Worcester and Wolverhampton Ry. (1853) 22 L. J. C. P. 99; 13 C. B. 200; 17 Jur. 167; 1 W. R. 151.—C.P., *not applied*.
Aberdeen Ry. v. Blaikie (1854) 1 Macq. 461; 2 Eq. R. 1281.—H. L. (SC).

Powers of Management.

Const v. Harris (1824) T. & R. 496; 24 R. R. 108.—L.C., *referred to*.
Taylor v. Hughes (1844) 2 Jo. & Lat. 25; 7 Ir. Eq. R. 529.—SUGDEN, L.C.

Natusch v. Irving (1824) 2 Cooper C. C. 358.—L.C.; and **Const v. Harris**, *principle applied*.

Simpson v. Westminster Palace Hotel Co. (1860) 29 L. J. Ch. 561; 2 De G. F. & J. 141; 8 W. R. 553.—KNIGHT BRUCE, L.J.; TURNER, L.J. *dissenting*; *affirmed*, 8 H. L. Cas. 712; 6 Jur. (N.S.) 985; 2 L. T. 707.—H. L. (S.). CAMPBELL, L.C., LORDS CRANWORTH, CRELMSPORD and KINGSDOWN.

Natusch v. Irving, *discussed*.
Pickering v. Stephenson (1872) 41 L. J. Ch. 493; L. R. 14 Eq. 322 (*post*, col. 435).

Const v. Harris, *explained*.
Wall v. London and Northern Assets Corporation (No. 1) (1898) 67 L. J. Ch. 596; [1898] 2 Ch. 469.—C.A. (*post*, col. 482).

Simpson v. Westminster Palace Hotel Co., *applied*.
Taunton v. Royal Insurance Co. (1864) 33 L. J. Ch. 406; 2 H. & M. 135; 10 Jur. (N.S.) 291; 10 L. T. 156; 12 W. R. 549.—WOOD, V.C.

Taunton v. Royal Insurance Co., *explained*.
Hampson v. Price's Patent Candle Co. (1876) 45 L. J. Ch. 437; 34 L. T. 711; 24 W. R. 754.—JESSEL, M.R.

Hampson v. Price's Patent Candle Co. and Taunton v. Royal Insurance Co., *distinguished*.

Hutton v. West Cork Ry. (1883) 23 Ch. D. 654; 52 L. J. Ch. 609; 49 L. T. 420; 31 W. R. 827.—C.A. COTTON and BOWEN, L.JJ.; BAGGALLAY, L.J. *dissenting*; *reversing* 52 L. J. Ch. 377; 48 L. T. 626; 31 W. R. 542.—FRY, J.
COTTON, L.J.—Cases were referred to in which the late M. R. and Wood, V.-C. had determined that matters which were not under the powers expressly

given to the directors or the general meeting were within the powers of the directors of a going concern. One was *Taunton v. Royal Insurance Co.*, where it was held that an insurance company might pay losses arising from lightning, which were not within the loss which they professed to insure against; and the other case, *Hampson v. Price's Patent Candle Co.*, where the M.R. held that the directors of Price's Patent Candle Co. were at liberty to make, and could not be restrained from making, a gratuity to their servants when there had been a very good year, by giving each of them who was in their service and was of good character a gratuity equal to a week's wages. In my opinion those cases went on a principle which is not applicable to the existing state of this company, from the time when it handed over its railway to another company, and existed only for the purpose of winding up the concern. The principle of those cases, as I understand, is this, that where there are directors of a trading company, those directors necessarily have incidentally the power of doing that which is ordinarily and reasonably done in every such business, with a view to getting either better work from their servants, or with a view to attract customers to them, as in the case of an insurance company. In the last-mentioned case the M.R. refers to this—that although it is said that nothing of this kind is to be expected again, yet when such a gratuity is given to servants in a good year, the servants then in the company's service, whom the directors may reasonably expect to stay, naturally look forward, not as a matter of right but as a matter of liberality, to this, that they will probably be dealt with in a similar way by their exertions they get a good profit, and that, therefore, that was a reasonable mode of carrying on the business of the company for the purpose of making it most profitable. But that assumes that it is a going concern, that it is a continuing business, and it is with reference to the effect upon the continuing business that the directors are said to have that power incidentally. And so in the case before Wood, V.-C. There it was shown that what the insurance company did was a reasonable way of conducting the business of an insurance office, in order to attract customers, by paying losses which were not strictly within the terms of the policy, and therefore could not be said to be legally enforceable against the company. But here the company was gone as a company carrying on business for the purpose of making profit.—p. 664.

Taunton v. Royal Insurance Co., Hampson v. Price's Patent Candle Co. and Hutton v. West Cork Ry., *discussed*.
Tomkinson v. S. E. Ry. (1887) 56 L. J. Ch. 932; 35 Ch. D. 675; 56 L. T. 812; 35 W. R. 758.—KAY, J.

Hutton v. West Cork Ry., *discussed*.
Leicester Club and County Racecourse Co., In re, Cannon, Ex parte (1885) 55 L. J. Ch. 206; 30 Ch. D. 629; 53 L. T. 840; 34 W. R. 14.—PEARSON, J. *And see post*, col. 421.

Leicester Club, & Co., In re, distinguished.
Municipal Permanent Investment Building Society v. Richards (1888) 58 L. J. Ch. 8; 39 Ch. D. 873; 59 L. T. 883; 37 W. R. 184.—C.A. COTTON, BOWEN and FRY, L.JJ.

Remuneration.

Taunton v. Royal Insurance Co. and Hutton v. West Cork Ry. (*supra*), *applied*.
Henderson v. Bank of Australia (1888) 58 L. J. Ch. 197; 40 Ch. D. 170; 59 L. T. 856; 37 W. R. 32.—NORTH, J.

Hutton v. West Cork Ry., *distinguished*, **Kaye v. Croydon Tramways Co.** (1898) 67 L. J. Ch. 222; [1898] 1 Ch. 358.—C.A. (*post*, col. 471); *applied*, **Newspaper Proprietary Syndicate, In re**, **Hopkinson v. Same** (1900) 69 L. J. Ch. 578; [1900] 2 Ch. 349; 83 L. T. 341.—COZENS-HARDY, J.

Leicester Club, &c. Co., In re, Cannon, Ex parte (*supra*), *distinguished*.
Dale and Plant, In re (1889) 59 L. J. Ch. 180; 43 Ch. D. 255; 62 L. T. 215; 38 W. R. 409; 2 Meg. 25.—KAY, J.

Dale and Plant, In re, followed.
Leicester Club, &c. Co., In re, Cannon, Ex parte, *distinguished*.
New British Iron Co., In re, Beckwith, Ex parte (1898) 67 L. J. Ch. 164; [1898] 1 Ch. 324; 78 L. T. 155; 46 W. R. 376; 5 Manson 168.

WRIGHT, J.—In this case there is a provision in the articles of association fixing definitely the amount of the remuneration of the directors, which did not exist in *Cannon, Ex parte*. . . In that case Pearson, J. clearly proceeded on the ground that the directors had no contractual rights at all as against the company, and that entirely distinguishes that case from the present. In my opinion, this case falls within the principle of *Dale and Plant, In re*.—p. 165.

Gilman v. Gilcher Electric Light Co. (1886) 3 Times L. R. 433.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**, *applied*.
European Central Ry., In re, Sykes' Case (1872) 41 L. J. Ch. 251; L. R. 18 Eq. 255; 26 L. T. 92.—BACON, V.-C., *not followed*.
Liverpool and London Guarantee and Accident Insurance Co., In re, Gallagher's Case (1882) 46 L. T. 54; 30 W. R. 378.—KAY, J., *followed*.

Wood's Ships' Woodite Protection Co., In re (1890) 62 L. T. 760; 2 Meg. 164.—STIRLING, J.

Rishton v. Grissell (1868) L. R. 5 Eq. 326.—WOOD, V.-C., *approved*.
Frames v. Bultfontein Mining Co. (1890) 60 L. J. Ch. 99; [1891] 1 Ch. 140; 64 L. T. 19; 39 W. R. 134; 2 Meg. 374.

CHITTY, J.—A very similar point was brought before Wood, V.-C. in *Rishton v. Grissell*, where the plaintiff, who was manager of the defendant's works, and was paid by a commission of 7½ per cent. on the profits of the business, claimed a commission on the excess of the amount realised by the sale of the works and business over the estimated value of the same in the books when the plaintiff was engaged. . . In the end the V.-C. refused the plaintiff's claim, and I think quite rightly.—p. 143.

Salton v. New Beeston Cycle Co. (No. 1) (1899) 68 L. J. Ch. 370; [1899] 1 Ch. 775; (*supra*, col. 418), *considered and applied*.
Central De Kaap Gold Mines, In re (1899) 69 L. J. Ch. 18; 7 Manson 82.—WRIGHT, J.

Salton v. New Beeston Cycle Co. (No. 1) and **Central De Kaap Gold Mines, In re**, *approved*.

Swabey v. Port Darwin Gold Mining Co. (1889) 1 Meg. 385.—C.A. **HALSBURY, L.C., ESHER, M.R. and LINDLEY, L.J.**, *distinguished*.

Inman v. Ackroyd and Best (1901) 70 L. J. K. B. 450; [1901] 1 K. B. 613; 84 L. T. 344; 49 W. R. 369; 8 Manson 291.—C.A.

A. L. SMITH, M.R.—The particular article which we have to construe in the present case differs from that which was before the Court in *Swabey v. Port Darwin Gold Mining Co.*, as well from the version as it was assumed by the Court there to be, as from what it now turns out was the actual version. In the report of that case it is assumed that by the articles there in question the remuneration to be paid to the directors was to be "at the rate of" 200*l.* a year. It now appears that the true version of the article was that the directors should "each receive by way of remuneration out of the funds of the company in each year the sum of 200*l.* per annum." The article with which we have to deal here provides that "the directors"—that is, the whole body of the directors—"shall be paid out of the funds of the company, by way of remuneration for their services . . . the sum of 125*l.* per annum per director . . . and the same shall be divided amongst them in such proportion as the directors by agreement may determine, and in default of any such determination, equally."—p. 451.

COLLINS, L.J.—Whatever be the hypothesis on which *Swabey v. Port Darwin Gold Mining Co.* was decided—whether it was upon the article as in the report of that case it is stated to have been, or upon the article, as it actually was—that decision does not touch the present case. For according to the terms of the article in the present case there is no fixed sum to be paid to any director. It in fact negatives the right of any director to say before the end of the year what remuneration is to be paid to him—p. 452. **ROMER, L.J.** concurred.

Nell v. Atalanta Gold and Silver Consolidated Mines (1895) 11 Times L. R. 470.—C.A. **ESHER, M.R., A. L. SMITH and RIGBY, L.JJ.**; *distinguished*, **Dashwood v. Cornish** (1897) 13 Times L. R. 337.—C.A. **ESHER, M.R., LOPES and CHITTY, L.JJ.**; *commented on*, **Caridad Copper Mining Co. v. Swallow** (1902) 71 L. J. K. B. 601; [1902] 2 K. B. 44; 86 L. T. 699; 50 W. R. 565; 9 Manson 366.—C.A. **V. WILLIAMS, ROMER and MATHEW, L.JJ.**

Lambert v. Northern Ry. of Buenos Ayres (1869) 18 W. R. 180.—MALINS, V.-C., *distinguished*.

London and Northern Bank, In re, McConnell's Case (1901) 70 L. J. Ch. 251; [1901] 1 Ch. 728; 84 L. T. 567; 9 Manson 91.

WRIGHT, J.—Certainly it [*Lambert v. Northern Ry. of Buenos Ayres*] is not a direct authority, for there the relator applied to restrain the company from paying the remuneration which they wanted to pay; and the ground of the decision was, that no such bill ought to be entertained. No doubt Malins, V.-C. uses in that case some observations which are capable of meaning that, in a case like this, an agreement to waive remuneration comes to nothing; but I think that those observations were directed only to the case in which the remuneration had been already earned. In any case I do not feel clear that the decision is one which ought to be regarded as having the effect which it is now sought to attach to it.—p. 254.

Misfeasance.

London, Hamburg and Continental Exchange

Bank v. Henry (1868) 1 L. R. 7 Eq. 334.—
 ROMILLY, M.R., distinguished.
 London, Hamburg, &c. Bank, in re, Zuluetta's
 Claim (1870) 39 L. J. Ch. 361, 598; L. R. 5 Ch.
 444; 18 W. R. 416, 778.—L.J.; reversing L. R. 9
 Eq. 270; 23 L. T. 84.—ROMILLY, M.R.

GIFFARD, J.J.—Suffice it to say that as
 regards that case the transaction was a totally
 different one. It was not a purchase of shares
 by the bank for the purposes of the bank—it was
 not a speculation in shares at all; but it was the
 case of a certain sum of money being advanced
 by the bank to assist in the purchase of shares,
 which were to be taken by Mr. Fletcher, he, if
 he got those shares at par, agreeing to become a
 director; and even in the judgment in that case
 the utmost that is said is that it is difficult to
 say that the articles of association do not, in
 terms at least, include the power to enter into a
 transaction of that description, which transac-
 tion was wholly different from this.—p. 599.

Mason's Hall Tavern Co., in re, Orgill's Case

(1869) 21 L. T. 221, disapproved.
Parker v. McKenna (1874) 44 L. J. Ch. 425;
 L. R. 10 Ch. 96; 31 L. T. 789; 23 W. R.
 271.—C.A. CAIRNS, L.C., JAMES
 and MELLISH, L.J.; reversing 31 L. T. 206.
 —BACON, V.C., approved.

Canadian Oil Works Corporation, in re, Hay's
 Case (1875) 44 L. J. Ch. 721; L. R. 10 Ch. 593;
 33 L. T. 466; 24 W. R. 191.

JAMES, L.J.—It is, in my judgment, very much
 to be regretted that that case (*Orgill's Case*) was
 not allowed *resquecere in pace*, and to moulder
 in the obscure corner of the Law Times to which
 it was consigned, and that its frailties should
 have been dragged from that dread abode. I
 cannot understand that case. There is evidently
 some mistake in what is said there, because the
 principle upon which it was said that the com-
 pany had lost their right to recover money which
 was then paid by the vendors to the directors.
 was that they did not repudiate the contract.
 Now, in every one of the cases it is where a
 contract is not repudiated that the money is
 recovered from the agent, because if the prin-
 cipal who has been defrauded is relieved from
 everything and is restored to his original position,
 of course he has nothing whatever to then say
 with regard to the moneys which have passed,
 or have been agreed to be passed, between the
 confederates. That case stands alone, it has
 been left undisturbed until now, it is entirely
 inconsistent with the whole current of authority
 in this country, from *Fawcett v. Whitehouse*
 [1829] 1 Russ. & Myl. 132; 8 L. J. (o.s.) Ch. 50.
 —LYNDHURST, L.C., down to the present day,
 by which it has been held that no agent in the
 course of his agency can derive any benefit
 whatever unknown to the principal without the
 sanction of the principal. That is a principle
 repeated by me, and repeated most emphatically
 by the full Court, in *Parker v. McKenna*.—p. 724.
And see post, col. 426.

Parker v. McKenna, adhered to.

Bagnall v. Carlton (1877) 47 L. J. Ch. 30;
 6 Ch. D. 371; 37 L. T. 481; 26 W. R. 243.
 —C.A. JAMES, BAGGALLAY and COTTON,
 L.J., approved.

Williams v. Scott (1899) 69 L. J. P. C. 77;

[1900] A. C. 499; 82 L. T. 727; 49 W. R. 33.—P.C.
 LORDS DAVEY, ROBERTSON and LINDLEY, SIR
 H. DE VILLIERS and SIR F. NORTH.

Parker v. McKenna and York and North

Midland Ry. v. Hudson (1853) 22 L. J. Ch.
 529; 16 Beav. 485; 1 W. R. 187, 510.—
 ROMILLY, M.R., explained.
Percival v. Wright (1902) 71 L. J. Ch. 846;
 [1902] 2 Ch. 421; 51 W. R. 31; 9 Manson 443—
 SWINFEN EADY, J.

Morvah Consols Tin Mining Co., in re,

McKay's Case (1875) 45 L. J. Ch. 148; 2
 Ch. D. 1; 33 L. T. 517; 24 W. R. 49.—C.A.
 JAMES and MELLISH, L.J.; and BRETT, J.
(and see post, col. 426); **Casparhill Colliery**
Co., in re, Pearson's Case (1877) 46 L. J.
 Ch. 339; 5 Ch. D. 336; 37 L. T. 299; 25
 W. R. 618.—C.A. JESSEL, M.R., JAMES,
 L.J. and BAGGALLAY, J.A. *(and see post*,
 col. 426); **Phosphate Sewage Co. v. Hart-**
mont (1877) 46 L. J. Ch. 661; 5 Ch. D.
 394; 37 L. T. 9; 24 W. R. 530.—C.A.
 JAMES, L.J., BRAMWELL and AMPHLETT,
 J.T.A., and Bagnall v. Carlton, *applied*.
Hall v. Hallet (1784) 1 Cox 134.—HARD-
 WICK, L.C., commented on.

Nant-y-Glo and Blairston Ironworks Co. v. Grave
 (1878) 12 Ch. D. 738; 38 L. T. 345; 26 W. R.
 504.—BACON, V.C.

[*Headnote*.—The principles laid down in
McKay's Case and *Pearson's Case*, viz., that a
 director being in a fiduciary position to his
 company cannot retain a consideration received
 by him from the promoters as an inducement to
 become a director; and, if the consideration has
 been a gift of fully paid-up shares, that he may be
 compelled not only to restore the shares, but to
 account to the company for the highest value to
 be attributed to them since they have been in
 his possession—are equally applicable to pro-
 ceedings in an action by the company to recover
 the value of the shares, as to proceedings under the
 Companies Act, 1862, s. 165, for the same purpose.]

Pearson's Case, followed.

West Jewell Tin Mining Co., in re, Weston's
 Case (1879) 48 L. J. Ch. 175; 10 Ch. D. 579;
 40 L. T. 43; 27 W. R. 310.—C.A. JESSEL, M.R.,
 JAMES and BRAMWELL, L.J.; *And see post*,
 col. 426.

Bagnall v. Carlton, considered, Faure Electric
 Accumulator Co., in re (No. 2) (1888) 58 L. J.
 Ch. 43; 40 Ch. D. 141 *(see post*, col. 435); *fol-*
lowed, Salford Corporation v. Lever (1890) 60
 L. J. C. P. 39; [1891] 1 Q. B. 168.—C.A.
(post, col. 445).

Society of Practical Knowledge v. Abbott

(1840) 9 L. J. Ch. 307; 2 Beav. 559; 4
 Jur. 453.—LANGDALE, M.R., distinguished.
British Seamless Paper Box Co., in re (1881)
 17 Ch. D. 467; 50 L. J. Ch. 497; 44 L. T. 98;
 29 W. R. 690.—C.A.; affirming JESSEL, M.R.
 JAMES, L.J.—The M.R. was of opinion, and I
 agree with him, that the directors were, and
 intended to be, thoroughly honest, and that they
 were, and intended to remain, the sole proprietors
 of the property of the company, and the sole
 members of the company, and that whatever
 agreements they chose to make among themselves
 as to the division of the property, concerned
 themselves alone. That being so, it distinguishes
 this case from *Society of Practical Knowledge v.*

Abbott, because in all these cases, when anything like a bonus has been given to directors, and it is called in question by allottees of shares, the burden of proof is thrown on those who have received it, to satisfy the Court that it was intended to be, and was in fact, honestly received. If they were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the Court would feel no difficulty in saying, as Lord Langdale did in *Society of Practical Knowledge v. Abbott*, that they intended to commit a fraud. Here there was nothing of that kind.—p. 476.

REBUTT, L.J., to the same effect.

COTTON, L.J.—The circumstances of this case entirely distinguish it from *Society of Practical Knowledge v. Abbott*, for there it was intended from the beginning to offer the shares to the public, and the directors had no right to deceive those whom they intended to bring into the company. I also think that the observations of James, L.J., in *Andrews, Laka Tin and Copper Mining Co., In re* (*supra*, col. 394), are not at all inconsistent with our decision.—p. 480.

British Seamless Paper Box Co., In re, distinguished.

Geo. Newman & Co., In re (1895) 64 L. J. Ch. 407; [1895] 1 Ch. 674; 12 R. 228; 72 L. T. 697; 43 W. R. 483; 2 Manson 267.—C.A.: reversing V. WILLIAMS, J.

LINDLEY, L.J. (for self, LORD HALSBURY, and A. L. SMITH, L.J.).—The question is whether these presents can be treated as valid against the liquidator on the winding up of the company, which is hopelessly insolvent, and which was largely in debt when these presents were made. Williams, J. has held that they are unimpeachable, and he referred to *British Seamless Paper Box Co., In re*, as supporting his view. But that case is very unlike this. The directors there had allotted shares to some of themselves as fully paid up. The shares were, in fact, allotted in consideration of some patents taken over by the company; and an agreement to issue the shares as paid up was registered. The transaction, therefore, was *intra vires*, and it was taken to be so both by counsel and by the Court. Further, the transaction was perfectly honest throughout, and it was sanctioned by a general meeting of the company, which then consisted of only the directors and one other person, who assented to what was done. More than a year afterwards shares were issued to other people, and the company being ultimately wound up, the liquidators sought to recover the nominal value of the shares, treating them, in fact, as not paid up. The Court held that this could not be done, because the transaction (being *intra vires*) was honest, and was sanctioned by all the members of the company at the time. But in this case the presents made by the directors to Mr. Newman, their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves.—p. 412.

British Seamless Paper Box Co., In re, distinguished. Olympia, Ltd., In re (1898) 67 L. J. Ch. 433; [1898] 2 Ch. 153.—C.A. (*supra*, col. 397); Leeds, &c. Theatre of Varieties, Ltd., In re (1902) 72 L. J. Ch. 1; [1902] 2 Ch. 809.—C.A. (*supra*, col. 399).

Hay's Case (*supra*, col. 423) and Pearson's Case (*supra*, col. 424), followed.

North Australian Territory Co., In re. Archer's Case (1891) 61 L. J. Ch. 129; [1892] 1 Ch. 322; 65 L. T. 800; 40 W. R. 212.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

Hay's Case, distinguished.

Lister & Co. v. Stubbs (1890) 59 L. J. Ch. 570; 45 Ch. D. 1; 63 L. T. 75; 38 W. R. 548.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

Lister & Co. v. Stubbs, distinguished.

Mouatt, In re, Kingston Cotton Mills Co. v. Mouatt (1898) 68 L. J. Ch. 390; [1899] 1 Ch. 831; 80 L. T. 406; 47 W. R. 506.—STIRLING, J.

M'Kay's Case (*supra*, col. 424) and Weston's Case (*supra*, col. 424), distinguished.

Hirsche v. Sims (1894) 64 L. J. P. C. 1; [1894] A. C. 654; 11 R. 303; 71 L. T. 357.—P.C.

EARL OF SELBORNE (for self, LORDS WATSON, MACNAGHTEN, MORRIS and SHAND, and SIR R. COUCH).—As to the measure of damage, their lordships do not think that the authorities cited by the respondents, of which *Morrah Consols Tin Mining Co., In re* [*M'Kay's Case*] and *West Jendell Tin Mining Co., In re* [*Weston's Case*], are typical examples, are applicable to this case, when related to one of an agreement made *bona fide*, but partially *ultra vires*. These were cases in which directors or fiduciary agents of companies had appropriated to themselves and for their own benefit, by means of secret bargains with promoters or vendors, shares represented as paid up, for which no consideration had been given, or other property of which they were trustees for their companies. In all of them the actual or presumable value was treated as a proper subject for evidence; and the principle applicable was, in *Morrah Consols Tin Mining Co., In re*, thus explained by Mellish, L.J.: "I think he is only liable for what was the fair value of the shares when the allotment was made or at any subsequent time. But M'Kay is a wrong-doer; and, therefore, in estimating the damages, a presumption may be made against him which could not be made against a person who was not a wrong-doer."—p. 8.

London and Birmingham, &c. Extension

Ry., In re, Carpenter's Executors' Case (1852) 21 L. J. Ch. 855; 5 De G. & Sm. 402.—PARKER, V.-C.; and **Cardiff Preserved Coal and Coke Co. v. Norton** (1866) 35 L. J. Ch. 646; 14 W. R. 947.—ROMILLY, M.R.; affirmed, (1867) 36 L. J. Ch. 451; L. R. 2 Ch. 405.—CHELMSFORD, L.C., *discussed*.

Royal Hotel Company of Great Yarmouth,

In re (1867) L. R. 4 Eq. 244; 16 L. T. 655; 15 W. R. 953.—ROMILLY, M.R., *disapproved*.

Mercantile Trading Co., In re, Stringer's Case (1869) L. R. 4 Ch. 475; 38 L. J. Ch. 698; 20 L. T. 502, 17 W. R. 654.—SELWYN and GIFFARD, L.JJ.

SELWYN, L.J.—Under these circumstances it appears to me that we should be doing something which is entirely inconsistent with the provisions of the Act of Parliament [Companies Act, 1862], so general as they are, if we were to introduce any such qualification as that said to have been laid down by the M.R. in the case of the *Royal Hotel Company of Great Yarmouth*.

His lordship is there reported to have said, "Where there is really a question to be tried, then I do not think this sect. 165 enables you to dispose of it in this way": and again, he says, the Court "can only do so in plain and straightforward cases where there is no point of law to be determined." Considering the great accuracy of the present Law Reports, one is very much disinclined to doubt that those are the words of the M.R.; otherwise, having regard to what I have always understood to be his own opinion upon the subject, and to his own decision in *Cardiff Preserved Coal Co. v. Norton*, I could not help thinking that there must be some error in that report. However that may be, I feel bound to say that I do not think there is to be found either in the words of the present Act of Parliament or in the conclusion which is justly to be drawn from the decisions upon this subject, any such qualification or limitation as that which is there expressed by his lordship; and if we were so to hold in all these cases we should be inducing the person against whom the charge is made to endeavour to make out that there was some question to be tried, or that the matter was not so plain or straightforward as it was represented to be; and there are very few cases indeed in which some such attempt as that might not be made with some reasonable hope of success. The result would be to occasion the necessity for a double mode of proceeding and unnecessary expense and delay.—p. 485.

Stringer's Case (*supra*), *applied*.

County Marine Insurance Co. in re. Rance's Case (1870) 40 L. J. Ch. 277; L. R. 6 Ch. 104; 23 L. T. 828; 19 W. R. 291.—JAMES and MELISE, L.JJ. *And see post*, cols. 429, 432.

Carpenter's Executors' Case (*supra*), *distinguished*.

East of England Bank. In re. Felton's Executors' Case (1865) 35 L. J. Ch. 196; L. R. 1 Ex. 219; 14 W. R. 247.—KINDERSLEY, V.-C.

Felton's Executors' Case, *recognised*.

United English and Scottish Insurance Co., in re. Hawkins, Ex parte (1868) L. R. 3 Ch. 787; 19 L. T. 292; 16 W. R. 1136.—WOOD and SELWYN, L.JJ.

Felton's Executors' Case, *followed*.

Stringer's Case, *discussed*.

Carpenter's Executors' Case, *distinguished*.

British Guardian Life Assurance Company, in re (1880) 14 Ch. D. 335; 49 L. J. Ch. 446; 28 W. R. 945. HALL, V.-C.—First, as to the objection taken that sect. 165 (Companies Act, 1862) is incapable of being put in operation against the executors of a deceased director. It has been contended that the question was expressly decided by Kindersley, V.-C. in *Felton's Executors' Case*, and that the decision was recognised by Selwyn, L.J. in *Hawkins, Ex parte*, and I think that the express point was decided, and upon the literal words of sect. 165. Looking at the language of the section in reference to making an offender who is criminally responsible liable, it appears to me that there is a total absence of power to investigate the conduct of a dead man under it; therefore I am of opinion that the words are in favour of the construction put upon them by Kindersley, V.-C. It has been contended that having regard to the later decision in *Stringer's Case*, upon sect. 165, the decision in *Felton's Executors' Case* is no longer binding,

and that the Court can now take a more enlarged view, and apply the section to the case of a dead director. A good deal could perhaps be said in favour of the view, that notwithstanding the particular words of sect. 165, upon the whole of the statute a larger construction might be adopted in reference to the point which has been discussed, but no case has been referred to in which the question has been considered and adjudicated upon, for I cannot say that the case before the M.R. in 1877 (*Stringer's Case*) is sufficiently in point for me to follow, looking at the form of the order made. I cannot hold that the executors of a deceased director are persons who can be made liable under sect. 165. . . .

Carpenter's Executors' Case arose under a different statute differently framed, and when examined it will be found to be inapplicable to the present case. An observation was made in reference to *Stringer's Case* that all objections are open to the parties as in a suit. That, however, means as to defence upon the merits, and not in regard to parties. The point in that case was that the persons sought to be charged could have been brought before the Court by bill filed against them, and that was true—pp. 340, 341.

M'Dougall v. Jersey Imperial Hotel Co. (1864)

34 L. J. Ch. 28; 2 H. & M. 528; 10 Jur. (N.S.) 1043; 10 L. T. 843; 12 W. R. 1142.

—WOOD, V.-C., *approved*.

Stringer's Case and **Mammoth Copperopolis of Utah**, *in re* (1880) 50 L. J. Ch. 11; 43

L. T. 754.—HALL, V.-C., *distinguished*.

Alexandra Palace Co., in re (1882) 21 Ch. D. 149; 51 L. J. Ch. 655; 46 L. T. 730; 30 W. R. 771.

PRY, J.—One matter remains for consideration, with respect to which, I confess, I have felt very considerable doubt, and that is the question of delay. [His lordship stated the material dates, and continued:—] These dates do not differ materially from the dates in *Mammoth Copperopolis of Utah, in re*, in which Hall, V.-C. considered that the staleness of the demand was a sufficient answer to the application of the official liquidator. If the two cases had been precisely parallel I should have felt myself bound to follow that decision, but it appears to me that they are not. In that case the directors had declared a dividend upon the footing of a balance-sheet which had been made up, and which I think, according to the view of the V.-C., was made up in a *bona fide* manner, although there might be grave questions as to the propriety of it. He considered that the liquidator's application was in fact an attempt to unravel the balance-sheets which had been passed and acted upon, and I observe that, in stating the considerations which led him to the conclusion that the demand was stale, he dwells in the first place upon the nature of the demand. Similar observations apply to *Stringer's Case*. There an attempt was made to compel a director to repay a dividend said to have been paid out of capital, by means of attacking three items in a balance-sheet which had been passed and acted upon. There also, the Court thought the delay was a sufficient answer. In the present case there is nothing of that sort. The transaction stands disclosed in the simplest way. There is no balance-sheet which it can be for a moment suggested induced the directors to come to the conclusion that there were divisible profits. It is a simple case in which the capital of the company or the moneys

borrowed by the company were applied in the payment of that which, according to the plain terms of the articles of association, could be paid only out of profits.—p. 162.

Rance's Case (*supra*, col. 427) and **Stringer's Case**, *not applied*.

National Funds Assurance Co., *In re* (1878) 48 L. J. Ch. 163; 10 Ch. D. 118; 39 L. T. 420; 27 W. R. 302.—JESSEL, M.R. *And see* col. 431.

Rance's Case, *applied*.

Alexandra Palace Co., *In re*; **Stringer's Case** and **Flitcroft's Case** (*post*) *referred to*.

Mammoth Copperopolis of Utah, *In re*, *distinguished*.

Sharpe, *In re*, Bennett, *In re* (1891) 61 L. J. Ch. 193; [1892] 1 Ch. 154.—NORTH, J. and O.A. (*post*, col. 436).

Canadian Land Reclaiming and Colonizing Co., *In re*, **Coventry and Dixon's Case** (1880) 14 Ch. D. 660; 42 L. T. 559; 28 W. R. 775.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.JJ., *commented on*.

Anglo-French Co-operative Society, *In re*, **Polly**, *Ex parte* (1882) 21 Ch. D. 492; 47 L. T. 638; 31 W. R. 177.—C.A.

BRETT, L.J.—I confess that I am extremely sorry that the restrictive interpretation which *Coventry and Dixon's Case* has put upon sect. 165 has been put upon it; because I have always thought that that section was the most salutary section in the whole of the Act, and one intended to meet, as I should have thought, in the very widest terms, transactions which have become a perfect scandal in the getting up of companies in this country. However, we are bound by the interpretation which has been put upon that section by the decision in *Coventry and Dixon's Case*.—p. 505.

COTTON, L.J.—It [*Coventry and Dixon's Case*] is, of course, binding on the Court, but I must consider it, not only as a binding decision, but as one the principle of which I approve.—p. 508. JESSEL, M.R. concurred.

National Funds Assurance Co., *In re*, and **Coventry and Dixon's Case**, *considered*.

Exchange Banking Co., *In re*, **Flitcroft's Case** (1882) 21 Ch. D. 519; 52 L. J. Ch. 217; 48 L. T. 80; 81 W. R. 174.—C.A.; *varying* 51 L. J. Ch. 525; 46 L. T. 474; 30 W. R. 695.—BAOON, V.-C. JESSEL, M.R.—The liquidator has taken out a summons to compel the directors to replace the sums so paid, and the V.-C., following the decision in *National Funds Assurance Co., In re*, made the order. Even if he had himself entertained a different view, he was not likely to refuse to follow that case; and the object of the present appeal is, in fact, to have that case overruled. It is said that it is not consistent with *Coventry and Dixon's Case*. This latter case decides that under sect. 165 directors cannot be made liable for anything (except perhaps for interest) for which they could not be made liable independently, not of the Act, but of that particular section. If, then, the decision of *National Funds Assurance Co., In re*, had been founded on some new equity arising under s. 165, it could not be relied upon. It is not, however, founded on any such equity, but on the law, independently of that section, and I entirely adhere to the judgment given in it.—p. 532.

COTTON, L.J.—The question of set-off is disposed

of by our decision in *Polly's Case* (*supra*) yesterday, and I should not have referred to it had not *Grisell's Case* (*post*, col. 605) been cited as conflicting with it. But that case only related to the question whether directors who were creditors of the company should be postponed to other creditors, which is quite a different question.—p. 532.

BRETT, L.J. to the same effect. *And see* col. 431.

Coventry and Dixon's Case, *distinguished*.

Western Counties Steam Bakeries and Milling Co., *In re* (1897) 66 L. J. Ch. 354; [1897] 1 Ch. 617.—C.A. (*post*, col. 467).

National Funds Assurance Co., *In re* (*supra*), *distinguished*.

Dale v. Martin (1883) 11 L. R. Ir. 371.—C.A. LAW, L.C., MORRIS, C.J. and FITZGIBBON, L.J.

National Funds Assurance Co., *In re*, **Flitcroft's Case** (*supra*), and **Rance's Case** (col. 427), *discussed and distinguished*.

Denham & Co., *In re* (1883) 25 Ch. D. 752; 50 L. T. 523; 32 W. R. 487.—CHITTY, J. *And see post*, col. 432.

Turgand v. Marshall (1869) 38 L. J. Ch. 639; L. R. 4 Ch. 376; 20 L. T. 769; 17 W. R. 935.—HATHERLEY, L.C.; *reversing*

37 L. J. Ch. 582; L. R. 6 Eq. 112; 18 L. T. 835; 16 W. R. 719.—ROMILLY, M.R., *explained*. *And see post*, col. 431.

Overend, Gurney & Co. v. Gibb (1872) L. R. 5 H. L. 480; 42 L. J. Ch. 67.—H.L. (R.). HATHERLEY, L.C., LORDS CHELMSFORD, WESTBURY and COLONSAY; *affirming* S. C. *nom.* Overend, Gurney & Co. v. Gurney (1869) 39 L. J. Ch. 45; L. R. 4 Ch. 701; 21 L. T. 73; 17 W. R. 719, 1115.—HATHERLEY, L.C., *who reversed* 20 L. T. 652.—MALINS, V.-C.

HATHERLEY, L.C.—I should like to say one word as regards *Turgand v. Marshall*. I certainly never intended to lay down the strong proposition that a person acting for another as his agent is not bound to use all the ordinary prudence that can be properly and legitimately expected from any person in the conduct of the affairs of the world, namely, the same amount of prudence which, in the same circumstances, he would exercise on his own behalf. What I did intend to state in that case was, that I could not measure—and I think it would be a very fatal error in the verdict of any Court of justice to attempt to measure—the amount of prudence that ought to be exercised by the amount of prudence which the judge himself might think, under similar circumstances, he should have exercised. I think it extremely likely that many a judge, or many a person versed by long experience in the affairs of mankind, as conducted in the mercantile world, will know that there is a great deal more trust, a great deal more speculation, and a great deal more readiness to confide in the probabilities of things, with regard to success in mercantile transactions, than there is on the part of those whose habits of life are entirely of a different character. It would be extremely wrong to import into the consideration of the case of a person acting as a mercantile agent in the purchase of a business concern those principles of extreme caution which might dictate the course of one who is not at all inclined to invest his property in any ventures of such a hazardous character.—p. 494.

Sharpe, *In re*, Bennett, *In re* (*supra*), *referred to*.

Turquand v. Marshall, *distinguished*.

National Bank of Wales, *In re*, Cory's Case (1899) 68 L. J. Ch. 634; [1899] 2 Ch. 629.—C.A. (*supra*, col. 398). *And see post*, col. 432.

Land Credit Company of Ireland v. Fermooy (Lord) (1870) L. R. 5 Ch. 763; 23 L. T. 439; 18 W. R. 1089.—HATHERLEY, L.G. and JAMES, L.J.; *reversing in part* L. R. 8 Eq. 7; 20 L. T. 293; 17 W. R. 562.—ROMILLY, M.R., *distinguished*.

Ashurst v. Mason, Ashurst v. Fowler (1875) 44 L. J. Ch. 337; L. R. 20 Eq. 225; 23 W. R. 506.—BACON, V.-C.

Joint Stock Discount Co. v. Brown (1869) L. R. 8 Eq. 381; 20 L. T. 844; 17 W. R. 1037.—JAMES, V.-C., *followed*.

Overend, Gurney & Co. v. Gibb and Land Credit Co. v. Fermooy (Lord), *distinguished*. Railway and General Light Improvement Co., *In re*, Marretti's Case (1880) 42 L. T. 206; 28 W. R. 541.—C.A. JAMES, BRETT and COTTON, L.J.

COTTON, L.J.—As to the cases, in *Overend, Gurney & Co. v. Gibb*, it was sought to make directors liable for making a bargain for which the company was expressly formed. They might have been liable if, knowing that the bargain was very improvident, they had neglected to say so; but there was no such charge against them: there was no charge of negligence pleaded against them. That case, therefore, has no bearing upon this. In *Land Credit Co. v. Fermooy* (Lord), the person sought to be made liable did not, it is true, know for what purpose the money had been paid; but the cheque had been before the executive committee, who reported that it was a proper payment. That is just the distinction between that case and the present.—p. 209.

National Funds Assurance Co., *In re*, (col. 429), *adopted*.

Oxford Benefit Building and Investment Society, *In re* (1886) 56 L. J. Ch. 98; 35 Ch. D. 502; 55 L. T. 598; 35 W. R. 116.—KAY, J.

Oxford Benefit Building & Co. Society, *In re*, *followed*.

Overend, Gurney & Co. v. Gibb; Turquand v. Marshall (col. 430); and Rance's Case (*supra*, col. 427), *distinguished*.

Leeds Estate Building and Investment Co. v. Shepherd (1887) 57 L. J. Ch. 46; 36 Ch. D. 787; 57 L. T. 684; 36 W. R. 322.—STIRLING, J.

Leeds Estate Building, & Co. v. Shepherd, *discussed*.

London and General Bank, *In re* (No. 3) (1895) 64 L. J. Ch. 866; [1895] 2 Ch. 673; 12 R. 520; 73 L. T. 304; 44 W. R. 80; 2 Manson 555.—C.A. (*post*, col. 467).

Rance's Case; Oxford Benefit Building & Co. Society, *In re*; and Leeds Estate Building, & Co. v. Shepherd, *discussed*.

Lee v. Neuchatel Asphalt Co. (1889) 58 L. J. Ch. 408; 41 Ch. D. 1; 61 L. T. 11; 37 W. R. 321; 1 Meg. 140.—C.A. COTTON, LINDLEY and LOPES, L.J.

Joint Stock Discount Co. v. Brown (*supra*), and Flitcroft's Case (*supra*, col. 429), *distinguished*.

London Financial Association v. Kelk (1884)

58 L. J. Ch. 1025; 26 Ch. D. 107; 50 L. T. 492.—BACON, V.-C.

Joint Stock Discount Co. v. Brown, *discussed*. Cullerne v. London and Suburban Building Society (1890) 59 L. J. Q. B. 525; 25 Q. B. D. 485.—C.A. (*post*, col. 435).

National Bank of Wales, *In re*, Cory's Case (*supra*, col. 431), *affirmed but commented on*.

Rance's Case (*supra*, col. 427), *judgment of* ROMILLY, M.R. *commented on*.

Stringer's Case (*supra*, col. 426); Leeds Estate Building, & Co. v. Shepherd (*supra*); and Denham & Co., *In re* (*supra*, col. 480), *approved*.

Dovey v. Cory (1901) 70 L. J. Ch. 753; [1901] A. C. 477; 85 L. T. 257; 50 W. R. 65; 8 Manson 346.—H.L. (B.).

LORD DAVEY.—I need only refer to three cases, which seem to me to contain the whole law upon the subject. In *Mercantile Trading Co., In re*, Stringer's Case, the business of the company in question was of an extremely speculative and hazardous character, and the directors had paid a dividend on their estimated value and assets which were afterwards totally lost. It was held that the estimate having been made *bona fide*, and without any intention to defraud anybody, a director could not be made liable. When the company was wound up, to replace the money. In *Rance's Case*, Lord Romilly laid down the principle which he thought governed cases of this description, thus: "When an improper payment has been made, if it be an error of judgment, it cannot be recovered: if it be a fraudulent payment, then it can." The learned judge explained what he meant by a fraudulent payment: "I mean one where the person who makes it, or is concerned in making it, is at the time aware of the impropriety of making it, but does so in order to obtain a benefit for himself;" and he adds, "The director may be ignorant of this fact, but if his ignorance arises from his wilfully shutting his eyes to the facts which are before him, he is equally guilty." I think that this statement of the law is very nearly but not quite accurate. In my opinion it is not necessary that the motive of the improper payment should be to obtain a benefit for the director himself. I also understand Lord Romilly to include in the expression "wilfully shutting his eyes" culpable negligence or reckless indifference by the director in the performance of his duties. The C. A. took a different view of the facts from that taken by Lord Romilly, and held that the directors in the preparation of the so-called balance-sheet had not followed the directions in their articles of association, and the balance-sheet did not in fact purport to show a profit out of which a dividend could be paid. In such a case there can be no doubt of the liability of the director who took part in the payment of the dividend. *Leeds Estate, &c. Co. v. Shepherd*, before Stirling, J. was a case of the same description. The directors had not followed the directions contained in the articles of association. The learned judge, in the course of his judgment, states the law thus: "It seems to me that the views expressed by the learned judges who decided *Rance's Case* are consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital fail to excuse themselves

if they have not taken reasonable care to secure the preparation of estimates and statements of account such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements of account submitted to them." I agree in this statement of the law, and I do not think it inconsistent with that of Lord Romilly, properly understood, and subject to the observation which I have already made upon it. It is by this standard that the conduct of the respondent must be judged in this case. . . . I agree with what was said by Sir G. Jessel in *Witcham, &c. Co., In re, Hallmark's Case* [post, col. 486], and by Chitty, J., in *Denham & Co., In re*, that directors are not bound to examine entries in the company's books. . . . I desire to express my dissent from some propositions of law which were laid down in the C. A., and upon which this House thought it right to hear the respondent's counsel. . . . It may be that I have misapprehended the statement of law intended to be made by learned judges in the C. A. I think it is possible, because I find that in *Vernor v. General and Commercial Trust* [post, col. 525], Lord Lindley says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." I reserve my opinion as to the effect of an actual and ascertained loss of part of the company's fixed capital, as in the case put by counsel for the respondent of a loss of a ship uninsured. But, subject to this observation, I think that the statement of law in the passage I have quoted is not open to objection, and it is only because the learned judge appears to me to have departed from it in his judgment in the present case that I have troubled your lordships with these remarks.—pp. 760–762.

HALSBURY, L.C. and LORDS MACNAGHTEN and SHAND also guarded themselves against being understood to concur in all the propositions laid down in the C. A. LORD BRAMPTON concurred.

National Bank of Wales, In re, Cory's Case, applied.

Bond v. Barrow Hematite Steel Co. (1902) 71 L. J. Ch. 246; [1902] 1 Ch. 353; 86 L. T. 10; 50 W. R. 295; 9 Manson 69; 17 Times L. R. 709.—FARWELL, J.

Benson v. Heathorn (1842) 1 Y. & C. C. C. 325.—KNIGHT BRUCE, v.-c., discussed.

Cape Breton Co., In re (1885) 54 L. J. Ch. 822; 29 Ch. D. 795.—C.A. (*supra*, col. 394).

Benson v. Heathorn, discussed.

Imperial Mercantile Credit Association v. Coleman (1873) 49 L. J. Ch. 644; L. R. 6 H. L. 189; 29 L. T. 1; 21 W. R. 696.—H.L. (B.) LORDS CHELMSFORD, COLONSAK and CAIRNS; reversing (1871) 24 L. T. 290.—HATHERLEY, L.C.; and affirming 22 L. T. 357.—MALINS, v.-c. Decision of HATHERLEY, L.C. followed.

Costa Rica Ry. v. Forwood (1900) 69 L. J. Ch. 408; [1900] 1 Ch. 756; 83 L. T. 19; 48 W. R.

553; affirmed, (1901) 70 L. J. Ch. 385; [1901] 1 Ch. 746; 84 L. T. 279; 49 W. R. 337; 8 Manson 374.—C.A. RIGBY, v. WILLIAMS and STIRLING, L.J.J. See judgments.

BYRNE, J.—The decision of Lord Hatherley was reversed upon appeal to the H. L.; but so far as is material in the present case, it was left untouched. Reliance was placed upon a passage in the speech of Lord Cairns; but the result is that he leaves the reasoning of Lord Hatherley in respect of the effect of a clause of this description untouched, reserving a right to reconsider the matter.—p. 411.

Benson v. Heathorn, referred to.

Rowland v. Chapman (1901) 17 Times L. R. 670.—BUCKLEY, J.

Forest of Dean Coal Mining Co., In re (1878)

10 Ch. D. 450; 40 L. T. 287; 27 W. R. 594.—JESSEL, M.R.; followed, Wedgwood Coal and Iron Co., In re (1882) 47 L. T. 612; 31 W. R. 181.—FRY, J.; referred to, Lands Allotment Co., In re (1894) 63 L. J. Ch. 291; [1894] 1 Ch. 616; 7 R. 115, 70 L. T. 286; 42 W. R. 404.—C.A. LINDLEY, KAY and A. L. SMITH, L.J.J.

Forest of Dean Mining Co., In re, and Lands

Allotment Co., In re, referred to.

Percival v. Wright (1902) 71 L. J. Ch. 846; [1902] 2 Ch. 421; 51 W. R. 31; 9 Manson 443.—SWINFEN EADY, J.

Misrepresentation.

Eaglesfield v. Londonderry (Marquis) (1875)

34 L. T. 113; 24 W. R. 368.—JESSEL, M.R.; reversed, (1876) 4 Ch. D. 633; 35 L. T. 822; 25 W. R. 190.—C.A. JAMES, L.J., BAGGALLAY and BRAMWELL, J.J.A.

National Exchange Co. of Glasgow v. Drew

(1855) 2 Macq. H. L. Cas. 103.—CRANWORTH, L.C., LORDS BROUGHAM and ST. LEONARDS, *discussed*. Royal British Bank, In re, Brockwell's Case (1857) 26 L. J. Ch. 855; 4 Drew. 205; 3 Jur. (N.S.) 879; 5 W. R. 858.—KINDERSLEY, v.-c.; Royal British Bank, In re, Mixer's Case (1859) 4 De G. & J. 575; 1 L. T. 19; 7 W. R. 677 (*post*, col. 502); Barry v. Croskey (1861) 2 J. & H. 1.—WOOD, v.-c. (*supra*, col. 399).

National Exchange Co. of Glasgow v. Drew,

disented from. And see post.

Royal British Bank, In re, Nicol, Ex parte, (1859) 28 L. J. Ch. 257; 3 De G. & J. 387; 5 Jur. (N.S.) 205; 7 W. R. 217.—C.A. CHELMSFORD, L.C. and TURNER, L.J.

[The *dicta* of Lord Cranworth and Lord St. Leonards, as stated in that case, with regard to the relation in which a company stands to its directors, in respect to fraudulent misrepresentations made by the latter, dissented from.]

Henderson v. Lacon (1867) L. R. 5 Eq. 249;

18 L. T. 627; 16 W. R. 328.—WOOD, v.-c.; and Stewart v. Austin (1866) 36 L. J. Ch. 162; L. R. 3 Eq. 299; 15 L. T. 407; 15 W. R. 122.—WOOD, v.-c., *discussed*. Ship v. Crosskill (1870) 39 L. J. Ch. 550; L. R. 10 Eq. 73; 22 L. T. 365; 18 W. R. 618.

ROMILLY, M.R.—In *Henderson v. Lacon*, Lord Hatherley laid it down that if a falsehood were put forth by the directors, they might be made liable, and he very properly held them to be guilty of fraud in that case. *Stewart v. Austin*

is quite a different case from that; there the directors made no representation at all, but the plaintiff had been struck off the register on exactly the same grounds as here, viz., excess of the objects of the company over those stated in the prospectus. He filed a bill against the directors and the company, and the demurrers both of the directors and the company were allowed. True, he did not allege fraud, but if the facts show fraud it is not necessary expressly to call it fraud, nor will the use of the word fraud constitute fraud if the facts do not show it.—p. 552.

National Exchange Co. of Glasgow v. Drew
(*supra*), *discussed*.

New Brunswick and Canada Ry. and Land Co. v. Conybeare (1862) 31 L. J. Ch. 297; 9 H. L. Cas. 711; 8 Jur. (N.S.) 575; 6 L. T. 109.—H. L. (B.). WESTBURY, L.C., LORDS CRANWORTH and CHELMSFORD; *reversing* S. C. *nom.* Conybeare v. New Brunswick and Canada, &c. Co. (1860) 29 L. J. Ch. 435, 442; 1 De G. F. & J. 578; 6 Jur. (N.S.) 164, 518; 2 L. T. 314.—KNIGHT BRUCE and TURNER, L.J.J., who had varied 1 Giff. 339. 1 L. T. 360; 8 W. R. 231.—STUART V.-C.

New Brunswick, &c. Co. v. Conybeare,
discussed.

Western Bank of Scotland v. Addie (1867) L. R. 1 H. L. (Sc.) 145 (*post*, col. 508).

Acts Ultra Vires.

Kernaghan v. Williams (1868) L. R. 6 Eq. 228.—ROMILLY, M.R., *followed*.

Pickering v. Stephenson (1872) 41 L. J. Ch. 493; L. R. 14 Eq. 322; 26 L. T. 608; 20 W. R. 654.—WICKENS, V.-C.

Pickering v. Stephenson, *followed*, Studdert v. Grosvenor (1886) 55 L. J. Ch. 639; 33 Ch. D. 528; 55 L. T. 171; 34 W. R. 754; 53 J. P. 710.—KAY, J.; *discussed*, Tomkinson v. S. E. Ry. (1887) 56 L. J. Ch. 932; 35 Ch. D. 675 (*supra*, col. 420).

Pickering v. Stephenson and Studdert v. Grosvenor, *distinguished*.

Faure Electric Accumulator Co., In re (No. 2) (1888) 58 L. J. Ch. 48; 40 Ch. D. 141; 59 L. T. 918; 37 W. R. 116; 1 Meg. 99.—KAY, J.

Evans v. Coventry (1857) 26 L. J. Ch. 400; 5 De G. M. & G. 835; 3 Jur. (N.S.) 1225; 5 W. R. 436.—KNIGHT BRUCE and TURNER, L.J.J.; *varying* 25 L. J. Ch. 489.—KINDERSELEY, V.-C.; *commented on*, State Fire Insurance Co., In re (1864) 33 L. J. Ch. 123; 1 De G. J. & S. 634; 2 N. R. 565; 11 W. R. 1011.—L.J.J.; *applied*, Salisbury v. Metropolitan Ry. (1870) 22 L. T. 889; 18 W. R. 839.—JAMES, V.-C.

Pickering v. Stephenson, commented on.

Evans v. Coventry, discussed.

Salisbury v. Metropolitan Ry., distinguished.

Cullerne v. London and Suburban Building Society (1890) 59 L. J. Q. B. 525; 25 Q. B. D. 485; 63 L. T. 511; 39 W. R. 88; 55 J. P. 148.—C.A.

LINDLEY, L.J. (for self, ESHER, M.R. and LOPES, L.J.).—I have carefully worked at the decree in *Evans v. Coventry*, and I infer that the directors there held liable, not only passed resolutions that were *ultra vires*, but also acted on them. The decree as to the increased

remuneration of the directors only charges each director with what he received. The decree as to dividends paid out of capital appears to me only to charge the directors who declared the dividends, and, in effect, ordered them to be paid. The decree as to the purchase of shares only charges those directors who concurred in the purchases, that is, as I understand, who made them, or ordered them to be made. In *Joint Stock Discount Co. v. Brown* (*supra*, col. 431), the directors who were held liable had done much more than the plaintiff did in this case. They were all parties to what James, V.-C. characterised as the "fatal" resolution that the shares improperly bought should not be sold for less than a certain sum. They were therefore implicated in the whole transaction which produced the loss. In *Salisbury v. Metropolitan Ry.* directors were held liable to make good dividends wrongly paid out of capital; but the point which has to be considered in the present case did not arise there. Reliance was placed by the counsel for the plaintiff on the judgment of Wickens, V.-C. in *Pickering v. Stephenson*, and followed in *Studdert v. Grosvenor*. But if a director, acting *ultra vires*—that is, not only beyond his own power, but also beyond any power the company can confer upon him—parts with money of the company, I fail to see on what principle the fact that he acted *bona fide*, and with the approval of a majority of the shareholders, can avail him as a defence to an action by the company to compel him to replace the money. I never could understand that part of the V.-C.'s judgment; nor can I understand it now. I think he was wrong.—p. 529.

Pickering v. Stephenson, Evans v. Coventry and Cullerne v. London, &c. Building Society, discussed.

Sharpe, In re, Bennett, In re, Masonic and General Life Assurance Co. v. Sharpe (1891) 61 L. J. Ch. 193; [1892] 1 Ch. 154; 65 L. T. 806; 40 W. R. 241.—C.A. LINDLEY, BOWEN and FRY, L.J.J. *And see* col. 431.

Board Meetings.

Imperial Hydropathic Hotel Co., Blackpool v. Hampson (1882) 23 Ch. D. 1; 49 L. T. 147; 31 W. R. 380.—C.A. JESSILL, M.R., COTTON and BOWEN, L.J.J., *discussed*.

Taylor v. Pilsen Beer and General Electric Light Co. (1884) 53 L. J. Ch. 856; 27 Ch. D. 268; 50 L. T. 480; 33 W. R. 134.—PEARSON, J. *See supra*, col. 405.

Monster v. Cammell Co. (1882) 51 L. J. Ch. 731; 21 Ch. D. 133; 47 L. T. 44; 30 W. R. 812.—FRY, J.; and **Imperial Hydropathic Co., Blackpool v. Hampson**, *distinguished*. Harben v. Phillips (1883) 23 Ch. D. 14; 48 L. T. 334; 31 W. R. 173.—C.A. COTTON and BOWEN, L.J.J.

Harben v. Phillips, explained.

Brown v. La Trinidad (1887) 37 Ch. D. 1; 57 L. J. Ch. 292; 58 L. T. 137; 36 W. R. 289.—C.A. COTTON, LINDLEY and LOPES, L.J.J. COTTON, L.J.—It was contended that in *Harben v. Phillips* it had been laid down that where there is an irregularity in the constitution of the board it cannot effectually call a general meeting. But I think that that case is not quite understood. The words "irregularity in the

constitution of the board" did not mean some irregularity in summoning persons who were in fact directors, as the mere non-issue of a notice to a particular director, or not giving him sufficient notice. . . . There had been a meeting where some who were not legally directors were present, and some who were legally directors were excluded, and we decided that it was not a meeting which could discharge the duties of a board.—p. 10.

Harben v. Phillips, *not applied*.

Briton Medical and General Life Association v. Jones (1889) 61 L. T. 884.—FOLLOCK, B. *And see post*, col. 438.

Imperial Hydropathic Hotel Co., Blackpool v. Hampson (*supra*), *applied*.

Foster v. Greenwich Ferry Co. (1888) 5 Times L. R. 16.—STIRLING, J.

Browne v. La Trinidad (*supra*), *applied*.

Southern Counties Deposit Bank v. Ryder (1895) 73 L. T. 474.—C.A. LINDLEY, LOPES and RIGBY, L.J.; *affirming* STIRLING, J.

Southern Counties Deposit Bank v. Rider, *commented on*.

Haycraft Gold Reduction and Mining Co. In re (1900) 69 L. J. Ch. 497; [1900] 2 Ch. 290; 83 L. T. 166; 7 Manson 243.—COZEN'S-HARDY, J.

Browne v. La Trinidad, *principle not applied*.

Wyoming State Syndicate, In re (1901) 70 L. J. Ch. 727; [1901] 2 Ch. 431; 84 L. T. 868; 49 W. R. 650; 8 Manson 311.—WRIGHT, J.

Royal British Bank v. Turquand (1855) 24 L. J. Q. B. 327; 5 El. & Bl. 248; 1 Jur. (N.S.) 1086.—Q. B.; *affirmed*, (1856) 25 L. J. Q. B. 317; 6 El. & Bl. 327; 2 Jur. (N.S.) 663.—EX. CH.; *applied*, Fountaine v. Carmarthen and Cardigan Ry. (1868) 37 L. J. Ch. 429; L. R. 5 Eq. 316 (*post*, col. 454); *adhered to*, Bank of Hindustan, &c., In re, Campbell's Case (1873) 43 L. J. Ch. 1; L. R. 9 Ch. 1 (*supra*, col. 405); *applied*, Mahony v. East Holyford Mining Co. (1875) L. R. 7 H. L. 869; 33 L. T. 338.—H. L. (IR.). CAIRNS, L.C., LORDS CHELMSFORD, HATHERLEY and PENZANCE; *reversing* 9 Ir. C. L. R. 306.—EX. CH. (IR.).

Royal British Bank v. Turquand, *distinguished*.

Irvine v. Union Bank of Australia (1877) 2 App. Cas. 366; 46 L. J. P. C. 87; 37 L. T. 176; 25 W. R. 832.—P.C.

SIR B. PEACOCK (for self, LORD BLACKBURN, SIR J. COLVILLE, SIR M. SMITH and SIR R. COLLIER).—*Royal British Bank v. Turquand* was decided with reference to a company registered under 7 & 8 Vict. c. 110, and Jervis, C.J. remarked that the lender finding that the authority might have been made complete by a resolution would have had a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done. In the present case, however, the bank would have found that, by the articles of association, the directors were expressly restricted from borrowing beyond a certain amount, and they must have known that, if the general powers vested in the directors by art. 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of sect. 31, a copy of that resolution ought, in regular course, to have been forwarded to the registrar of joint-stock companies, in pursuance

of sect. 53 of the Companies Act, and would have been found amongst his records.—p. 379.

Royal British Bank v. Turquand and Mahony v. East Holyford Mining Co. (*supra*), *applied*.

County of Gloucester Bank v. Rudry, Merthyr Steam and House Coal Colliery Co. (1895) 64 L. J. Ch. 451; [1895] 1 Ch. 629; 12 K. 188; 72 L. T. 375; 43 W. R. 486; 2 Manson 223.—C.A.

LORD HALSBURY.—The case relied on by the respondents—*D'Arcy v. Tamur, &c. Ry.* (*supra*, col. 411)—was a case in which a bond given by a company was held not to be the bond of the company, for this, among other reasons, that, by a section in the company's special Act, the business of the company was to be conducted by directors and by a particular quorum by the special Act prescribed, and it was held that all persons dealing with the company were bound, therefore, to know what was in the provisions of the special Act in respect to that matter. If that case were identical in its facts with the case now before us, we should be bound by that decision, but I think the facts are not the same at all. The decision in *Royal British Bank v. Turquand*, and . . . *Mahony v. East Holyford Mining Co.*, affirm a proposition of a very different character.—p. 452.

LINDLEY, L.J.—That case [*D'Arcy v. Tamur, &c. Ry.*] has never been applied, that I know of, to these registered companies where the quorum and other formalities depend entirely upon the regulations which the directors may choose to make themselves. The case is governed, not by *D'Arcy v. Tamur, &c. Ry.*, but by *Royal British Bank v. Turquand*, followed as it has been by a string of cases too numerous to refer to, the principal one of which is the Irish case, *Mahony v. East Holyford Mining Co.*, to which Lord Halsbury has referred.—p. 454.

A. L. SMITH, L.J. to the same effect.

Briton Medical and General Life Association v. Jones (*supra*, col. 437) and **Mahony v. East Holyford Mining Co.**, *distinguished*.

Tyne Mutual Steamship Insurance Association v. Brown (1896) 74 L. T. 283; 1 Com. Cas. 345.—RUSSELL OF KILLOWEN, C.J.

Royal British Bank v. Turquand, *followed*.

Hampshire Land Co., In re, Portsea Island Building Society, Ex parte (1896) 65 L. J. Ch. 860; [1896] 2 Ch. 743.—V. WILLIAMS, J. (*post*, col. 446).

Royal British Bank v. Turquand and Mahony v. East Holyford Mining Co., *referred to*.

County of Gloucester Bank v. Rudry, &c. Co. (*supra*), *applied*.

Duck v. Tower Galvanising Co. (1901) 70 L. J. K. B. 625; [1901] 2 K. B. 314; 84 L. T. 847.—ALVERSTONE, O.J. and LAWRENCE, J. *See supra*, col. 413.

4. CONTRACTS.

Savin v. Hoylake Ry. (1865) 35 L. J. Ex. 52; L. R. 1 Ex. 9; 4 H. & C. 67; 11 Jur. (N.S.) 934; 18 L. T. 374, 14 W. R. 109.—EX., *followed*.

Burden v. River Fergus Navigation Co. (1866) 1 R. R. 2 C. L. 13.—MONAHAN, C.J.

Savin v. Hoylake Ry., *distinguished*.

Brampton and Longtown Ry., In re, Shaw's Claim (1875) 44 L. J. Ch. 670; L. R. 10 Ch.

177. 33 L. T. 5; 23 W. R. 818.—*CAIRNS, L.O. and MELLISH, L.J.*

MELLISH, L.J.—The only question is a question of law which was argued by Mr. FRY. He urged that if any one person was discharged, then the whole company might avail themselves of it. I do not at all agree in that. He seemed to think that that was decided by *Narva v. Hoylake Ry.*; but in that case there was most clearly alleged a contract on behalf of the company, because what was said was that the plaintiff before the application to Parliament induced certain persons to become promoters of the company upon the faith of an express agreement between the plaintiff and the said persons; that he, the plaintiff, would bear and pay all the costs, charges, and expenses of applying for and obtaining and passing the said Act, and in relation thereto; and that neither the said persons, nor the said company when incorporated, nor any other person, should be liable to him for the same or any part thereof. It was, therefore, expressly stated, as part of the agreement, that the company when incorporated should not be liable, and the true ground of the decision is plainly this, that the Court, as a matter of construction, held that the words "charges and expenses," in the Act of Parliament, did not include charges and expenses which a man had voluntarily incurred on the express agreement that he was not to be paid.—p. 673.

Shaw's Claim (*supra*), discussed and distinguished.

Skegness and St. Leonard's Tramways Co., In re (1888) 53 L. J. Ch. 737; 41 Ch. D. 215; 60 L. T. 906; 37 W. R. 225.—*C.A.* See post, col. 509.

Gunn v. London and Lancashire Fire Insurance Co. (1862) 12 C. B. (N.S.) 694.—*C.F.*, approved.

Kelner v. Baxter (1866) 36 L. J. C. P. 94; L. R. 2 C. P. 174; 12 Jur. (N.S.) 1016; 15 L. T. 213.—*C.P.*

Gregory v. Williams (1817) 3 Mer. 582.—*GRANT, M.R.*, followed.

Touche v. Metropolitan Ry. Warehousing Co. (1871) L. R. 6 Ch. 671.—*HATHERLEY, L.O.* And see post, col. 440.

Kelner v. Baxter, followed.

Touche v. Metropolitan Ry. Warehousing Co., discussed.

Melhado v. Porto Allegre, &c. Ry. (1874) 43 L. J. C. P. 253; L. R. 9 C. P. 503; 81 L. T. 57; 23 W. R. 57.—*C.P.*

Kelner v. Baxter, not applied.

Melhado v. Porto Allegre, &c. Ry., observed on.

Touche v. Metropolitan Ry. Warehousing Co., explained.

Spiller v. Paris Skating Rink Co. (1878) 7 Ch. D. 368; 46 W. R. 456.

MADINS, V.O.—*Kelner v. Baxter* has no application; for the only point decided in that case was that the persons who had made the contract were liable on it, and could not shift the burden over to the company. Great stress was laid on *Melhado v. Porto Allegre, &c. Ry.*; but there Lord Coleridge himself says that the decisions at law and in equity are different, and I feel no doubt that that case would have been otherwise decided in equity. Lord Coleridge says that *Touche v. Metropolitan Ry. Warehousing Co.* rested upon the principle of trustee

and *cestui que trust*, but in my opinion it rested on no such principle, but on the power of a company to adopt contracts made by its promoters after its formation.—p. 369.

Spiller v. Paris Skating Rink Co., discussed from.

Gregory v. Williams (*supra*), explained.

Hereford and South Wales Waggon and Engineering Co., In re, Head and Walter's Claim (1876) 45 L. J. Ch. 461; 2 Ch. D. 621; 35 L. T. 40; 24 W. R. 953.—*C.A.* *JAMES and MELLISH, L.J.*, and *BAGGALLAY, J.A.*, applied.

Empress Engineering Co., In re (1880) 16 Ch. D. 125; 43 L. T. 752; 29 W. R. 342.—*C.A.* *JESSEL, M.R.*, *JAMES* and *BRETT, L.J.*

JAMES, L.J.—I think it is perhaps as well that we should say that *Gregory v. Williams* seems to be misunderstood. When that case is considered with the careful criticism with which the *M.R.* has examined it [*Jessel, M.R.* discussed this case in the argument], it appears quite clear that there was there a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person. . . .

Notwithstanding what was said by *Malins, V.C.*, in *Spiller v. Paris Skating Rink Co.*, it appears to me that it is settled, both in the Courts of law and by us in the *C.A.* in . . . *Hereford and South Wales Waggon, &c. Co., In re*, that a company cannot ratify a contract made on its behalf before it come into existence—cannot ratify a nullity. The only thing that results from what is called ratification or adoption of such a contract is not the ratification or adoption of a contract, *quid* contract, but the creation of an equitable liability depending on equitable grounds. It is inequitable for a man not to pay for the services of which he has taken the benefit.—p. 129.

I may add . . . that in *Gregory v. Williams* the man with whom the contract was made was one of the plaintiffs, and the only defence then would have been misjoinder of plaintiffs, and that is a defence which the Court is not likely to view with much favour.—p. 130.

Hereford and South Wales Waggon, &c. Co., In re, considered.

Rotherham Alum and Chemical Co., In re, Pearce. Ex parte (1883) 25 Ch. D. 103; 53 L. J. Ch. 290; 50 L. T. 219; 32 W. R. 131.—*C.A.* *COTTON, LINDLEY and FRY, L.J.*

COTTON, L.J.—*Hereford and South Wales Waggon, &c. Co., In re*, was relied on, where it was said that but for the equitable ground of defence there set up *Walter and Head* would have had a good claim, but in that case the services were not done on the retainer of any other person who was liable to pay for them. In the same way *Bramwell*, who had been employed by *Walter and Head*, and urged that the company had taken the benefit of his services, was held to have no claim against the company.—p. 108.

Touche v. Metropolitan Ry. Warehousing Co. (*supra*, col. 439), considered.

Gandy v. Gandy (1885) 80 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803.—*C.A.*

COTTON, L.J.—Of the cases that have been referred to I will notice the last . . . that of *Touche v. Metropolitan Ry. Warehousing Co.*, where there was an arrangement between a

promoter of a company and another person that a certain sum should be paid out of the funds of the company to that other person; the company seems to have admitted the arrangement, and in the articles there was a contract or stipulation that the money should be paid to the promoter, in order that the arrangement might be carried out. There Lord Hatherley held that the other person who was to get the money was entitled to sue under that contract. What Lord Hatherley says is this: "The case comes within the authority that, when a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself. It is possible that Walker may, as he states in his answer, not be under any personal liability to the plaintiffs; but I think that, on the evidence, the plaintiffs were to be paid when Walker got the money, and they knew that by the articles of the company he was to be paid." Now if that is intended to lay down the rule as a general proposition of law in the general terms there used, it is not consistent with . . . *Empress Engineering Co., In re*; but it may be that on the facts of the former case it was considered that the contract between Walker and the company was entered into by Walker as a trustee for and on behalf of the plaintiffs; and, if so, that is in accordance with what I understand to be the law. But the late M.R., in *Empress Engineering Co., In re*, dealing with *Touche's Case*, said this in the course of the argument: "In that case the L.C. finds, as a fact, that Walker was to receive the money as a trustee for the plaintiffs. If you can make out that Jones and Prde are *cestui que trust*, that alters the case. It appears to me that they are not. . . ." This shows that the general terms used by Lord Hatherley must be taken with some qualification as laying down the general law.—p. 67. BOWEN and FRY, L.J.J. concurred.

The case subsequently came on before COTTON, BOWEN and FRY, L.J.J., when BOWEN, L.J. (p. 81) discussed *Gandy v. Gandy* (1882) 51 L. J. P. 41; 7 P. D. 168; 46 L. T. 607; 30 W. R. 673.—C.A. See "HUSBAND AND WIFE."

Williams v. St. George's Harbour Co., 24 Beav. 339; 3 Jur. (N.S.) 1014; 5 W. R. 725.—ROMILLY, M.R.; *reversed*, (1858) 27 L. J. Ch. 691; 2 De G. & J. 547; 4 Jur. (N.S.) 1066; 6 W. R. 609.—KNIGHT BRUCE and TURNER, L.J.J.

Teversham v. Cameron's Coalbrook, &c. Ry. (1849) 18 L. J. Ch. 177; 3 De G. & Sm. 296; 13 Jur. 333.—KNIGHT BRUCE, V.C., *observed on*.

Universal Salvage Co., In re, Murray's Executors' Case (1854) 5 De G. M. & G. 746.

TURNER, L.J.—Whether the decision in that case is one to be adhered to under all circumstances I need not determine now, but I should require much consideration, before I said anything to impeach that case; I should hesitate long before I gave any opinion at variance with it. This case, however, is not governed by it, because there no question of construction arose in that case and the Act of Parliament provides that a contract such as that now in question may be confirmed.—p. 751.

KNIGHT BRUCE, L.J.—On the point whether that [case] was rightly decided, it is unnecessary for me to say anything, and I give no opinion.—p. 753

Ashbury Ry. Carriage and Iron Co. v. Riche (1875) 44 L. J. Ex. 185; L. R. 7

H. L. 635; 33 L. T. 451; 24 W. R. 794.—H.L. (E.). CAIRNS, L.C., LORDS CHELMSFORD, HATHERLEY, O'HAGAN and SELBORNE; *reversing* S. C. *nom. Riche v. Ashbury Ry. Carriage, &c. Co., L. R. 9 Ex. 224, observed on*.

Att.-Gen. v. G. E. Ry. (1880) 5 App. Cas. 473; 49 L. J. Ch. 545; 42 L. T. 810; 28 W. R. 769.—H.L. (E.); *affirming* (1879) 48 L. J. Ch. 428; 11 Ch. D. 449.—C.A. JAMES and BRAMWELL, L.J.J.; BAGGALLAY, L.J. *dissenting*. And see col 443. SELBORNE, L.C.—I assume that your lordships will not now recede from anything that was determined in *Ashbury Ry. Co. v. Riche*. It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained.—p. 478.

LORD BLACKBURN.—I take it that, as far as the main point to be considered is concerned, this House has no more right than any other tribunal to depart from the principle of the decisions which have been already arrived at; more particularly I allude to the last case of *Ashbury Ry. Co. v. Riche*. That case appears to me to decide, at all events, this, that, where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited; and, consequently, that the G. E. Co., created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose.—p. 481.

LORD WATSON.—I cannot doubt that the principle by which this House, in *Ashbury Ry. Co. v. Riche*, tested the power of a joint-stock company registered (with limited liability) under the Companies Act, 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament.—p. 486.

Ashbury Ry. Carriage, &c. Co. v. Riche, distinguished.

* Coltman, *In re, Coltman v. Coltman* (1881) 19 Ch. D. 64; 51 L. J. Ch. 3; 45 L. T. 392; 30 W. R. 342.—C.A. JESSEL, M.R., BRETT and LINDLEY, L.J.J.; *reversing* 50 L. J. Ch. 721; 29 W. R. 923.—FRY, J. *And see post*.

BRETT, L.J.—*Ashbury Ry. Carriage, &c. Co. v. Riche* only decides that if the directors of a company assume to make a contract on the part of a company which neither the directors nor the company have authority to make, that contract cannot be enforced against the company, and, moreover, that it is so void from the beginning that it cannot be ratified by the company so as to make them liable. But the H. L. did not hold that if money had been lent by directors without authority, the money could not have been recovered, or that the borrowers could set up the defence that those who lent them the money had no authority to do so.—p. 71.

Ashbury Ry. Carriage, &c. Co. v. Riche, explained and distinguished.

London Financial Association v. Kolk (1884) 53 L. J. Ch. 1025; 26 Ch. D. 107; 50 L. T. 492.—BACON, V.C.

Ashbury Ry. Carriage, &c. Co. v. Riche, extended.

Wenlock (Baroness) v. River Dee Co. (1885) 10 App. Cas. 354; 54 L. J. Q. B. 577; 53 L. T. 62; 49 J. P. 773.—H.L. (E.); *affirming* C.A. BRETT, M.R., COTTON and BOWEN, L.J.J.

LORD BLACKBURN.—It is not necessary to decide anything as to the effect of *Ashbury Co. v. Riche*. The course the argument took makes me think it proper to say—though it is quite true, as Mr. Rigby said, that it was not necessary for the decision in *Ashbury Co. v. Riche* to do more than decide what the law was with regard to a company formed under the Companies Act, 1862—that I think the law there laid down applies to all companies created by any statute for a particular purpose. I think that if I were to confine the effect of the decision to companies created under the Act of 1862, and to say it did not extend to such a corporation as this, I should do wrong. The law is proverbially uncertain. That cannot be helped. But I think I should unjustifiably add to the uncertainty if I set an example of adhering to my previous reasoning (even should I still think it better than that of noble and learned lords who decided against it) in every case not involving precisely the same point. I think *Ashbury Co. v. Riche* is a binding authority to the extent indicated in *Att.-Gen. v. G. E. Ry. (supra)*.—p. 360.

LORD WATSON to the same effect.

LORD FITZGERALD concurred.

Ashbury Ry. Carriage, & Co. v. Riche, discussed, Trevor v. Whitworth (1887) 57 L. J. Ch. 28; 12 App. Cas. 409.—H. L. (E.) (*supra*, col. 406); applied, Walker and Hacking, in re (1887) 57 L. T. 768.—STIRLING, J.

Wenlock (Baroness) v. River Dee Co. (supra), discussed and applied.

Wenlock (Baroness) v. River Dee Co. (1887) 56 L. J. Ch. 899; 36 Ch. D. 674; 57 L. T. 401.—KEKEWICH, J.; affirmed, (1888) 57 L. J. Ch. 946; 38 Ch. D. 534; 59 L. T. 485.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

Ashbury Ry., & Co. v. Riche, distinguished. Balkis Consolidated Co. v. Tomkinson (1893) 63 L. J. Q. B. 134; [1893] A. C. 96; 1 R. 178; 69 L. T. 598; 42 W. R. 204.—H. L. (E.) (*post*, col. 522).

Ashbury Ry., & Co. v. Riche and Wenlock (Baroness) v. River Dee Co. (supra), col. 442), discussed.

Enniskillen Loan Fund Society (Treasurer) v. Green (1897) [1898] 2 Ir. R. 103.—O'BRIEN, C.J., HOLMES and GIBSON, JJ.; O'BRIEN, J. dissenting.

Ashbury Ry., & Co. v. Riche, explained. Andrews v. Gas Meter Co. (1897) 66 L. J. Ch. 246; [1897] 1 Ch. 361.—C.A. (*supra*, col. 389).

Att.-Gen. v. G. E. Ry. (col. 442) and *Coltman*, in re, *Coltman v. Coltman* (col. 442), referred to.

Lindsay v. Maguire [1899] 2 Ir. R. 554.—GIBSON, J.

Ashbury Ry., & Co. v. Riche, referred to. *Att.-Gen. v. G. E. Ry.*, judgment of JAMES, L.J., discussed.

Att.-Gen. v. London County Council (1901) 70 L. J. Ch. 367; [1901] 1 Ch. 781; 84 L. T. 245.—C.A.; affirmed, *nom.* London County Council v. *Att.-Gen.* (1902) 71 L. J. Ch. 268; [1902] A. C. 165; 86 L. T. 161; 50 W. R. 497; 66 J. P. 430.—H. L. (E.). HALSBURY, L.C., LORDS MACNAGHTEN, SHAND, BRAMPTON ROBERTSON and LINDLEY.

RIGBY, L.J.—It is said that although the

London County Council may not be expressly authorised to run the omnibuses, yet that it is an undertaking so intimately connected with the powers that are expressly given to the council of running the tramways, that under the doctrine mainly depending on the judgment of James, L.J. in *Att.-Gen. v. G. E. Ry.*, it may be treated as tacitly understood as being something belonging to, and so connected with, the other powers which are expressly given as to be really within the statute. It is not to be denied that there are certain things which a statutory corporation may do which are not absolutely mentioned in their Act, but they must be things of a very different degree of importance from what is sought to be done in this case, that is, the running of omnibuses as a separate undertaking; and I cannot read in the observations of James, L.J. anything to authorise the notion that a separate undertaking might be entered upon, merely because it was thought to be convenient for the purposes of the main undertaking. I find no authority for that at all. Indeed, in *Colman v. Eastern Counties Ry.* (*post*, col. 468), it might well have been argued that to run steamboats from Harwich to the Continent was most advantageous for the railway, and therefore ought to be taken as impliedly granted to them for the purposes of their undertaking; but Lord Hatherley would not have it at all. He said it was outside the power given to the railway company by the Act of Parliament, and, however advantageous it might be, there was no authority to do it.—p. 373.

V. WILLIAMS and STIRLING, L.JJ. to the same effect.

And see the address of the L.C. in the H. L.

Australian Auxiliary Steam Clipper Co. v. Mounsey (1858) 27 L. J. Ch. 729; 4 K. & J. 733; 4 Jur. (N.S.) 1224; 6 W. R. 734.—WOOD, V.-C. *Bryon v. Metropolitan Saloon Omnibus Co.* (1858) 27 L. J. Ch. 685; 3 De G. & J. 123; 4 Jur. (N.S.) 1262; 6 W. R. 817.—KNIGHT BRUCE and TURNER, L.JJ.; affirming KINDERSLEY, V.-C.; and *Patent File Co., in re, Birmingham Banking Co., Ex parte* (1870) 40 L. J. Ch. 190; L. R. 6 Ch. 83; 19 W. R. 193.—JAMES and MELLISH, L.JJ. affirming 23 L. T. 484.—STUART, V.-C., principles applied.

General Auction Estate and Monetary Co. v. Smith [1891] 8 Ch. 432; 60 L. J. Ch. 723; 65 L. T. 188; 40 W. R. 106.

STIRLING, J. (after discussing *Australian Auxiliary Steam Clipper Co. v. Mounsey* and *Bryon v. Metropolitan Saloon Omnibus Co.*) said: I do not think that the cases to which I have referred were intended to be overruled by anything that was laid down in *Blackburn Benefit Building Society v. Cantliffe Brooks & Co.* [(1882) 52 L. J. Ch. 92; 22 Ch. D. 61; 48 L. T. 83; 31 W. R. 98.—C.A. See "BUILDING SOCIETY"], or in *Wenlock (Baroness) v. River Dee Co.* [(1888) 36 Ch. D. 675, n.—C.A. See "BUILDING SOCIETY"]. The proposition of law which was acted upon in those two cases was thus laid down by Lord Selborne in a single sentence in the former case: "There is also no doubt, that where there is not an express prohibition against borrowing in a case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it is properly incident to the course and conduct of the business for its proper purposes." In neither

of these cases was the company whose powers were the subject of discussion a trading company, and the cases to which I have referred, viz., *Australian, &c. Co. v. Monney* and *Bryon v. Metropolitan, &c. Co.*, appear to me to show that in the opinion of Lord Hatherley, Kindersley, V.-C. and Turner, L.J., such a borrowing as has taken place here is properly incident to the course of conduct of the business of a trading company for its proper purposes. That being so, it seems to me that I must treat the deposit made by Mr. Thunders as a valid loan to the company. It was competent, therefore, for the company again to borrow money for the purpose of repaying him, and to give security for the advance. That is shown by *Patent Fite Co., In re*.—p. 442.

Salford Corporation v. Lever (1890) 60 L. J. Q. B. 39; [1891] 1 Q. B. 168; 63 L. T. 658; 39 W. R. 85.—C.A. BISHOP, M.R., LINDLEY and LOPES, L.J.J., *distinguished*.
Lands Allotment Co. v. Broad (1895) 13 R. 699; 2 Manson 470.—ROMER, J.

Salford Corporation v. Lever and Panama and South Pacific Telegraph Co. v. India Rubber, &c. Telegraph Works Co. (1875) 45 L. J. Ch. 121; L. R. 10 Ch. 515; 32 L. T. 517; 23 W. R. 583.—C.A. JAMES and MELLISH, L.J.J.; *affirming* L. R. 10 Ch. 520, n.—MALINS, V.-C. (*see* this judgment at length), *applied*.

Lands Allotment Co. v. Broad, considered.
Grant v. Gold Exploration and Development Syndicate of British Columbia (1899) 69 L. J. Q. B. 150; [1900] 1 Q. B. 233; 82 L. T. 5; 48 W. R. 280.—C.A. A. L. SMITH, COLLINS and V. WILLIAMS, L.J.J.

Salford Corporation v. Lever and Grant v. Gold Exploration and Development Syndicate, applied.

Hovenden v. Millhoff (1900) 83 L. T. 41.—C.A. A. L. SMITH, V. WILLIAMS and ROMER, L.J.J.

Panama, &c. Co. v. India Rubber, &c. Co., referred to.

Rowland v. Chapman (1901) 17 Times L. R. 670.—BUCKLEY, J.

Ridley v. Plymouth Grinding and Bakery Co. (1848) 17 L. J. Ex. 252; 2 Ex. 711; 12 Jur. 542.—PARKER and PLATT, BB.; and **Kingsbridge Flour Mill Co. v. Plymouth, Devon and Stonehouse Grinding and Bakery Co.** (1848) 17 L. J. Ex. 252; 2 Ex. 718.—PARKER and PLATT, BB., *distinguished*.

Smith v. Hull Glass Co. (1849) 19 L. J. C. P. 123; 8 C. B. 668.—WILDE, C.J. (for the Court).

Smith v. Hull Glass Co. and Smith v. Hull Glass Co. (No. 2) (1852) 21 L. J. C. P. 106; 11 C. B. 897; 7 Rail. Cas. 287; 16 Jur. 595.—C.P. *observed on*.

Sea Fire and Life Assurance Co., In re, Greenwood's Case (1854) 23 L. J. Ch. 966; 3 De G. M. & G. 459 (*post*, col. 598).

Smith v. Hull Glass Co., discussed. Ernest v. Nicholls (1857) 6 H. L. Cas. 401; 3 Jur. (N.S.) 919; 6 W. R. 34.—H.L. (P.). GRANWORTH, L.G. and LORD WENSLEYDALE: *principle applied*; **Biggerstaff v. Rowatt's Wharf** (1896) 65 L. J. Ch. 536; [1896] 2 Ch. 93; 74 L. T. 473; 44 W. R. 536.—C.A. LINDLEY, LOPES and KAY, L.J.J.

Biggerstaff v. Rowatt's Wharf, explained and approved.

Roundwood Colliery Co. In re, Lee v. Roundwood Colliery Co. (1897) 66 L. J. Ch. 189; [1897] 1 Ch. 373; 75 L. T. 641; 45 W. R. 324.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.J.J.; *reversing* 66 L. J. Ch. 189; [1897] 1 Ch. 373; 75 L. T. 508; 45 W. R. 317.—STIRLING, J.

Northumberland Avenue Hotel Co., In re, Sully's Case (1886) 33 Ch. D. 16; 54 L. T. 777.—C.A. COTTON, LINDLEY and LOPES, L.J.J., *considered and distinguished*.

Howard v. Patent Ivory Manufacturing Co. (1888) 67 L. J. Ch. 878; 38 Ch. D. 156; 68 L. T. 895; 36 W. R. 801.—KAY, J. *See* judgment at length.

Howard v. Patent Ivory Manufacturing Co., followed. Pyle Works, In re (1890) 59 L. J. Ch. 489; 44 Ch. D. 534.—C.A. (*post*, col. 450); *referred to*, **Newton v. Anglo-Australian, &c. Co.** (1895) 64 L. J. P. C. 57, [1895] A. C. 244.—P.C. (*post*, col. 450); *approved*, **Saligman v. Prince & Co.** (1895) 64 L. J. Ch. 745; [1895] 2 Ch. 617; 12 R. 529, 73 L. T. 124; 46 W. R. 6; 2 Manson 586.—C.A. LINDLEY, LOPES and RIGBY, L.J.J.

Northumberland Avenue Hotel Co., In re, and Howard v. Patent Ivory Manufacturing Co., referred to.

Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co. (1901) 71 L. J. Ch. 168; [1902] 1 Ch. 146; 85 L. T. 652; 50 W. R. 177; 9 Manson 56.—C.A. V. WILLIAMS, ROMER and COZENS-HARDY, L.J.J.

Marseilles Extension Ry., In re, Crédit Foncier et Mobilier, Ex parte (1871) 41 L. J. Ch. 345; L. R. 7 Ch. 161; 25 L. T. 858; 20 W. R. 254.—JAMES and MELLISH, L.J.J.; and **Gale v. Lewis** (1846) 16 L. J. Q. B. 119; 9 Q. B. 730.—Q.B., *followed*.

Hampshire Land Co., In re, Portsea Island Building Society, Ex parte (1896) 65 L. J. Ch. 860; [1896] 2 Ch. 743; 75 L. T. 181; 45 W. R. 136; 3 Manson 269.

V. WILLIAMS, J.—It is not disputed that the authority of *Royal British Bank v. Turquand* (*supra*, col. 437) is such that the building society has a right to assume in a case like this that all the essentials of internal management have been carried out by the borrowing company, and that the building society is only bound if the law properly imputes to it knowledge of these irregularities which have been committed. The case, therefore, comes to this: Is it right to impute such knowledge in this case? Counsel for the land company shrink from saying that in all cases where one person is an officer common to two societies, this knowledge is to be imputed to both societies. It was impossible, having regard to the decision in *Marseilles Extension Ry., In re*, that they could successfully contend for so wide a proposition. Both the L.J.J. in that case were of opinion that there might be cases in which the personal knowledge of a common officer did not affect both companies. When one has read the judgments in that case, which negative any general proposition that the knowledge of a common officer is always the knowledge of both companies, one has to ask oneself, What is the line that has to be drawn, or what is the test to be applied, in order to see when the knowledge of the common officer is the know-

ledge of both companies? It seems to me broadly that the L.J.J. do draw the line that knowledge acquired by the officer of one company will not be imputed to the other company unless the common officer of both had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed upon him by the second company to receive notice thereof. I think this view of the case is confirmed by a consideration of *Gule v. Lewis*. In that case the jury found that the common agent was authorised by the company sought to be affected with notice to receive the notice that was given by him as the officer of the company; and that being so, Lord Denman said: "It was further contended that Densham communicated to Loosemore in his capacity of attorney, and not as agent for the insurance office, but where the two capacities are united in one person, a notice received in one capacity for the purpose of being transmitted in the other is an effectual notice in both capacities." Of course you must add to the statement of Lord Denman the finding of the jury that the company did authorise Loosemore to receive notice. That addition seems to me to make it quite plain that both in *Marseilles Extension Ry.*, *In re*, and *Gule v. Lewis* the test applied by the Court was—first, was it within the scope of the duty of one company's officer to give notice to the other company? Secondly, was it within the scope of his duty as the officer of the other company to receive such notice? That is certainly not the case here.—p. 862.

5. DEBENTURES AND MORTGAGES.

Debenture, What is a.

Edmonds v. Blaina Furnaces Co. (1887) 56 L. J. Ch. 815; 36 Ch. D. 215; 57 L. T. 139; 35 W. R. 798.—CHITTY, J. (and see *post*, col. 449), *followed*.

Ross v. Army and Navy Hotel Co. (1886) 34 Ch. D. 43; 55 L. T. 472; 35 W. R. 40.—C.A. COTTON, LINDLEY and LOPES, L.J.J.; *affirming* 55 L. J. Ch. 697.—KAY, J., *applied*. See judgment of latter.

Levy v. Abercrombie Slate Co. (1887) 37 Ch. D. 260; 57 L. J. Ch. 202; 58 L. T. 218; 36 W. R. 411.

CHITTY, J.—Now what is a "debenture"? I am unable to add anything to what I have already stated on this point in *Edmonds v. Blaina Furnaces Co.*—p. 263. And see *post*, col. 449.

Ross v. Army and Navy Hotel Co. (and see *post*, col. 449), *distinguished*.

Jenkinson v. Brandley Mining Co. (1887) 19 Q. B. D. 568; 35 W. R. 834.—GROVE, J. and HUDDLESTON, B.

Ross v. Army and Navy Hotel Co. *discussed*. Marshall's Estate, *In re* (1898) [1899] 1 Ir. R. 96.—ROSS, J.

Edmonds v. Blaina Furnaces Co. and Jenkinson v. Brandley Mining Co., *commented on*.

Topham v. Greenslade Glazed Fire-brick Co. (1887) 57 L. J. Ch. 538; 37 Ch. D. 281; 58 L. T. 274; 36 W. R. 464.—NORTH, J.

Jenkinson v. Brandley Mining Co., *dictum questioned*.

Read v. Joannon (1890) 59 L. J. Q. B. 544; 25 Q. B. D. 300; 63 L. T. 387; 38 W. R. 734; 2 Meg. 275.

COLERIDGE, C.J.—I respectfully pass by the *dictum*—for it is no more than a *dictum*—of my

brother Grove that the word "company" in sect. 17 [Bills of Sale Act, 1882] must mean a company incorporated for the purpose of mortgage or loan. I do not agree with that *dictum*, and I am not bound, and do not intend to act upon it. Moreover, one of the learned judges of the other division has twice treated the section as applying to debentures of incorporated companies generally, and there is, therefore, authority for saying that that *dictum* is not law.—p. 545.

WILLS, J. to the same effect.

Levy v. Abercrombie Slate Co. (*supra*, col. 447), *referred to*.

City of London Brewery Co. v. Inland Revenue Commissioners (1898) 68 L. J. Q. B. 62; [1899] 1 Q. B. 121; 79 L. T. 648; 47 W. R. 216.—C.A. A. L. SMITH, BIGBY and COLLINS, L.J.J. And see "REVENUE."

Debenture Holders of John Welsted & Co. v. Swansea Bank (1889) 5 Times L. R. 332.—POLLOCK, B.; and *Read v. Joannon* (*supra*), *followed and approved*.

Jenkinson v. Brandley Mining Co., *overruled*. **Standard Manufacturing Co.**, *In re*, *Lower, Ex parte* (1891) 60 L. J. Ch. 292; [1891] 1 Ch. 627; 64 L. T. 487; 39 W. R. 369; 2 Meg. 418.—C.A. HALSBURY, L.C. BOWEN and FRY, L.J.J.

Standard Manufacturing Co., *In re*, *followed*. **Opera, Ltd.**, *In re* [1891] 3 Ch. 260; 60 L. J. Ch. 839; 65 L. T. 371; 39 W. R. 705.—C.A. LINDLEY, FRY and LOPES, L.J.J.; *reversing* [1891] 2 Ch. 154; 60 L. J. Ch. 464; 64 L. T. 313; 39 W. R. 398.—KEKEWICH, J.

LINDLEY, L.J.—After the decision in *Standard Manufacturing Co.*, *In re*, it seems tolerably plain and settled that the rights of the holders of debentures must prevail even as against the execution creditor, at least before sale. What the position of the debenture holder is after the property is sold and the money handed over, I do not know, and I will not say at this moment.—p. 263.

Hubbuck v. Helms (1887) 56 L. J. Ch. 536; 56 L. T. 232; 35 W. R. 574.—STIRLING, J., *followed*.

Standard Manufacturing Co., *In re*, and **Opera, Ltd.**, *In re*, *distinguished*.

Robson v. Smith (1895) 64 L. J. Ch. 457; [1895] 2 Ch. 118; 13 R. 529; 72 L. T. 559; 43 W. R. 632; 2 Manson 422.

ROMER, J.—The holder of a debenture constituting a floating security only while the company is carrying on its business, and when no steps have been taken to wind up the company or to get a receiver appointed, cannot single out a particular debt due to the company and require by notice that debt to be paid to him, or not to be paid to the company, or to those validly claiming through the company. See the observations of Stirling, J. in *Hubbuck v. Helms*. . . Those [*Standard Manufacturing Co.*, *In re*, and *Opera, Ltd.*, *In re*] were cases of execution creditors, and in both the winding up of the company commenced before the sheriff sold, and therefore before the execution was completed—in other words, before the assets seized by the execution creditors had been completely dealt with so as to give any rights therein to the creditors.—p. 461.

Standard Manufacturing Co., *In re*, *discussed and distinguished*.

G. N. Ry. v. Coal Co-operative Society (1895) 65 L. J. Ch. 214; [1896] 1 Ch. 187; 73 L. T. 443; 44 W. R. 252; 2 Manson 621.—V. WILLIAMS, J.

Opera, Ltd., In re (*supra*), commented on.
Roundwood Colliery Co., In re, Lee v. Roundwood Colliery Co. (1897) 66 L.J. Ch. 186; [1897] 1 Ch. 378.—C.A. (*supra*, col. 446).

Ross v. Army and Navy Hotel Co., In re (*supra*, col. 447); and **Standard Manufacturing Co., In re**, explained and followed.

Richards v. Kidderminster Overseers (1896) 65 L.J. Ch. 502; [1896] 2 Ch. 212; 74 L.T. 483; 44 W.R. 505.

NORTH, J.—Now is the covering deed a debenture or not? In *Edmonds v. Blava Furnaces Co.* (col. 447) and in *Levy v. Abercrombie Slate and Slab Co.* (col. 447), Chitty, J. pointed out some of the distinguishing qualities of a debenture, and personally I do not see why this document is not a debenture. It was, however, held by Field, J. in chambers in *Brooklehurst v. Ry. Printing and Publishing Co.*, W.N. (1884) 70, that a covering deed was not a debenture. In *Ross v. Army and Navy Hotel Co.*, the C.A. proceeded on the admission that the covering deed was not a debenture. In this conflict of authority I do not feel called on to decide the point. It is immaterial whether the deed is a debenture or not. It is quite clear that it is not a bill of sale, and that it does not require registration as a bill of sale. No doubt in *Ross v. Army and Navy Hotel Co.* the C.A. assumed that the covering deed ought to have been registered, and was void because it was not registered. Cotton, L.J. said in that case: "Undoubtedly, the covering deed being void, we cannot look at it as a contract to give security." But he did not say it was void. His words merely amounted to saying, "Assuming it to be void"; and Lindley, L.J. said: "It is said now that the debentures are void because the (covering) deed is admitted on all hands to be void under the Bills of Sale Act." He then proceeded to consider the debentures, and held they were not void. No doubt he assumed the covering deed to be void. But in *Standard Manufacturing Co., In re*, the matter was fully considered. It is sufficient to read the headnote, which is fully borne out by the judgments. It runs thus: "The mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not upon the true construction of the Bills of Sale Act, 1878, bills of sale within the scope of that Act." Now, this covering deed is one for the registration of which provision has been made by the Companies Act, 1862. The decision is exactly in point, and the covering deed is not a bill of sale.—p. 507. See judgment at length.

Richards v. Kidderminster Overseers, distinguished; per RIGBY, L.J.

Marriage, Neave & Co., In re, North of England Trustee Debenture and Assets Corporation v. Marriage, Neave & Co., (1896) 65 L.J. Ch. 839; [1896] 2 Ch. 668; 75 L.T. 169; 45 W.R. 42; 60 J.P. 805.—C.A. LINDLEY, LOPES and RIGBY, L.JJ. See "RATES and RATING" and Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19).

Standard Manufacturing Co., In re, discussed and applied.

Simultaneous Printing Syndicate v. Foweraker (1901) 70 L.J. K.B. 453; [1901] 1 K.B. 771; 8 Manson 307.—WRIGHT, J.

O.C.

Standard Manufacturing Co., In re, and Opera, Ltd., In re (*supra*, col. 448), explained.

Duck v. Tower Galvanising Co. (1901) 70 L.J. K.B. 625; [1901] 2 K.B. 314; 84 L.T. 847.—ALVERSTONE, C.J. and LAWRENCE, J.

Uncalled Capital.

British Provident Life and Fire Insurance Society, In re, Stanley, Ex parte (1861) 33 L.J. Ch. 535; 4 De G. J. & S. 407; 38 L.T. 536.—KNIGHT BRUCE and TURNER, LJJ., approved.

Lishman's Case, Colonial and General Gas Co., In re (1870) 23 L.T. 759; 19 W.R. 344.—STUART, V.-C. *disapproved*.

Bank of South Australia v. Abrahams (1875) 44 L.J. P.C. 76; L.R. 6 P.C. 265; 32 L.T. 277; 23 W.R. 668.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, JAMES and MELLISH, LJJ., and SIR M. SMITH.

Stanley's Case, discussed.

Phoenix Bessemer Steel Co., In re (1875) 44 L.J. Ch. 683; 32 L.T. 854.—JESSEL, M.R.

Bank of South Australia v. Abrahams, distinguished.

Howard v. Patent Ivory Manufacturing Co. (1888) 57 L.J. Ch. 878; 38 Ch. D. 156 (*supra*, col. 446).

Phoenix Bessemer Steel Co., In re, followed.

Pyle Works, In re (1890) 59 L.J. Ch. 489; 44 Ch. D. 534; 62 L.T. 887; 38 W.R. 674; 2 Meg. 88.—C.A. COTTON and LINDLEY, LJJ.; LOPES, L.J. *doubting*. See judgments.

Pyle Works, In re, followed.

Newton v. Anglo-Australian Investment Finance and Land Co. (1895) 64 L.J. P.C. 57; [1895] A.C. 244; 11 R. 438; 72 L.T. 805; 43 W.R. 401; 2 Manson 246.—P.C.

LORD MACNAGHTEN (for self, HERSCHELL, L.C., LORDS WATSON, HOBHOUSE, SHAND and DAVEY and SIR R. COCHRAN).—The power of a company limited by shares to charge uncalled capital has been the subject of several reported cases in this country. The Court seems almost always to have regarded such a charge with disfavour. Whenever the question has arisen, borrowing powers have been construed strictly and sometimes perhaps rather narrowly. But no case was cited to their lordships in which any judge has ever held it to be beyond the powers of a limited company to create a charge upon its uncalled capital. *British Provident Fire Assurance Co., In re, Stanley's Case*, in 1864 (*supra*), goes further in that direction than any other. There Knight Bruce and Turner, LJJ., laid great stress on the difficulty of enforcing a charge on uncalled capital owing to the discretionary power of making calls which the company's deed of settlement entrusted to the directors; and they seem to intimate that, assuming the borrowing powers of the company to have extended to future calls, it would have been a breach of trust on the part of the directors to give effect to the charge, though created by their own act under the authority of the company—a proposition which is somewhat difficult to follow. The decision, however, turned entirely upon the construction of the deed of settlement. There was power to charge "the property or funds" of the company.

It was held that that expression did not include future calls. "They are property," said Turner, L.J., "not of the society immediately, but which may be called up by the directors of the society at their discretion." The context too was relied on as showing that the property intended to be charged was property capable of being "assigned, transferred, conveyed, or surrendered." *British Provident Society, In re, Stanley's Case*, was approved and followed by this Board in *Bank of South Australia v. Abrahams (supra)*, where the judgment was delivered by James, L.J. But there the difficulty in connection with the discretionary power of the directors in regard to calls was treated merely as an argument against implying a power to charge future calls where the language of the instrument was doubtful. And it certainly seems to be assumed in the judgment that by "apt and proper words or a sufficient context," a power to charge uncalled capital may be conferred. In *Phoenix Bessemer Steel Co., In re (supra)*, the M.R. (Sir G. Jessel) said: "There can be no doubt that the power can be given to a company by the articles of association." He brushed aside the difficulty which weighed so much with the L.J.J., observing that to his mind it was no difficulty at all, and referring to the case of companies governed by the Companies Clauses Consolidation Act, 1845. Where such companies have power to create mortgages, the statute itself confers upon them, as incidental to that power, a power to charge future calls. The decision in *Phoenix Bessemer Steel Co., In re*, was in 1875. During the last twenty years Sir G. Jessel's opinion has been followed in many cases, and many securities have been given and taken on the faith of it. Kay, J. adopted the same view in *Howard v. Kent Ivory Manufacturing Co. (supra)*, which was decided in 1888. More recently still, in 1890, the question came before the C.A. in *Pyle Works, In re*. After examining all the previous authorities and discussing the matter very fully, Cotton and Lindley, L.J.J. upheld a charge on uncalled capital. They found nothing in the Act expressed or implied to prevent or avoid such a security. Lopes, L.J. with some hesitation concurred in the judgment. The main argument against the validity of the charge was that it seemed to contravene the directions of the Act in regard to the application of monies recovered from contributories in the winding up. But the answer was obvious. The liability of a contributory as a present member to pay calls in the winding up is not a liability springing into existence for the first time on the company going into liquidation. It is merely the ripening of that liability which the contributory undertook when he became a member.—p. 59.

Newton v. Anglo-Australian Investment, &c. Co. (supra), discussed and followed.
 Jackson v. Rainford Coal Co. (1896) 65 L. J. Ch. 757; [1896] 2 Ch. 340; 44 W. R. 554.—CHITTY, J.

Pyle Works, In re (supra), and Newton v. Anglo-Australian, &c. Co., explained.
 Mayfair Property Co. In re, Bartlett v. Mayfair Property Co. (1898) 67 L. J. Ch. 337; [1898] 2 Ch. 28; 75 L. T. 302; 46 W. R. 465; 5 Manson 126.—C.A.

LINDLEY, L.J.—When *Pyle Works, In re*, was decided I foresaw that the decision might be pressed further than I was prepared to go, and

I pointed out that, in my opinion, it did not authorise mortgages of reserve capital formed under the Act of 1879. . . . With respect to *Newton v. Anglo-Australian Investment Co.* . . . I need only observe that it was not a decision on the Act of 1879, but a decision on an article of association, so worded as not to preserve, nor indeed to show any intention to preserve, the reserve capital for the benefit of the general creditors in the event of liquidation. I cannot regard that case as an authority against the view I take of the Act of 1879.—p. 341. RIGBY, L.J. concurred.

V. WILLIAMS, L.J.—I think if [the introduction of a clause in the memorandum of association as to reserve capital] would have this effect by negating *quid* this portion of the capital the implication of a power to mortgage, just as Knight Bruce and Turner, L.J.J., held in *Stanley's Case* (col. 450) that the necessary discretion of the directors from time to time to make calls negated the implication of a power to mortgage or assign uncalled capital. It is true that the inference of the L.J.J. must be taken to be overruled by *Pyle Works, In re*; but the principle that you may negative such implication by an intent drawn from the terms of the memorandum is not overruled.—p. 343.

Floating Charge.

Norton v. Florence Land and Public Works Co. (1877) 7 Ch. D. 332; 38 L. T. 377; 26 W. R. 123.—JESSEL, M.R., corrected.

Marine Mansions Co. In re (1837) 37 L. J. Ch. 113; L. R. 4 Eq. 601; 17 L. T. 50.—WOOD, V.-C., discussed.

Florence Land and Public Works Co. In re, Moor, Ex parte (1878) 10 Ch. D. 530; 48 L. J. Ch. 157; 39 L. T. 539; 27 W. R. 230.—C.A. JESSEL, M.R., JAMES and THESIGER, L.J.J.; reversing HALL, V.-C.

JESSEL, M.R.—I cannot say in this case that I disagree with the V.-C., for in fact the appeal has been occasioned by his agreeing with a decision of mine in *Norton v. Florence Land and Public Works Co.*, but it should be known in the first place that I had not before me on that occasion the articles of association, nor were they relied on in the argument, and I had to construe the bond or obligation, or whatever it is to be called, as well as I could without any such articles. In the next place I wish to say this, that I adhere to every word I then said, except with respect to a passage at the top line of p. 338 in the report. I think there is a slip in that passage, whether made by me or the reporter I cannot say. I ought to have said—and I now think that I intended to say—"themselves, their successors and assigns;" and if those words are substituted for the words "estate, property, and effects" the judgment will be found consistent. Having read at the bottom of p. 337 all the words, I first dealt with the first half of the sentence, and then in p. 338 I dealt with the second half. But, with that correction, I entirely adhere to what I then said. . . . But as regards the question we have now to decide, on what appears to me very different materials, I have arrived at a different conclusion from what I did in the case of *Norton v. Florence Land and Public Works Co.*; and I do not think it at all material to discuss whether the conclusion I have arrived at now is or is not consistent with my former decision.—p. 536.

THESIGER, L.J. discussed *General South American Co., In re* (post, col. 456), *Marino Mansions Co., In re*, and *Panama, New Zealand, &c. Royal Mail Co., In re* (post, col. 460).

Florence Land and Public Works Co., In re, Moor, Ex parte, explained. *Moor v. Anglo-Italian Bank* (1879) 10 Ch. D. 681; 40 L. T. 620; 27 W. R. 652.—JESSEL, M.R.; *approved*, Hamilton's Windsor Ironworks, *In re*, Pitman and Edwards, *Ex parte* (1879) 12 Ch. D. 707; 40 L. T. 569; 27 W. R. 445.—MALINS, V.-C.; *distinguished*, Mersey Wood Working Co., *In re* (1885) 1 Times L. R. 566.—KAY, J.

Florence Land, &c. Co., In re; Hamilton's Windsor Ironworks, In re, and Colonial Trusts Corporation, In re (1879) 15 Ch. D. 456.—JESSEL, M.R., *applied*.

Wheatley v. Silstone and Haigh Moor Coal Co. (1885) 54 L. J. Ch. 778; 24 Ch. D. 715; 52 L. T. 798; 33 W. R. 797.—NORTH, J.

Wheatley v. Silstone, &c. Coal Co., referred to.

English and Scottish Investment Co. v. Brunton [1892] 2 Q. B. 1; 66 L. T. 767.—CHARLES J.; *affirmed*, [1892] 2 Q. B. 700; 62 L. J. Q. B. 136; 4 L. R. 58; 67 L. T. 406; 41 W. R. 153.—O.A. ESHER, M.R., BOWEN and KAY, L.JJ.

Florence Land, &c. Co., In re, and Colonial Trusts Corporation, In re, distinguished. *Horne and Hellard, In re* (1885) 54 L. J. Ch. 919; 29 Ch. D. 736; 53 L. T. 562.—PEARSON, J.

Florence Land, &c. Co., In re, applied. *Driver v. Broad* (1893) 62 L. J. Q. B. 12; [1893] 1 Q. B. 539, 744; 69 L. T. 169; 41 W. R. 489.—O.A. ESHER, M.R., LOPES and KAY, L.JJ.

Colonial Trusts Corporation, In re, not followed.

West Cumberland Iron and Steel Co., In re (1889) 58 L. J. Ch. 373; 40 Ch. D. 361; 60 L. T. 627; 37 W. R. 317.—NORTH, J.

Horne and Hellard, In re (*supra*), *commented on*.

Brunton v. Electrical Engineering Co. (1891) [1892] 1 Ch. 434; 61 L. J. Ch. 256; 65 L. T. 745. KEKEWICH, J.—PEARSON, J. in *Horne and Hellard, In re*, did use the word "floating;" and without wishing to be hypercritical, it seems to me that the learned judge used it with some slight inaccuracy. I should say that a floating security remained such until a receiver was appointed of the company's property, or until there was a winding up.—P. 440.

Horne and Hellard, In re, distinguished.

Government Stock and other Securities Investment Co. v. Manila Ry. [1895] 2 Ch. 551; 64 L. J. Ch. 740; 12 R. 409; 72 L. T. 886.—O.A. LINDLEY, LOPES and RIGBY, L.JJ.; *affirmed*, (1896) 66 L. J. Ch. 102; [1897] A. C. 81; 75 L. T. 563; 45 W. R. 353.—H.L. (E.) HALSBURY, L.C., LORDS MACNAGHTEN, SHAND and DAVEY. RIGBY, L.J.—The charge there was totally different and it was a vendor and purchaser's case.—p. 563.

Colonial Trusts Corporation, In re (*supra*), *and Government Stock, &c. Investment Co. v. Manila Ry., followed.*

Hubbard & Co., *In re*, Hubbard v. Hubbard & Co. (1898) 68 L. J. Ch. 54; 79 L. T. 665; 5 Manson 360.—WRIGHT, J.

Government Stock, &c. Investment Co. v. Manila Ry., applied.

Foster v. Borax Co. (1899) 68 L. J. Ch. 410; [1899] 2 Ch. 130; 80 L. T. 461, 637; 6 Manson 439.—NORTH, J., *disapproved*.

Borax Co., In re, Foster v. Borax Co. (1900) 70 L. J. Ch. 162 [1901] 1 Ch. 326; 83 L. T. 638; 49 W. R. 212.—O.A. ALVERSTONE, O.J., RIGBY and v. WILLIAMS, L.JJ.

Sneath v. Valley Gold Co. (1892) [1893] 1 Ch. 477; 2 R. 292; 63 L. T. 602.—O.A.

LINDLEY, LOPES and KAY, L.JJ., *applied*. **Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.** (1893) 63 L. J. Ch. 366; [1894] 1 Ch. 578; 8 R. 791; 70 L. T. 131; 42 W. R. 365.—ROMER, J.

Loan Notes and Lloyds' Bonds.

White v. Carmarthen and Cardiganshire Ry. (1863) 33 L. J. Ch. 93; 1 H. & M. 786; 9 L. T. 439; 11 L. T. 179, n.; 12 W. R. 68.—WOOD, V.-C.; and **Chambers v. Manchester and Milford Ry.** (1864) 33 L. J. Q. B. 268; 5 B. & S. 588; 10 Jur. (n.s.) 700; 10 L. T. 715; 12 W. R. 980.—Q.B., *approved*.

Cork and Youghal Ry., In re, Overend, Gurney & Co., and London, Hamburg and Continental Exchange Bank, Ex parte (1868) 39 L. J. Ch. 277; L. R. 4 Ch. 748; 21 L. T. 735; 18 W. R. 26.—HATHERLEY, L.C. and GIFFARD, L.J.

Chambers v. Manchester and Milford Ry., applied, Fontaine v. Carmarthen and Cardigan Ry. (1868) 37 L. J. Ch. 429; 1 L. R. 5 Eq. 316; 16 W. R. 476.—WOOD, V.-C.; *referred to*, *Wenlock (Baroness) v. River Dee Co.* (1885) 54 L. J. R. 877; 10 App. Cas. 354.—H. (E.) (*supra*, col. 442); *Wrexham, Mold and Connah's Quay Ry., In re* (post, col. 456); *Payne (or Paine) v. Cork Co.* [1900] 1 Ch. 303; 69 L. J. Ch. 156 (post, col. 481).

Fontaine v. Carmarthen and Cardigan Ry., commented on, Wat-on, Ex parte, Sheffield Permanent Building Society, In re, or Companies Acts, In re (1888) 56 L. J. Q. B. 609; 21 Q. B. D. 301; 59 L. T. 501; 36 W. R. 829; 52 J. P. 742.—CAVE and WILLS, JJ.; *approved*, *Usborne v. Limerick Market Trustees* (1898) [1899] 1 Ir. R. 229.—PORTER, M.R.

German Mining Co., In re, Chippendale, Ex parte (1854) 24 L. J. Ch. 41; 4 De G. M. & G. 19; 18 Jur. 710; 2 W. R. 543.—KNIGHT BRUCE and TURNER, L.JJ.; and **Cork and Youghal Ry., In re** (*supra*), *observed on and explained*.

National Permanent Building Society, In re, Williamson, Ex parte (1869) L. R. 5 Ch. 309; 22 L. T. 284; 18 W. R. 388.

GIFFARD, L.J.—A class of cases has been referred to on that subject [equitable debt], the principal of which are *German Mining Co., In re*, and *Cork and Youghal Ry., In re*, the latter of which was before the L.C. and myself a short time ago; I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognised in old cases beginning with *Marlow v. Pigfield* ([1719] 1 P. Wms 558), where there was a loan to an infant, and the money was spent in paying for necessities, and in another case of a more modern

date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that, although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a Court of equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from.—p. 313.

Cork and Youghal Ry., In re (*supra*).
followed.

Blackburn Building Society v. Cunliffe, Brooks & Co. (1882) 52 L. J. Ch. 92; 22 Ch. D. 61; 48 L. T. 33; 31 W. R. 98.—C.A.; *affirmed, nom.* Cunliffe, Brooks & Co. v. Blackburn Building Society (1884) 54 L. J. Ch. 376; 9 App. Cas. 857; 52 L. T. 225; 33 W. R. 309.—H.L. (E.). See "BUILDING SOCIETY."

German Mining Co., In re (*supra*). *considered.*

Norwich Equitable Fire Insurance Co., In re, Brasnett's Case (1886) 53 L. T. 569; 34 W. R. 206.—C.A.; *affirming* (1884) 54 L. J. Ch. 227.—BACON, V.-C.

LINDLEY, L.J.—It is quite obvious that Mr. Brasnett is liable to pay these calls. It is also quite obvious that when the winding-up commenced he had no right to a set-off, or to anything else that I can discover. He may have acquired a right against the company in respect of that 500*l.*, but his right, if any, against the company, in respect of that sum, is by no means established yet. I am not at all satisfied that he has any right. He may have—I do not say that he has not—but I am quite sufficiently familiar with *German Mining Co., In re*, to know that nothing would be more dangerous than to assume that that case applies to a director who has paid money for what he is pleased to call the benefit of the company. The principle of that case requires to be applied with the very greatest caution, and, when one looks at that case closely, one finds that it proceeded on the principle that the money which the company had ultimately to repay had been applied in discharging debts which the company was liable to pay. The liability does not depend on the mere fact that the money has been borrowed of the bankers—that is no debt at all in law—but in the fact that the money itself has been applied in discharge of debts and liabilities which might otherwise have been enforced against the company in another way. I doubt very much whether Mr. Brasnett will, when the case is closely investigated, bring himself within that case. I am not at all sure that this debt of 500*l.* was ever a debt of the company, or that the money which it represents has been applied in discharging debts or liabilities of the company in such a way that *German Mining Co., In re*, applies. I do not say it was not so applied, but it is not established that it was. Sect. 101 of the Companies Act, 1862, was not considered in *German Mining Co., In re*, and it appears to me that all we can do is to order this gentleman to pay that which is due from him, without prejudice to any question as to his right to prove in respect of the 500*l.*—p. 571.

GUTHRON, L.J. to the same effect. BOWEN, L.J. concurred.

German Mining Co., In re, and Cork and Youghal Ry., In re, *discussed.*

Wrexham, Mold and Connah's Quay Ry., In re (1899) 68 L. J. Ch. 270; [1899] 1 Ch. 440; 80 L. T. 130; 47 W. R. 172, 464; 6 Manson 218.—C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.J.J.

German Mining Co., In re, *discussed and approved.*

Hardoon v. Bellios (1900) 70 L. J. P. C. 9; [1901] A. C. 118; 83 L. T. 573; 49 W. R. 209.—P.C. (*post*, col. 552).

Blackmore v. Yates (1867) 36 L. J. Ex. 121; L. R. 2 Ex. 225; 16 L. T. 288; 15 W. R. 750.—EX., *applied.*

Stagg v. Midway (Upper) Navigation Co. (1902) 72 L. J. Ch. 177; [1903] 1 Ch. 169; 50 W. R. 446.—SWINFEN EADY, J.

Registration.

Patent Bread Machine Co., In re, Valpy and Chaplin, Ex parte (1872) L. R. 7 Ch. 289; 26 L. T. 228; 20 W. R. 347.—JAMES, L.J., *distinguished.*

General South American Co., In re (1876) 2 Ch. D. 337; 34 L. T. 706; 24 W. R. 891.—C.A. JAMES and MELLISH, L.J.J. and BAGGALLAY, J.A. *And see supra*, col. 452.

Wynn Hall Colliery Co., In re, North and South Wales Bank, Ex parte (1870) 39 L. J. Ch. 695; L. R. 10 Eq. 515; 23 L. T. 348; 18 W. R. 1128.—MALINS, V.-C., and Valpy and Chaplin, *Ex parte*, *approved.*

General South American Co., In re, *distinguished.*

Native Iron Ore Co., In re, Elphinstone, *Ex parte* (1876) 45 L. J. Ch. 517; 2 Ch. D. 345; 34 L. T. 777; 24 W. R. 503.—C.A. JAMES and MELLISH, L.J.J. and BAGGALLAY, J.A. *And see post.*

Wynn Hall Colliery Co., In re, and Valpy and Chaplin, Ex parte, *commented on*, Borough of Hackney Newspaper Co., In re (1876) 3 Ch. D. 669.—JESSEL, M.R.; *discussed*, Globe New Patent Iron and Steel Co., In re (1878) 48 L. J. Ch. 295; 40 L. T. 580; 27 W. R. 424.—JESSEL, M.R. *And see post.*

Valpy and Chaplin, Ex parte, and Native Iron Ore Co., In re, *observed on.*

International Pulp and Paper Co., In re, Knowles's Mortgage (1877) 46 L. J. Ch. 625; 6 Ch. D. 556; 37 L. T. 351; 25 W. R. 822.—JESSEL, M.R. *And see post.*

Valpy and Chaplin, Ex parte, and Native Iron Ore Co., In re, *distinguished.*

General South American Co., In re, *discussed.* South Durham Iron Co., In re Smith's Case (1870) 40 L. T. 572; 48 L. J. Ch. 480; 11 Ch. D. 579. 27 W. R. 845.—C.A.

Headnote.—Where a firm, one of whose members was a director of a company in course of winding-up, had advanced money to the company on the security of a transfer of delivery warrants of iron, and the warrants were transferred to the director-partner, but it was established on the evidence that the security ensured to the benefit of the firm, and there was no entry of the transaction on the register of mortgages of the company as required by sect. 43 of the Companies Act, 1862, it was held by Jessel, M.R. and Bramwell, L.J. (affirming Hall, V.-C.), Baggallay, L.J. dissenting, that the doctrine of the above two cases did not apply, and that the security was not forfeited.

Valpy and Chaplin, Ex parte, disapproved.

Imperial Land Co. of Marseilles, In re (1870) 39 L. J. Ch. 381; L. R. 10 Eq. 298.—MALINS, V.-C., *applied*.

Great Western Forest of Dean Coal Co., In re, Carter's Case (1886) 55 L. J. Ch. 494; 81 Ch. D. 496; 54 L. T. 531; 34 W. R. 516.—PEARSON, J.

Imperial Land Co. of Marseilles, In re, and Carter's Case, referred to.

Western Counties Steam Bakeries and Milling Co., In re, Parsons and Robbent's Case (1897) 66 L. J. Ch. 354; [1897] 1 Ch. 617.—C.A. (*post*, col. 467).

Native Iron Ore Co., In re, Elphinstone, Ex parte (*supra*); **Dublin Drapery Co., In re, Cox, Ex parte** (1884) 13 L. R. 1r 174.—PORTER, M.R.; and **Wynn Hall Coal Co., In re** (*supra*), *disapproved*.

Globe New Patent Iron, &c. Co., In re; South Durham Iron Co., In re, Smith's Case, and International Pulp and Paper Co., In re, Knowles, Ex parte (*supra*), *approved*.

Wright v. Horton (1887) 56 L. J. Ch. 873; 12 App. Cas. 371; 56 L. T. 782; 86 W. R. 17; 52 J. P. 179.—H.L. (E.). HALSBURY, L.C., LORDS WATSON and FITZGERALD.

LORD WATSON.—The rule in question was first laid down by Malins, V.-C. in *Wynn Hall Coal Co., In re*, and was thus explained by that learned judge: "In this case the mortgagees are the directors, who have committed an illegal act by not registering the mortgage, and, upon the strict construction of the language of the Act, I think they are precluded from setting up the mortgage. But independently of the language of the Act, I am of opinion that, upon general principles, it cannot be permitted that directors who get a charge on the property of the company and omit to register it, but keep it as a pocket security concealed from the creditors, should set it up against the general creditors." A decision of Lord Romilly to the same effect in *Valpy and Chaplin, In re*, was upheld by James, L.J., sitting alone. "Every one," the L.J., said, "standing in a fiduciary position to the company is bound to see that the company obeys the directions of the legislature: and I am of opinion that the failure of the appellant to do so is fatal in his case." Next followed *Native Iron Ore Co., In re*, in which a similar decision of the vice-warden of the Stannaries was affirmed by the C. A., consisting of James, Mellish and Baggallay, L.J.J., all of whom were of the opinion expressed by Mellish, L.J., that the rule established by the two preceding cases was "founded on a perfectly good equitable principle." These are the decisions upon which the rule at present rests. In several subsequent cases the late M.R. (Sir G. Jessel) expressed very strong disapproval of it. He did so in *Borough of Hackney Newspaper Co., In re* (*supra*), and also in *International Pulp and Paper Co., In re*. In the first of these cases he held that directors who had realised their security before the commencement of the winding-up could not be compelled to refund the proceeds, inasmuch as they had not "knowingly and wilfully authorised or permitted the omission" to enter their mortgage on the register; and in the second, he decided that the sub-mortgagee of a director was not affected by the want of registration. In *South Durham Iron Co., In re*, Hall, V.-C. decided that the rule in *Native Iron Ore Co., In*

re, did not apply to a mortgage made to partners, of whom one only was a director of the company; and his decision was affirmed in the C. A. by the M.R. and Bramwell, L.J., Baggallay, L.J., dissenting. Bramwell, L.J., whilst recognising the authority of *Valpy and Chaplin, Ex parte*, and *Native Iron Ore Co., In re*, as binding on the C. A., did not conceal his disapproval of the principle laid down in these cases. In *Globe, &c. Co., In re*, the late M.R. again took the opportunity of reviewing the previous decisions, and of delivering an elaborate argument against the rule which they established. I do not think any one of the learned judges who have supported the rule adopts the first reason assigned by Malins, V.-C. in *Wynn Hall Coal Co., In re*. I do not think it can be reasonably affirmed that the rule has been enacted, either expressly or impliedly, by the legislature in sect. 43 of the Companies Act, 1862, or that it could be sustained in equity apart from the provisions of that section. . . . As I understand the decisions of the C. A., the foundation of the rule is the neglect of the director or other official to discharge his statutory duty, which raises, or is supposed to raise, in equity, a personal disability which precludes him from enforcing his charge upon the property of the company, in competition with any creditor who is not in the same position with himself. I have come to the conclusion that the effect of the rule is to inflict upon persons who may fail to perform the duty imposed upon them by sect. 43, severe penal consequences which the legislature has not enacted and cannot be held to have contemplated. The creation of such penalties, in addition to the pecuniary mulct which the legislature has thought fit to attach to the wilful neglect of the statutory duty of registration, is, in my opinion, altogether beyond the functions of a Court of equity. I do not think it necessary to explain in detail the reasons which have held me to that conclusion. They are all to be found in the judgment delivered by the late M.R. in *Globe, &c. Co., In re*, in which I entirely concur, subject to the observation that it appears to me to be, in some passages, expressed in terms more forcible than the occasion required.—p. 878.

LORD FITZGERALD to the same effect.

South Durham Iron Co., In re, Smith's Case, distinguished.

Freeman v. Laing (1899) 68 L. J. Ch. 586; [1899] 2 Ch. 355; 81 L. T. 167; 48 W. R. 9.

BYRNE, J.—*Smith's Case* is distinguishable on the ground, amongst others, that there was no question there as to the effect of the neglect of one of several joint tenants, but of the neglect of one of several persons having separate interests, to do something which he ought to have done in a different capacity.—p. 588.

Wright v. Horton (*supra*), *applied*.

Pearks, Gunston and Tee, Ltd. v. Thompson, Talmey & Co. (1901) 17 Times L. R. 250.—FARWELL, J.; *affirmed*, 18 Rep. Pat. Cas. 189.—C.A. RIGBY, V. WILLIAMS and STIRLING, L.J.

Wright v. Horton, principle applied.

Pearks, Gunston and Tee, Ltd. v. Thompson, Talmey & Co., *followed*.

Randall (H. E.), Ltd. v. British and American Shoe Co. (1902) 71 L. J. Ch. 683; [1902] 2 Ch. 354; 87 L. T. 442; 50 W. R. 697.—SWINFEN EADY, J.

Joplin Brewery Co., In re (1901) 71 L. J. Ch. 21; [1902] 1 Ch. 79; 85 L. T. 411; 50 W. R. 75; 8 Manson 426.—BUCKLEY, J., *followed*, *Spiral Globe Co., In re* (1901) 71 L. J. Ch. 128; [1902] 1 Ch. 396; 85 L. T. 778; 50 W. R. 187; 9 Manson 52.—SWINFEN FADY, J.: *not applied*, *Abrahams & Sons, In re* (1902) 71 L. J. Ch. 307; [1902] 1 Ch. 695; 86 L. T. 290; 50 W. R. 284; 9 Manson 176.—BUCKLEY, J.: *discussed and distinguished, form of order settled*, *Johnson & Co., In re* (1902) 71 L. J. Ch. 576; [1902] 2 Ch. 101; 86 L. T. 791; 50 W. R. 482; 9 Manson 307.—C.A. COLLINS, M.R., *STIRLING and COZENS-HARDY, L.J.* And see "BILLS OF SALE."

Issue.

Strand Music Hall Co., In re (1865) 3 De G. J. & S. 147; 13 L. T. 177; 14 W. R. 6.—KNIGHT BRUCE and TURNER, L.J.J., *followed*.

Queensland Land and Coal Co., In re, *Davis v. Martin* (1894) 63 L. J. Ch. 810; [1894] 3 Ch. 181; 8 R. 476; 71 L. T. 115; 42 W. R. 600; 1 Manson 555.—NORTH, J.

Strand Hall Music Hall Co., In re, *discussed*.

Marshall's Estate, In re (1898) [1899] 1 Ir. R. 96.—ROSS, J.

Queensland Land and Coal Co., In re, *followed*.

Pegge v. Neath District Tramways Co. (1897) 67 L. J. Ch. 17; [1898] 1 Ch. 183; 77 L. T. 550; 46 W. R. 243.—NORTH, J.

Inns of Court Hotel Co., In re (1868) 37 L. J. Ch. 692; L. R. 6 Eq. 82.—GIFFARD, V.-C., *applied*.

Broderip v. Salomon & Co. (1895) 64 L. J. Ch. 689; [1895] 2 Ch. 528; 12 R. 395; 72 L. T. 755; 43 W. R. 612; 2 Manson 449.—C.A. LINDLEY, LOPES and KAY, L.J.J.; *reversed, non*, *Salomon v. Salomon & Co.* (*supra*, col. 396), *distinguished*.

Seligman v. Prince & Co. (1895) 64 L. J. Ch. 745; [1895] 2 Ch. 617; 12 R. 592; 73 L. T. 124; 44 W. R. 6; 2 Manson 586.—C.A. LINDLEY, LOPES and RIGBY, L.J.J.

LINDLEY, L.J.—This decision in no way conflicts with the decisions of this Court in *George Newman & Co., In re* (*supra*, col. 425), or in *Broderip v. Salomon & Co.* The company is recognised as a corporate body distinct from Prince, and there are no proceedings against Prince as there were against Salomon, entitling the company to set aside the agreement for the sale of the business to acquire which the company was formed, or to be indemnified by the vendor against the debts which were endeavoured to saddle the company with. No such fraud as was proved in *Salomon's Case* is proved in this case, and on the materials before us the plaintiff is entitled to the usual judgment in a debenture-holder's action, with costs of the appeal.—p. 750.

Broderip v. Salomon & Co., commented on and distinguished.

Munkittrick v. Perryman (1896) 74 L. T. 149.—WILLS and WRIGHT, JJ.

Campbell's Case, Compagnie Générale de Bellegarde, In re (1876) 4 Ch. D. 470; 35 L. T. 900; 25 W. R. 299.—BACON, V.-C., *applied*.

Webb v. Shropshire Rys. (1893) 63 L. J. Ch. 80; [1893] 3 Ch. 307; 7 R. 231; 69 L. T. 533.—C.A.

LINDLEY, L.J. (for self, LOPES and A. L. SMITH, L.J.J.)—The authorities which show that the debentures can be issued at a discount—for example, *Campbell's Case*—are, in our opinion, as applicable to this company [formed under the Companies' Clauses Act, 1845, and amending Acts] as to companies governed by the Companies Act, 1862, to which those decisions more particularly relate.—p. 89.

Remedies.

Perry v. Clutton Coal Co. Seton on Decrees, 5th ed., p. 1685, *distinguished*. *Parkinson v. Wainwright* (1895) 13 R. 467; 64 L. J. Ch. 493; 72 L. T. 485; 43 W. R. 420; 2 Manson, 420.

NORTH, J.—This case differs from *Perry v. Clutton Coal Co.*, because there the plaintiff was suing on behalf of himself and all other debenture-holders, while here the plaintiff is the holder of the only first mortgage debentures.—p. 468.

Gardner v. L. C. & D. Ry. (1866) 36 L. J. Ch. 323; L. R. 2 Ch. 201; 15 L. T. 552; 15 W. R. 324.—CAIRNS and TURNER, L.J.J., *distinguished*. And see *post*, col. 461.

Panama, New Zealand and Australian Royal Mail Co., In re (1870) 39 L. J. Ch. 482; L. R. 5 Ch. 318; 22 L. T. 424; 18 W. R. 441.

GIFFARD, L.J.—*Gardner v. L. C. & D. Ry.* also seems to me to have no application, because in that case the subject-matter on which the debentures operated was of a particular character, i.e., a permanent railway, which cannot be sold or dealt with in any way. All that that case decided was that, regard being had to the relative position and duties of the parties, the debentures could only affect a special subject-matter and nothing else.—p. 482. And see *supra*, col. 453.

Gardner v. L. C. & D. Ry., principle applied. *Exmouth Docks Co., In re* (1873) 43 L. J. Ch. 110; L. R. 17 Eq. 181; 29 L. T. 573; 22 W. R. 104.—MALINS, V.-C. And see *post*, col. 553.

Panama, New Zealand and Australian Royal Mail Co., In re, *applied*.

Hodson v. Ten Co. (1886) 49 L. J. Ch. 234; 14 Ch. D. 859; 28 W. R. 498.—HALL, V.-C. And see *post*, col. 461.

Gardner v. L. C. & D. Ry., applied.

Blaker v. Herts and Essex Waterworks Co. (1889) 58 L. J. Ch. 497; 41 Ch. D. 399; 60 L. T. 776; 37 W. R. 601; 1 Meg. 217.—KAY, J.

Blaker v. Herts, &c. Waterworks Co., distinguished.

Barton-upon-Humber and District Water Co., In re (1889) 42 Ch. D. 585; 58 L. J. Ch. 613; 61 L. T. 803; 38 W. R. 8; 1 Meg. 412.

NORTH, J.—Kay, J. [*Blaker v. Herts and Essex Waterworks Co.*] declared the plaintiffs entitled to a charge upon the company's undertaking, and directed an inquiry who were the debenture-holders and what was due to each of them, and he appointed a receiver, but declined to order a sale of the undertaking or to appoint a manager. He acted apparently upon the principles laid down in the well-known case of *Gardner v. L. C. & D. Ry.* He did not dismiss the action, but he made an order in the terms which I have mentioned. The present case is one in which a winding-up order ought certainly to be made, unless the fact that the company's undertaking is for the carrying out of a public object is a sufficient reason for not making it. In my

opinion that is not a sufficient reason. . . . It may be necessary to obtain an Act of Parliament to authorise the sale of the undertaking. . . . The order which I am now asked to make will be equivalent to the judgment which Kay, J. pronounced in the case to which I have referred. By appointing an official liquidator I shall not be taking the management of the undertaking out of the hands of the company; I shall be appointing an officer of the Court to carry on the undertaking for the company, and in the interests of the shareholders. . . . I do not forget that in *Free Fishermen of Faversham, In re* (post, col. 560), the C. A. refused to make a winding-up order. But there the company was a very peculiar one, as there was a right of fishery in the individual members of the company; and the ground of the decision was, that no good could result from the making of a winding-up order. If I thought that in the present case, I should refuse to make the order. . . . In that case the company had been carrying on their business for a very long time, and there was no reason for putting an end to it. —pp. 587–590.

Gardner v. L. C. & D. Ry., distinguished.

Bartlett v. West Metropolitan Tramways Co. (1893) 63 L. J. Ch. 208; [1898] 3 Ch. 437; 69 L. T. 560.

NORTH, J.—I will appoint a receiver and manager. There are several cases in which a manager of a tramway undertaking has been appointed. The case is quite distinguishable from *Gardner v. L. C. & D. Ry.*, a case where the Court had no power to wind up the company. Here the Court has power to wind up the defendant company — p. 208.

Panama, New Zealand and Australian Royal

Mail Co., In re (supra, col. 460); and **Hodson v. Tea Co.** (supra, col. 460), followed.

Wallace v. Universal Automatic Machines Co. (1894) 63 L. J. Ch. 598; [1894] 2 Ch. 547; 7 R. 316; 70 L. T. 852; 1 Manson 815.—C.A. **LINDLEY, LOPES and KAY, L.JJ.; varying** 42 W. R. 428.—KEKEWICH, J.

LINDLEY, L.J.—The undertaking on the security of which the money was borrowed has in fact come to an end by the winding-up, and this circumstance entitles the debenture-holders to realise their security. This point was determined in *Hodson v. Tea Co.*, which was itself based on the earlier case of *Panama, &c. Mail Co., In re*. In *Hodson v. Tea Co.* the debenture was not due, but it was treated as having become due on the commencement of the winding-up of the company, and accounts were directed of what was due for principal and interest on that footing. The principle on which that decision is founded is, in my opinion, correct, and the plaintiff is in my opinion entitled to an order to give effect to it. —p. 600.

KAY, L.J. to the same effect. **LOPES, L.J.** concurred.

Peck v. Trinsmaran Iron Co. (1876) 45 L. J. Ch. 748; 2 Ch. D. 115; 24 W. R. 381.—JESSE, M.B., followed.

Makins v. Percy Ibtson & Sons (1890) 60 L. J. Ch. 164; [1891] 1 Ch. 133; 63 L. T. 515; 39 W. R. 73; 2 Meg. 371.

KAY, J.—The matter came before a very experienced judge, the late M.R., in *Peck v.*

Trinsmaran Iron Co., and there, although there was no opposition, there being an application by a holder of a debenture bond whereby all the company's effects and machinery were charged, and the motion was for both a receiver and manager, the late M.R. said: "I am of opinion that the plaintiffs are entitled to secure the property in the only way in which it can be made secure, as otherwise it may go to ruin. I know of no authority bearing on the question, but on principle I consider that they are entitled to have a manager appointed." The opinion of the late M.R. in a question of this kind is of very considerable authority, and it has been followed in another case before Chitty, J. [*Campbell v. Lloyds', Barnett's and Bosanquet's Bank* (1889)]. Certainly it is remarkable that the case before the late M.R. is not referred to either in Mr. Buckley's work on Companies, or in Lindley, L.J.'s well-known work. However there is authority for such an application, and I am justified in following it; but I should be very glad if the question were brought to the attention of the C. A. and the matter authoritatively settled. —p. 165.

Campbell v. Lloyds', Barnett's and Bosanquet's Bank, and Makins v. Percy Ibtson & Sons, explained.

Whitley v. Challis (1891) 61 L. J. Ch. 307; [1892] 1 Ch. 64; 65 L. T. 838; 40 W. R. 291.—C.A. **LINDLEY, BOWEN and FRY, L.JJ.**

Whitley v. Challis, distinguished.

Leas Hotel Co., In re, Salter v. Leas Hotel Co. (1902) 71 L. J. Ch. 294; [1902] 1 Ch. 332; 86 L. T. 182; 50 W. R. 409; 9 Manson 168.—KEKEWICH, J.

Whitley v. Challis, applied.

Farmer v. Pitt (1902) 71 L. J. Ch. 500; [1902] 1 Ch. 954; 50 W. R. 453.—BYRNE, J.

Legg v. Mathieson (1860) 29 L. J. Ch. 885; 2 Giff. 71; 2 L. T. 112.—STUART, V.-C., distinguished.

Wildy v. Mid-Hants Ry. (1868) 18 L. T. 73; 16 W. R. 409.—CHELMSFORD, L.C.; and **Makins v. Percy Ibtson & Sons, followed.**

Edwards v. Standard Rolling Stock Syndicate (1892) 62 L. J. Ch. 605; [1893] 1 Ch. 574; 3 R. 226; 68 L. T. 194, 693; 41 W. R. 343.—NORTH, J.

McMahon v. North Kent Iron Works (1891) 60 L. J. Ch. 372; [1891] 2 Ch. 148; 64 L. T. 817; 39 W. R. 349.—KEKEWICH, J.; and **Edwards v. Standard Rolling Stock Syndicate, distinguished.**

Mersey Ry., In re, Gibbs v. Mersey Ry. (1895) 11 Times L. R. 391.—STIRLING, J.

Edwards v. Standard Rolling Stock Syndicate, referred to.

Wallace v. Evershed (1899) 68 L. J. Ch. 415; [1899] 1 Ch. 891; 80 L. T. 523; 6 Manson 361.—COZENS-HARDY, J.

Perry v. Oriental Hotels Co. (1870) L. R. 5 Ch. 420; 23 L. T. 525; 18 W. R. 779.—GIFFARD, L.J., followed.

Campbell v. Compagnie Générale de Bellegarde (1876) 45 L. J. Ch. 386; 2 Ch. D. 181; 34 L. T. 54; 24 W. R. 573.—BACON, V.-C.

Perry v. Oriental Hotels Co. and Campbell v. Compagnie Générale de Bellegarde (*supra*), *distinguished*.

Boyle v. Bettws Llantwit Colliery Co. (1876) 45 L. J. Ch. 748; 2 Ch. D. 726; 84 L. T. 844.
BACON, V.-O.—The cases referred to were cases in which it was held unnecessary to appoint persons receivers when the liquidator was perfectly capable of performing the duties of receiver. Here the case is wholly different, because the evidence shows that the colliery is rapidly deteriorating, and may become worthless unless some steps are taken to improve matters. It is also clear that the liquidator has no funds and no power to do anything.—p. 749.

Perry v. Oriental Hotels Co. and Campbell v. Compagnie Générale de Bellegarde, *principally applied*.

Tottenham v. Swansea Zinc Ore Co. (1884) 53 L. J. Ch. 776; 51 L. T. 61; 32 W. R. 716.—PEARSON, J.

David Lloyd & Co., In re, Lloyd v. David Lloyd & Co., (1877) 6 Ch. D. 339; 37 L. T. 83; 25 W. R. 872.—C.A. JESSEL, M.R., JAMES and COTTON, L.J., *discussed*.

Pound (Hy.), Son, and Hutchins, In re (1889) 58 L. J. Ch. 792; 42 Ch. D. 402; 62 L. T. 137; 38 W. R. 18; 1 Meg. 363.—C.A. COTTON, FRY and LOPES, L.JJ.

Pound (Hy.), Son, and Hutchins, In re, and David Lloyd & Co., In re, *distinguished*.

Perry v. Oriental Hotels Co., *discussed*.

Joshua Stubbs, Ltd., In re, Barney v. Joshua Stubbs (1891) 60 L. J. Ch. 190; [1891] 1 Ch. 475; 64 L. T. 806; 39 W. R. 617.—C.A. LINDLEY and KAY, JJ.

Pound (Hy.), Son, and Hutchins, In re, *followed*.

Strong v. Carlyle Press (1892) 62 L. J. Ch. 541; [1893] 1 Ch. 263; 2 R. 283; 63 L. T. 896; 41 W. R. 404.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Perry v. Oriental Hotels Co., *approved*.

Tottenham v. Swansea Zinc Ore Co.; Joshua Stubbs, Ltd., In re, and Bartlett v. Northumberland Hotel Co. (1885) 53 L. T. 611.—C.A. COTTON and LINDLEY, L.JJ., *applied*.

Strong v. Carlyle Press, *explained*.

British Linen Co. v. South American and Mexican Co. (1893) 10 Times L. R. 14.—V. WILLIAMS, J.

Sadler v. Worley (1894) 63 L. J. Ch. 551; [1894] 2 Ch. 170; 8 R. 194; 70 L. T. 494; 42 W. R. 476.—KEKEWICH, J., *commented on*.

Oldrey v. Union Works (1895) 72 L. T. 627.—KEKEWICH, J.

Sadler v. Worley and Welch v. National Cycle Co. (1886) Palmers Company Precedents (6th ed.), p. 909.—CHITTY, J., *discussed*.

Continental Oxygen Co., In re, Elias v. Continental Oxygen Co. (1897) 66 L. J. Ch. 273; [1897] 1 Ch. 511; 76 L. T. 229; 45 W. R. 313.—KEKEWICH, J.

Transfer.

Agra and Masterman's Bank, In re, Asiatic Banking Corporation, Ex parte (1867) 36

L. J. Ch. 222; L. R. 2 Ch. 391; 16 L. T. 162; 15 W. R. 414.—TURNER and CAIRNS, L.JJ., *approved but not applied*. *And see* "BILLS OF EXCHANGE."

Blakely Ordnance Co., In re, New Zealand Banking Co., Ex parte (1867) 37 L. J. Ch. 448; L. R. 3 Ch. 154; 18 L. T. 132; 16 W. R. 533.—ROLY, L.J., *distinguished*.

Natal Investment Co., In re, Financial Corporation (Claim of) (1868) 37 L. J. Ch. 362; L. R. 3 Ch. 355; 18 L. T. 171; 16 W. R. 637.

CAIRNS, L.C. (after discussing *Agra and Masterman's Bank, In re*) said: That decision would not, however, have any application to a question arising upon a single instrument like the debenture now before the Court. The other case upon which the M.R. founded his decision was *Blakely Ordnance Co., In re*. . . . So far as the form of the debenture is concerned, the debenture there bears a considerable similarity to the debentures in the case now before the Court; but there were other facts in that case which do not occur in the present. The debentures in that case were given in pursuance of the terms of an antecedent contract entered into between Mr. Blakely and Mr. Dent and the company. That contract was to this effect: an agreement was entered into in June, 1855, between Blakely and Dent of the one part, and Mr. Hardwick of the other part, for the sale to the company, which was then projected, of certain property belonging to Blakely and Dent for a large sum of money, part of which was to be paid by the issue and delivery to Blakely and Dent, immediately on the establishment of the company, of debentures to the amount of 150,000*l.*, which were to be payable to bearer, the capital to be repayable to bearer at the end of three years from the date of the agreement. The question was raised whether the issuing of a debenture, professing to be payable to bearer and to be negotiable as money, would in a fiscal point of view, be competent to a company of this kind; but, without dwelling on that question, it is perfectly clear . . . that the bargain which Blakely and Dent made was that, so far as the company could do it, debentures which were to be payable to bearer, and therefore to be treated as money, were to be given to them. Rolt, L.J., finding that this was a contract, finding also that the contract was embodied in the articles of association, and that the company was formed to give effect to it, came to the conclusion that the company were estopped from setting up, upon a claim by holders of these debentures to prove for the amounts specified in them, any equity or right of set-off which it might have against Blakely and Dent, to whom the debentures were originally given. That was a case, therefore, depending on the special circumstances of the antecedent contract, to which I have already referred.—p. 364.

Natal Investment Co., In re, considered.

General Estates Co., In re, City Bank, Ex parte (1868) L. R. 3 Ch. 758; 16 W. R. 919.—WOOD and SELWYN, L.JJ.

Blakely Ordnance Co., In re, and General Estates Co., In re, *followed*.

Natal Investment Co., In re, *distinguished*.

Higgs v. Northern Assam Tea Co. (1869) 38 L. J. Ex. 233; L. R. 4 Ex. 387; 21 L. T. 336; 17 W. R. 1125.—BRAMWELL and CHANNELL, BB.

Higgs v. Northern Assam Tea Co., *approved and followed*.

Athenæum Life Assurance Society v. Pooley (1858) 28 L. J. Ch. 119; 3 De G. & J. 294; 5 Jur. (N.S.) 129; 7 W. R. 167.—KNIGHT BRUCE and TURNER, L.J.; *affirming* 1 Giff. 102.—STUART, V.-C., *distinguished*.

Northern Assam Tea Co., *In re*, **Universal Life Assurance Co.**, *Ex parte* (1870) 39 L. J. Ch. 829; L. R. 10 Eq. 458; 23 L. T. 639; 18 W. R. 1082.—ROMILLY, M.R.

General Estates Co., *In re* (*supra*), *applied*.

Imperial Land Co. of Marseilles, *In re*, **Colborne and Strawbridge**, *Ex parte* (1870) 40 L. J. Ch. 93; L. R. 11 Eq. 478; 24 L. T. 255; 19 W. R. 223.—MALINS, V.-C.

Athenæum Life Assurance Society v. Pooley, *adversely commented on*.

Hercules Insurance Co., *In re*, **Brunton's Claim** (1874) 44 L. J. Ch. 450; L. R. 19 Eq. 802; 31 L. T. 747; 23 W. R. 286.—MALINS, V.-C.

Blakely Ordnance Co., *In re*; **Imperial Land Co. of Marseilles**, *In re*, **Colborne and Strawbridge**, *Ex parte*, and **Natal Investment Co.**, *In re* (*supra*), *discussed*.

Couch v. Credit Foncier Co. (1878) 42 L. J. Q. B. 182; L. R. 8 Q. B. 374; 29 L. T. 259; 21 W. R. 946.—BLACKBURN, J. (for the Court). *See judgment*, where the earlier cases are discussed; and *see* "NEGOTIABLE INSTRUMENT."

General Estates Co., *In re*, and **Imperial**

Land Co. of Marseilles, *In re*, *discussed*.

British India Steam Navigation Co. v. Inland Revenue Commissioners (1881) 50 L. J. Q. B. 577; 7 Q. B. D. 165; 44 L. T. 378; 29 W. R. 610.—GROVE and LINDLEY, JJ.

British India Steam Navigation Co. v. Inland Revenue Commissioners, *distinguished*.

Edmonds v. Blauna Furnaces Co. (1887) 56 L. J. Ch. 815; 36 Ch. D. 215 (*supra*, col. 447). *And see* **Bechuanaland Exploration Co. v. London Trading Bank** (1898) 67 L. J. Q. B. 987; [1898] 2 Q. B. 658; 79 L. T. 270.—KENNEDY, J., where the cases are discussed, and "NEGOTIABLE INSTRUMENT."

Agra and Masterman's Bank, *In re* (*supra*, col. 463); **Blakely Ordnance Co.**, *In re*; **Athenæum Life Assurance Society v. Pooley**, and **Natal Investment Co.**, *In re* (*supra*), *referred to*.

Imperial Land Co. of Marseilles, *In re*, *discussed and distinguished*.

Gwelo (Matabeleland) Exploration and Development Co., *In re*, **Williamson's Claim** (1900) [1901] 1 Ir. R. 38.—C.A. WALKER and HOLMES, L.J.J.; *carrying* PORTER, M.R.

And see **Smith (Richard) & Co., Ltd.**, *In re* (1900) [1901] 1 Ir. R. 73.—PORTER, M.R.

6. MANAGEMENT.

List of Members.

Gibson v. Barton (1875) 44 L. J. M. C. 81; L. R. 10 Q. B. 329; 32 L. T. 396; 23 W. R. 558.—Q.B., *approved*. *And see post*, col. 467.

Edmonds v. Foster (1875) 45 L. J. M. C. 41;

33 L. T. 690; 24 W. R. 368.—COLERIDGE, C.J., ARCHIBALD, J. and AMPHLETT, B.

Edmonds v. Foster, *distinguished*.

Reg. v. Newton (1879) 48 L. J. M. C. 77.—COCKBURN, C.J. and POLLOCK, B.

Grosvenor Bank and Discount Co. v. Boaler

(1885) 49 J. P. 774.—POLLOCK, B. and DAY, J., *followed*.

Briton Medical and General Life Association, *In re* (1888) 57 L. J. Ch. 874; 39 Ch. D. 51, 59 L. T. 134; 37 W. R. 52.—STIRLING, J.

Auditors.

Liberator Permanent Benefit Building Society, *In re* (1894) 15 R. 149; 71 L. T. 406.—CAVE and COLLINS, JJ., *dictum disapproved*.

London and General Bank, *In re* (No. 2) (1895) 64 L. J. Ch. 866; [1895] 2 Ch. 166; 12 R. 263; 72 L. T. 611; 43 W. R. 481; 2 Manson 282.—C.A. LINDLEY, LOPES and RAY, L.J.J.

LOPES, L.J.—*It [Liberator Building Society, In re] was not the case of a banking company but of a building society. It is true that Cave, J. in the course of his judgment, says: "It seems to me that more because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society, any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society." I do not think that his attention was drawn to the word "mistakeance"; but, however that may have been, the case which had to be decided was not the case of an auditor, but the case of a solicitor.—p. 869*

London and General Bank, *In re* (No. 2), *discussed and followed*.

Kingston Cotton Mill Co., *In re* (1895) 63 L. J. Ch. 145; [1896] 1 Ch. 6; 73 L. T. 432; 44 W. R. 210; 2 Manson 626.—C.A.; *affirming* V. WILLIAMS, J.

LORD HERSCHHELL.—I desire to retain absolute liberty of action, in case it should hereafter become necessary, with regard to the question whether *London and General Bank, In re*, was rightly decided. . . . All that we decide is that, in a case identical with *London and General Bank, In re*, as I take this to be in substance, the auditor is an officer. We decide that as bound by the previous decision of the C. A. Beyond that our decision does not go. I say this because some general observations were made by the learned judge in the Court below, as to which I desire to express no opinion.—p. 151.

A. L. SMITH, L.J.—Three points of distinction have been alluded to. The first is, that in *London and General Bank, In re*, the auditors were officers by statute; but it was pointed out by the counsel for the respondent that, although that was so, in substance Table A. was incorporated in the articles of the bank. The next point was, that the articles of the bank contained a definite clause which included auditors as officers, whereas no such clause existed in the present case; and the third point was that the indemnity clause in the articles of the bank referred to directors, auditors, and other officers, whereas

the indemnity clause in the present case does not mention auditors. In my opinion we should be frittering away the judgment in *London and General Bank, In re*, if we were to attempt to distinguish the present case from it. Being bound by that decision, I say that in any case which comes within the terms of that case the auditor is an officer of the company. Further than that I am not prepared to go on the present occasion.—p. 161.

RIGBY, L.J. to same effect.

London and General Bank, In re (No. 3) (1895) 64 L. J. Ch. 866; [1895] 2 Ch. 675; 12 R. 520; 73 L. T. 904; 44 W. R. 80; 2 Manson 555.—C.A. LINDLEY, LOPES and RIGBY, L.J.s, principles applied.
Kingston Cotton Mill Co., In re (No. 2) [1896] 66 L. J. Ch. 673; [1896] 2 Ch. 279; 74 L. T. 568.—C.A. LINDLEY, LOPES and KAY, L.J.s: reversing on this point [1895] 65 L. J. Ch. 290; [1896] 1 Ch. 331.—V. WILLIAMS, J.

Gibson v. Barton (*supra*, col. 465), distinguished.

Western Counties Steam Bakeries and Milling Co., In re, Parsons and Robtjen's Case (1897) 66 L. J. Ch. 854; [1897] 1 Ch. 617; 76 L. T. 289; 45 W. R. 263, 418.—C.A.

LINDLEY, L.J.—If sect. 10 of the Winding-up Act, 1890, contained the word "auditor," it might well be that Messrs. Parsons and Robtjen, having acted as they did, could not be heard to say that they were not auditors, and sect. 10 might very well apply to them. But the word "auditor" is not in the section. . . . If all persons who did auditor's work for a company were officers of the company, the case would be easy; but no decision has yet gone this length, and if that were the law the careful examination of the Acts of Parliament and articles of association made in *London and General Bank, In re*, and *Kingston Cotton Mill Co., In re*, would have been quite unnecessary. An auditor may or may not be an officer of a company. So may anybody else—for example, a banker or solicitor. *Prima facie* such persons are not officers—see as to bankruptcy, *Imperial Land Co. of Marseilles, In re* (*supra*, col. 457), and as to solicitors, *Carter's Case* (*supra*, col. 457). But if appointed to an office under the company, and if they act in that office as officers of the company, they will be officers within sect. 10—*Liberator Building Society, In re* (*supra*)—and no irregularity in their appointment would, I conceive, avail them. . . . In my opinion Stirling, J. has regarded the decisions in *London and General Banking Co., In re*, and *Kingston Cotton Mill Co., In re*, as going considerably further than they did. They decided two points only—namely, first, that auditors might be officers within sect. 10—a proposition which, in the first case, was very stoutly disputed; and secondly, that the auditors in those cases were officers of the companies there in question—that is, that the persons there held to be within sect. 10 really filled the office of auditor in those cases respectively.—p. 356.

A. L. SMITH, L.J.—The first case which is relied upon is *Gibson v. Barton*, where Blackburn and Lush, J.J. held (Quain, J. dissenting) . . . that "manager" in the Act [Companies Act, 1862, s. 27] meant manager *de facto*, and that a person who performed manager's work became thereby manager; but how does this establish

that a person who performs auditor's work becomes an officer of the company? If the words of the section had included the word "auditor," the case would have been applicable, but no such word is in the section. I agree that performing the work of an auditor shows the person to be a *de facto*, though he may not be a *de jure*, auditor; but to succeed the liquidator must show that the person is a *de facto* "officer." . . . The next case is *Corycatty and Dixon's Case* (*supra*, col. 423). There two directors did the work of directors without being qualified to be directors. Sir G. Jessel held them to be *de facto* directors though they were not *de jure* directors, and as such were liable to be proceeded against summarily by way of misfeasance summons as being directors of the company, who are persons designated in the section to be proceeded against. When this case was under appeal (it was reversed upon another point), Bramwell, L.J. said, "if he"—that is, the director—"has done anything wrong as a *de facto* director, no doubt he can be got at under the clause." In this I agree, and if Messrs. Parsons and Robtjen had done anything wrong as *de facto* officers they could be got at; but they have done nothing of the sort, for the simple reason that they have never become officers of the company at all. When examined, *Corycatty and Dixon's Case* is only *Gibson v. Barton* over again.—p. 357.

RIGBY, L.J. to the same effect.

And see *National Bank of Wales, In re, Cory's Case* (1899) 68 L. J. Ch. 634; [1899] 2 Ch. 629.—C.A. (*supra*, col. 398).

Interference by Court.

Colman v. Eastern Counties Ry. (1846) 16 L. J. Ch. 73; 10 Beav. 1; 11 Jur. 74; 4 Railw. Cas. 513.—LANGDALE, M.R., commented on.

Forrest v. Manchester, Sheffield, and Lincolnshire Ry. (1861) 4 De G. F. & J. 126; 7 Jur. (N.S.) 887; 4 L. T. 666; 9 W. R. 818.—CAMPBELL, L.C.; affirming on different grounds, 30 Beav. 40.—ROMILLY, M.R. And see post, col. 519.

Colman v. Eastern Counties Ry., approved.

Att.-Gen. v. London County Council (1901) 70 L. J. Ch. 367; [1901] 1 Ch. 781.—C.A. (*supra*, col. 448).

Taylor v. Salmon (1838) 4 Myl. & Cr. 134.—COTTENHAM, L.C.; and **Hichens v. Congreve** (1828) 4 Russ. 562; 1 Russ. & Myl. 150, n.; 6 L. J. (O.S.) Ch. 167; 32 R. R. 172.—LYNDHURST, L.C., applied.

Loscombe v. Russell (1830) 4 Sim. 8.—SHADWELL, V.-C., commented on.
Walworth v. Holt (1841) 10 L. J. Ch. 138; 4 Myl. & Cr. 619.—COTTENHAM, L.C. And see post, col. 469.

Hichens v. Congreve, followed.

Gluckstein v. Barnes (1900) 69 L. J. Ch. 385; [1900] A. C. 240; 82 L. T. 393; 7 Manson 321.—H.L. (E.). HALSBURY, L.C., LORDS MACNAGHTEN and ROBERTSON.

LORD MACNAGHTEN.—The third ground of defence was that the only remedy was rescission. That defence, in the circumstances of the present case, seems to me to be as contrary to common-sense as it is to authority. The point was settled

more than sixty years ago by the decision in *Hickens v. Congreve*, and, so far as I know, that case has never been questioned.—p. 391.

[His lordship discussed the case at length.]
And see *supra*, col. 398.

Hickens v. Congreve and Preston v. Grand Collier Dock Co. (1840) 10 L. J. Ch. 73, 11 Sim. 327; 2 Railw. Cas. 335.—SHADWELL, V.-C., *approved*.
Foss v. Harbottle (1843) 2 Harv. 461.—WIGRAM, V.-C.

Foss v. Harbottle, *followed*.
Taylor v. Salmon and Walworth v. Holt, *commented on*.
Mozley v. Alston (1847) 16 L. J. Ch. 217; 1 Ph. 790; 11 Jur. 315; 4 Railw. Cas. 636.—COTTENHAM, L.C. And see *post*, col. 471.

Foss v. Harbottle and Mozley v. Alston, *confirmed*.
Lord v. Copper Miners' Co. (1848) 18 L. J. Ch. 65; 2 Ph. 740; 1 Hall & Tw. 85.—COTTENHAM, L.C.; *reversing* 2 De G. & Sm. 308.—KNIGHT BRUCE, V.-C.

Mozley v. Alston and Exeter and Crediton Ry. v. Buller (1847) 16 L. J. Ch. 449, 11 Jur. 527, 532; 5 Railw. Cas. 211.—COTTENHAM, L.C., *applied*.
Edwards v. Shrewsbury and Birmingham Ry. (1849) 2 De G. & Sm. 537.—KNIGHT BRUCE, V.-C.; **Yettis v. Norfolk Ry.** (1849) 3 De G. & Sm. 298; 13 Jur. 249; 5 Railw. Cas. 487.—KNIGHT BRUCE, V.-C.

Mozley v. Alston, *applied*.
Hattersley v. Shelburne (Earl) (1862) 31 L. J. Ch. 873; 7 L. T. 650, 10 W. R. 881.—KINDERSLEY, V.-C.

Foss v. Harbottle, *not applied*.
Atwood v. Merryweather (1867) 37 L. J. Ch. 35; 1 L. R. 5 Eq. 464, n.—WOOD, V.-C.

Atwood v. Merryweather and Featherstone v. Cooke (1873) L. R. 16 Eq. 298; 21 W. R. 835.—MALINS, V.-C., *distinguished*.
MacDougall v. Gardiner (1875) L. R. 10 Ch. 606; 23 W. R. 816.—C.A.

JAMES, L.J.—The great principle laid down in *Mozley v. Alston* and *Foss v. Harbottle* was, that whatever should be done by the company itself through its own internal organisation, ought to be left to the company, and ought not to be interfered with by this Court. In the cases which have been cited [*Atwood v. Merryweather* and *Featherstone v. Cooke*], and upon the statement of which the V.-C. [Malins, V.-C.] seems to have altered his original opinion, there was a doubt whether the legal proceedings had been authorised by the company; and the Court said that a meeting ought to be summoned in order to ascertain whether the company desired its name to be continued as plaintiff or defendant. . . . That is not a direction to call a meeting for any purpose connected with the management of the company, or to do anything which the company could do for itself according to its own organisation—p. 608. MELLISH, L.J. concurred.

Mozley v. Alston; Lord v. Copper Miners' Co.; and Foss v. Harbottle, *followed*.
MacDougall v. Gardiner (1875) 45 L. J. Ch. 27; 1 Ch. D. 13, 33 L. T. 521; 24 W. R. 118.—C.A.; *reversing* L. R. 20 Eq. 383; 32 L. T. 653; 23 W. R. 808.—MALINS, V.-C. And see col. 471.

JAMES, L.J.—I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley v. Alston*, *Lord v. Copper Miners' Co.*, and *Foss v. Harbottle*, should be always adhered to, that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent, something *ultra vires* on the part of the company, *quod* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire to entertain it.—p. 32.

MELLISH, L.J.—Is it not better that the rule should be, if it is a thing which the majority are masters of, that the majority in substance shall be entitled to have their will followed? That, as I understand it, is what has been decided by *Mozley v. Alston* and *Foss v. Harbottle*. In my opinion that is the rule that is to be maintained.—p. 35. BAGGALLAY, J.A. concurred.

Gray v. Lewis (1869) L. R. 8 Eq. 526; 20 L. T. 282, 17 W. R. 431.—MALINS, V.-C., *commented on*.

British and American Telegraph Co. v. Albion Bank (1872) 41 L. J. Ex. 67; L. R. 7 Ex. 119; 26 L. T. 257; 20 W. R. 413.—BRAMWELL, B. (for the Court).

British and American Telegraph Co. v. Albion Bank, *approved*.

Gray v. Lewis (*supra*), and **Parker v. Lewis** (1873) 28 L. T. 91.—MALINS, V.-C., *reversed*.

Foss v. Harbottle and Mozley v. Alston, *principle applied*.

Atwood v. Merryweather (*supra*), *discussed*.
Gray v. Lewis, Parker v. Lewis (1873) 43 L. J. Ch. 281; L. R. 8 Ch. 1035; 29 L. T. 12; 21 W. R. 923.—JAMES and MELLISH, L.J.J. See judgments at length.

Foss v. Harbottle and Gray v. Lewis, *discussed*.

Atwood v. Merryweather, *applied*.
Menier v. Hooper's Telegraph Works Co. (1874) 43 L. J. Ch. 330; L. R. 9 Ch. 350; 30 L. T. 209; 22 W. R. 396.—JAMES and MELLISH, L.J.J.

Foss v. Harbottle, *applied*.
Duckett v. Gover (1877) 46 L. J. Ch. 407; 6 Ch. D. 82; 25 W. R. 554.—JESSEL, M.R.

Duckett v. Gover, *explained*.
MacDougall v. Gardiner (*supra*), *approved*.
Atwood v. Merryweather and Menier v. Hooper's Telegraph Co., *followed*.

Mason v. Harris (1879) 48 L. J. Ch. 589; 11 Ch. D. 97; 40 L. T. 644; 27 W. R. 699.—C.A. JESSEL, M.R., JAMES and BRAMWELL, L.J.J.

JESSEL, M.R.—In *Duckett v. Gover* the company were not joined as co-plaintiffs by an oversight of the pleader, and I allowed the case to stand over for a fortnight to enable the plaintiff to obtain the consent of the company, and he got it. Then the defendants moved to strike out the name of the company, on the ground that they had been added as plaintiffs without authority; but I refused the motion, because I was satisfied that the company had consented.—p. 591.

Foss v. Harbottle (*supra*), referred to, *Isle of Wight Ry. v. Tahourdin* (1883) 53 L. J. Ch. 353; 25 Ch. D. 320; 50 L. T. 132; 32 W. R. 297.—C.A. COTTON, LINDLEY and FRY, L.J.; Tessen v. Henderson (1899) 68 L. J. Ch. 353; [1899] 1 Ch. 861 (*post*, col. 472).

Foss v. Harbottle, principle not applied.

Alexander v. Automatic Telephone Co. (1900) 69 L. J. Ch. 428; [1900] 2 Ch. 56; 82 L. T. 400; 48 W. R. 546.—C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.J.; reversing (1899) 68 L. J. Ch. 514; [1899] 2 Ch. 302; 80 L. T. 753.—COZENS-HARDY, J.

LINDLEY, M.R.—The breach of duty to the company consists in depriving the company of the use of the money which the directors ought to have paid up [on their shares] sooner than they did. I cannot regard the case as one of mere internal management, which, according to *Foss v. Harbottle*, and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders. Under these circumstances an action by some of the shareholders on behalf of themselves and others against the defendants is in accordance with the authorities, and is unobjectionable in form—see *Menier v. Hooper's Telegraph Co.* (*supra*). An action in this form is far preferable to an action in the name of the company and then a fight as to the right to use the name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present.—p. 433.

Foss v. Harbottle; **Mozley v. Alston**; **Menier v. Hooper's Telegraph Co.**; **MacDougall v. Gardiner** (*supra*); and **North-West Transportation Co. v. Beatty** (1887) 56 L. J. P. C. 102; 12 App. Cas. 589; 57 L. T. 426; 36 W. R. 647.—P.C. LORD HOUSHOUSE, SIR B. PEACOCK, SIR R. BAGGALLAY and SIR R. COUCH, referred to.

Burland v. Earle (1901) 71 L. J. P. C. 1; [1902] A. C. 83; 85 L. T. 553; 50 W. R. 241; 9 Manson 17.—P.C. LORDS HOUSHOUSE, DAVEY and ROBERTSON, and SIR R. COUCH.

Mills v. Northern Ry. of Buenos Ayres (1870) L. R. 5 Ch. 621; 23 L. T. 719; 19 W. R. 171.—HATHERLEY, L.C., applied. *Cutbill v. Shropshire Rys.* (1891) 7 Times L. R. 382.—STIRLING, J.

7. MEETINGS OF SHAREHOLDERS.

Special Resolutions.

Southall v. British Mutual Life Assurance Society (1871) 40 L. J. Ch. 97, 698; L. R. 6 Ch. 614; 19 W. R. 865.—L.J.; affirming, (1870) L. R. 11 Eq. 65; 23 L. T. 682.—M.R., discussed.

Kaye v. Croydon Tramways Co. (1898) 67 L. J. Ch. 222; [1898] 1 Ch. 358; 78 L. T. 237; 46 W. R. 405.—C.A.

V. WILLIAMS, L.J.—A great deal has been said about the decision of the Court in *Southall v. British, &c. Society*, and it has been rather argued that the decision of the M.R. and James and Mellish, L.J.J. respectively in that case was a decision that there was nothing which would render invalid a resolution of the majority

of the shareholders giving a bonus to the servants of the company, never mind what was the motive of giving the bonus. I do not think myself that *Southall v. British, &c. Society* decides anything of the sort. James, L.J., in dealing with this matter, says: "I agree that if this had been done secretly, in all probability it could not be supported. But it was done openly, and appeared on the face of the agreement. There was nothing in itself wrong in such an arrangement, and it was known to all the shareholders. . . . All that I understand that the L.J. is saying there is that, if the circumstances are such as not to import any impropriety in the gift which is being made by the shareholders of the company by the resolution of its officers, there is no reason why that resolution should be treated as an invalid resolution. I do not understand him to mean that such a resolution would be valid if it had been passed under different circumstances. . . . If it does turn out in fact that really this money was a real bonus given by the purchasing company to the directors of the selling company in consideration of the directors of the selling company facilitating the contract, I wish to say emphatically on my part that there is nothing, in my opinion, in the judgments in *Southall v. British, &c. Society* which says that the majority of the shareholders can bind the minority in respect of such a matter as that. I do not want to go in detail into a case which in many respects is a different one from the present, but as I understand the majority of the Court in *Hutton v. West Cork Ry.* (*supra*, col. 419), that is, the majority of the C.A., although deciding the case upon another ground, upon the ground that the company there had already gone into liquidation, do, as does Fry, J., affirm this proposition which I have been attempting to state here—that is, that these are matters which are *intra vires*, but yet are of such a character that the majority cannot bind the minority, even though the notice itself might be in due form.—p. 281.

LINDLEY, M.R. and RIGBY, L.J. to same effect.

Kaye v. Croydon Tramways, discussed.

Alexander v. Simpson (1889) 59 L. J. Ch. 187; 43 Ch. D. 139; 61 L. T. 708; 38 W. R. 161; 1 Meg. 457.—C.A. BOWEN and FRY, L.J., distinguished.

Tessen v. Henderson (1899) 68 L. J. Ch. 353; [1899] 1 Ch. 861; 80 L. T. 433; 47 W. R. 459; 6 Manson 340.

KEKEWICH, J.—It seems to me that *Alexander v. Simpson* is an entirely different case. There an extraordinary general meeting was summoned, and in the notice summoning that meeting (it is not the first time, in my experience, I have seen it) it was notified that if the resolutions were passed another extraordinary general meeting would be held on a certain day to confirm those resolutions. The C. A. held that that was not sufficient; that the shareholder was entitled to know, not whether a meeting would be held in a certain event, but whether it would be held as a certainty; he was entitled to be told after the resolutions were passed that they would be confirmed on a certain date. . . . Here there was a separate notice convening the confirmatory meeting—and that is, no doubt, to some extent, in the alternative; that is to say, there were two schemes put before the meeting—a new scheme which had only been mentioned at the first

meeting, and the old scheme, which had been provisionally established at the first meeting: and if that new scheme was passed the scheme which had received the approval of the first extraordinary general meeting would, of course, be out of the question altogether, and to that extent there was a conditional element about it. . . . I think that the shareholder had ample notice of what was intended to be done, that there was nothing conditional to affect his mind, and that *Alexander v. Simpson* does not apply to such a case as that.—p. 358.

Alexander v. Simpson, not applied.

Jenner Institutes of Preventive Medicine, Inc (1899) 15 Times L. R. 394.—STIRLING, J.

Kaye v. Croydon Tramways Co. (*supra*), distinguished.

Torbock v. Westbury (Lord) (1902) 71 L. J. Ch. 845; [1902] 2 Ch. 871; 87 L. T. 165; 51 W. R. 133.

SWINFEN EADY, J.—The case differs wholly from *Kaye v. Croydon Tramways Co.*, where there were in reality two proposals—one for the sale of the undertaking, and the other for payment of a substantial sum to the directors as compensation for loss of office—and the latter was undisclosed. In the present case full notice was given of what was intended to be done.—p. 846.

Ry. Sleepers Supply Co., In re (1885) 54 L. J. Ch. 720; 29 Ch. D. 204; 52 L. T. 731; 33 W. R. 595.—CHITTY, J., distinguished.

Miller's Dale and Ashwood Dale Lime Co., In re (1885) 31 Ch. D. 211; 55 L. J. Ch. 203; 53 L. T. 692; 34 W. R. 192.

BACON, V.-C.—Mr Marten referred to the 51st section of the Companies Act, 1862, which enacts that there must be an interval of not less than fourteen days between the meeting at which a special resolution, such as this for the increase of capital, is passed, and the meeting at which that resolution is confirmed. Here the interval was not sufficient. The meetings were held on the 3rd and 17th January, thus leaving an interval of thirteen days, and that is not enough. The interval should have been fourteen clear days, exclusive of the days of meeting; and on the authority of Chitty, J. (*Ry. Sleepers Supply Co., In re*) such a defect is fatal. Now, if the dispute here was simply between the company and its shareholders and directors, undoubtedly that would be so; but that is not the case I have now to deal with. Such an objection as that which is now raised does not apply where the creditors of the company are concerned.—p. 214.

Miller's Dale, &c. Co., In re, and Ry. Sleepers Supply Co., In re, not applied.

Briton Medical and General Life Association v. Jones (1889) 61 L. T. 384.—POLLOCK, B.

Voting.

Horbury Bridge Coal, Iron and Waggon Co.,

In re (1879) 48 L. J. Ch. 341; 11 Ch. D. 109—114; 40 L. T. 353; 27 W. R. 433.—C.A. JESSEL, M.R., BRAMWELL and BRETT, L.Js., dicta dissented from. And see post, col. 477.

Chillington Iron Co., *In re*, Mansell, Ex parte (1865) 29 Ch. D. 169, 54 L. J. Ch. 624; 52 L. T. 504; 33 W. R. 442.

[The dicta cited in argument were: "We must import into the case our common knowledge that where a poll is demanded it never is taken there and then, and I am by no means of opinion that a chairman could direct it to be so taken"—per Jessel, M.R.; and "You will have some difficulty in persuading me that if a poll is demanded, a chairman can appoint it to be held there and then without notice to anybody not present."—per Brett, L.J.]

KAY, J.—Is it the usual custom—is it the universal custom—at public meetings to defer, when a poll is asked for, the taking of the poll to an adjourned meeting? If so, I confess I was not aware of it. However, I do not profess to set up my own personal knowledge as worth anything in such a matter, particularly when I find that in . . . *Horbury Bridge Coal, &c. Co., In re*, the late M.R. and the present M.R. are stated to have made the observations which have been quoted. The point, however, to which those observations were addressed did not arise for decision in that case, and was not decided: and although it seems to have been argued that a poll could have been taken then and there, no case on the subject was cited. But a case has been cited to me of *Reg. v. D'Oyly* [(1840) 12 A. & E. 139; 4 P. & D. 52; 4 Jur. 1056. See "ECCLÉSIASTICAL LAW"] where the point arose distinctly, and where, after considerable argument, Lord Denman gave judgment upon it. I see that Sir J. Campbell, Att.-Gen., Mr. Thesiger, and Mr. Swann were on one side, and Sir F. Pollock, Mr. Cresswell, and Mr. Hayes on the other side. The meeting upon which the question arose in that case was a vestry meeting summoned by churchwardens for the purpose of electing new churchwardens, and Lord Denman in his judgment said (12 A. & E. 158): "The meeting being held, and a show of hands taken, some one was to declare on whom the nomination had fallen. Who was to do that? Not the body of the parishioners who had made the nomination, nor the old churchwardens, but the person presiding at the vestry, namely, the rector. A poll is then demanded; and it is demandable as of right; and the president of the meeting is the person to grant it. In the absence of other business the poll should be taken immediately: if time does not allow of that, there must be an adjournment for the purpose. Then who is to direct the adjournment? It is suggested that a majority of the voters should do so. But how is the majority to be ascertained in so large a constituency?" Then he goes on to say that it is not a matter for the majority to decide upon whether there should be an adjournment or not, but the question is one which ought to be decided by the president of the meeting. I take that to be a statement, after considerable argument, by a very eminent judge of what the common law is with reference to meetings and the mode of holding them, and what is the legal course to take when a poll is demanded. And I confess I was surprised to find that it had ever been suggested with regard to a meeting held under the Companies Act, 1862, under a rule in the words of the 43rd article of Table A, that a poll demanded at a meeting of that kind could not, if the chairman so directed, be taken at that meeting. It seems to me, with great respect to the dicta which have been cited to me, that that is not law. The law is distinct that a poll can be taken at that same meeting.—p. 162.

Chillington Iron Co., In re (*supra*), *distinguished*.

British Flax Producers' Co., In re (1889) 60 L. T. 215; 1 Meg. 138.

KAY, J.—The case cited is entirely different from the present case, because there the time of the poll was to be fixed by the chairman.—p. 216.

Caloric Engine and Siren Fog Signals Co., In re (1885) 52 L. T. 846.—**KAY, J.**, *not followed*.

Horbury Bridge Coal, Iron and Waggon Co., In re (*supra*, col. 478), *distinguished*.

Reg. v. Government Stock Investment Co. (1878) 47 L. J. Q. B. 478; 3 Q. B. D. 442; 39 L. T. 230.—**COCKBURN, C.J.** and **MELLOR, J.** *referred to*.

Bidwell Bros., In re (1893) 62 L. J. Ch. 549; [1893] 1 Ch. 603; 3 R. 377; 68 L. T. 342; 41 W. R. 363.—**V. WILLIAMS, J.** *And see post*, col. 476.

Caloric Engine, &c. Co., In re, *approved and followed*.

Bidwell Bros., In re, *overruled*.

Ernest v. Loma Gold Mines Co. (1896) 66 L. J. Ch. 17; [1897] 1 Ch. 1; 75 L. T. 221, 317; 45 W. R. 86.—**G.A.**: *affirming* 65 L. J. Ch. 850; [1896] 2 Ch. 572 —**CHITTY, J.**

LINDLEY, L.J. (for Court, **LINDLEY** and **A. L. SMITH, L.J.J.**).—The same view [as Chitty, J.'s] was taken by **KAY, J.** in *Caloric Engine Co., In re*, and by the **C.A.** in *Horbury Bridge Coal, &c. Co., In re*. It is true that the only point decided in this last case was that on a show of hands shares ought not to be counted. No one suggested that absentees should be counted as present, but the observations of Sir G. Jessel, M.R. on the mode of voting by show of hands are clearly against the propriety of so counting them. In *Bidwell Bros., In re*, **V. WILLIAMS, J.** however, decided that on a show of hands absent members entitled to vote by proxy ought to be counted as present if their proxy is himself present and votes. We agree that this is true if the proxy is a non-member and represents only one person—namely, the absentee for whom he votes. The proxy's vote must be counted, and that vote is in effect the vote of the absentee. But to hold that on a show of hands a proxy has more than one vote is to introduce a mode of voting never heard of in practice, and not, in our opinion, required by law. Section 51 of the Companies Act, 1862, is a reproduction of sect. 34 of the Joint Stock Companies Act, 1857, and if **V. WILLIAMS, J.**'s decision is right, a practice which has prevailed ever since 1856, if not for even a longer period, will have been improper. Such a conclusion makes it necessary to examine the grounds on which it is based with great care and some suspicion; and for the reasons above stated we have come to the conclusion that the decision in *Bidwell Bros., In re*, is erroneous, and ought not to be followed.—p. 21. *And see post*, col. 476.

Horbury Bridge, &c. Co., In re, *referred to*. **Young v. South African and Australian Exploration and Development Syndicate** (1896) 65 L. J. Ch. 638; [1896] 2 Ch. 268; 74 L. T. 527; 44 W. R. 509.—**KEKEWICH, J.**

Young v. South African, &c. Syndicate, *commented on*.

Wall v. London and Northern Assets Corporation (No. 2) (1899) 68 L. J. Ch. 243; [1899] 1 Ch. 550; 80 L. T. 70; 6 Manson 312.

NORTH, J.—I do not agree with what **KEKEWICH, J.** appears from the report to have thought in *Young v. South African, &c. Syndicate*, that if the chairman's decision were held to be conclusive at all it would be conclusive, even though fraudulently given. I have no doubt that fraud could be inquired into at any time, notwithstanding any decision of the chairman.—p. 250.

Lancaster, Ex parte, Lancaster, In re (1877) 46 L. J. Bk. 90; 5 Ch. D. 911; 36 L. T. 674; 25 W. R. 699.—**G.A. JAMES, BAGGALLAY** and **BRAMWELL, L.J.J.**, *distinguished*.

Howard v. Hill (1888) 59 L. T. 818; 37 W. R. 219.

KEKEWICH, J.—There the claim was in a bankruptcy, and the proxy was given to a solicitor to act in the matter of the bankruptcy, and **JAMES, L.J.** says that the essence of it was, that the creditor gave the proxy to his solicitor that he might go to the meeting and represent him, and the filling in of his name was a mere matter of form and not of substance. I think that the date of the execution of the proxy here was a matter of substance and not of form.—p. 820.

Young v. South African, &c. Development Syndicate (*supra*), *not followed*.

Bidwell Bros., In re (*supra*, col. 475), and **Ernest v. Loma Gold Mines Co.** (*supra*, col. 475), *discussed*.

Hadleigh Castle Gold Mining Co., In re (1900) 69 L. J. Ch. 631; [1900] 2 Ch. 419; 83 L. T. 400.

COZENS-HARDY, J.—I think the legislature intended, in the case of a special or extraordinary resolution, that the chairman's declaration should be conclusive unless challenged by means of a poll demanded by five members. This view, however, is directly contrary to that expressed by **KEKEWICH, J.** in *Young v. South African, &c. Development Syndicate*. . . . **KEKEWICH, J.** was under the impression that the point arose before him for the first time. His attention was not called to *Gold Co., In re*, which is reported 11 Ch. D. 701, but is more fully reported 48 L. J. Ch. 281. In that case only seventeen shareholders were present. Eleven voted for the extraordinary resolution to wind up voluntarily, two against it, and four did not vote at all. No poll was demanded, and the chairman declared the resolution to be carried. It seems plain that this was a mistake, for there was not the requisite three-fourths majority. **Malins, V.-C.** treated the voluntary winding up as valid, but nevertheless made a compulsory order. In the **C.A.** this order was reversed. It appears from the *Law Journal* report, p. 286, that counsel for the respondent (petitioner) were about to argue that the voluntarily winding up was irregular, and that the wishes of the shareholders were not properly ascertained, upon which **JAMES, L.J.** remarked, "As no poll was demanded the ruling of the chairman is by sect. 51 [Companies Act, 1862] made conclusive. You cannot go into that now." This apparently was the decision of the whole Court. The Court discharged the order of **Malins, V.-C.** and recognised that the voluntary winding up could not be impeached. This decision was not brought to the notice of **KEKEWICH, J.**, and under the circumstances I think myself

at liberty to disregard his decision, and to follow my own view. The result is that I must treat the winding up as valid and not capable of being impeached. . . . It is perhaps right that I should observe that V. Williams, J. in *Bidwell Bros., In re*, and Chitty J. and the C. A. in *Ernest v. Loma Gold Mines Co.*, considered whether a chairman had proceeded upon correct principles, but the point was not taken that a chairman's declaration is *ma te* conclusive, and the attention of the Court was not called to the authorities. I cannot regard either of these cases as decisions adverse to the view which I have expressed. . . . The decision of the C. A. in *Gold Co., In re* (post, col. 564), is itself a strong illustration of the doctrine that the Court will not, under ordinary circumstances, make a winding-up order after a voluntary winding up at the instance of shareholders.—p. 634.

Hadleigh Castle Gold Mining Co., In re, *approved*.

Horbury Bridge Coal, & Co., In re (*supra*, col. 473), *distinguished*.

Arnot v. United African Land Co. (1901) 70 L. J. Ch. 806; [1901] 1 Ch. 518; 84 L. T. 309; 49 W. R. 322; 8 *Manson* 179.—C.A. RIGBY, V. WILLIAMS and STIRLING, L.JJ.

V. WILLIAMS, L.J.—It was argued that *Horbury Bridge Coal, & Co., In re*, was an authority to show that, although in sect. 51 [Companies Act, 1862] the word used is "conclusive," that word is not to be read as conclusive, but as *prima facie* conclusive. I do not agree with the argument; and I think that when *Horbury Bridge, & Co., In re*, is looked at it decides nothing of the sort. I thought at first that the interlocutory observations of Sir G. Jessel in that case had reference to the words of sect. 51; but Stirling, L.J., called my attention to the fact that that was not so, and that Sir G. Jessel was referring really to the thirty-seventh article of association of that particular company, the material words of which, as set out in the report of that case, were, "a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution"; and it is in reference to those words that Sir G. Jessel says: "Sufficient evidence in the absence of evidence to the contrary, but not conclusive evidence."—p. 307.

STIRLING, L.J. to the same effect.

Hadleigh Castle Gold Mining Co., In re, and Arnot v. United African Land Co., *distinguished*.

Caratal (New) Mines, Ltd., In re (1902) 71 L. J. Ch. 883; [1902] 2 Ch. 498; 87 L. T. 437; 50 W. R. 572; 9 *Manson* 414.—BUCKLEY, J.

8. AMALGAMATION AND RECONSTRUCTION.

Clinch v. Financial Corporation (1868) 38 L. J. Ch. 1; L. R. 4 Ch. 117; 19 L. T. 334; 17 W. R. 84.—C.A. CAIRNS, L.C., WOOD and SELWYN, L.JJ.; *varying* 37 L. J. Ch. 281; L. R. 5 Eq. 450.—WOOD, V.-C., *discussed*.

Oriental Commercial Bank, In re, Alabaster, Ex parte (1868) 38 L. J. Ch. 32; L. R. 7 Eq. 273; 17 W. R. 134.—GIFFARD, V.-C.

Clinch v. Financial Corporation, approved.
Bank of Hindustan v. Alison (1870—1871) 40 L. J. C. P. 1, 117; L. R. 6 C. P. 54, 232 (*supra*, col. 405).

Alabaster's Case, *approved*.

Empire Assurance Corporation, In re, Chailis's Case and Somerville's Case (1871) 40 L. J. Ch. 431; L. R. 6 Ch. 266 (*post*, col. 506), *discussed*.

Empire Assurance Corporation, In re, Dougan's Case (1873) L. R. 8 Ch. 540; 42 L. J. Ch. 460; 28 L. T. 649; 21 W. R. 495.

MELLISH, L.J.—There have been a great many cases in which, although the amalgamation has been *ultra vires*, the question has been raised, how far the shareholders of the selling company have become liable as shareholders of the purchasing company. . . . But I think those authorities establish this proposition—that if the shareholder enters into no personal negotiation, and only acts through his own company, and does nothing but consent to and act on the amalgamation, then, unless the amalgamation is eventually completed, he is not bound. That is shown by *Alabaster's Case*; and I think that case is good law.—p. 546. JAMES, L.J. concurred.

United Ports and General Insurance Co., In re, Wynne's Case, 28 L. T. 805; 21 W. R. 726.—BACON, V.-C.; *reversed*, (1873) 43 L. J. Ch. 138; L. R. 8 Ch. 1002; 29 L. T. 381; 21 W. R. 895.—JAMES and MELLISH, L.JJ.

Marine Investment Co., In re, Poole's Executors, Ex parte (1873) 42 L. J. Ch. 620; L. R. 8 Ch. 702.—JAMES and MELLISH, L.JJ., *commented on and applied*.
Tunis Railways Co., In re (1874) 30 L. T. 512; 22 W. R. 639.—MALINS, V.-C.; *affirmed*, 81 L. T. 264.—C.A. JAMES and MELLISH, L.JJ.

Dale's Case (1871) Reilly 11, *rejected*.
India and London Life Assurance Co., In re, Dyke's Case (1872) 41 L. J. Ch. 601; L. R. 7 Ch. 651; 27 L. T. 191; 20 W. R. 790.

[This case was decided by Lord Cairns as arbitrator in the *Albert Assurance Society*.]

JAMES and MELLISH, L.JJ., said that such a case was not citable as an authority in this Court. The decision was nothing but the opinion of a living lawyer.—p. 603.

Hallett v. Dowdall (1852) 21 L. J. Q. B. 93; 18 Q. B. 2; 16 Jur. 462.—EX. CH. (*see judgments*); and **Merchant Traders' Ship Loan and Insurance Co., In re, Lord Talbot's Case** (1852) 21 L. J. Ch. 846; 5 De G. & Sm. 336.—PARKER, V.-C., *distinguished*. *See post*, col. 479.

Sea Fire and Life Assurance Co., In re, Greenwood's Case (1854) 23 L. J. Ch. 866; 3 De G. M. & G. 459.

Hallett v. Dowdall, *discussed*.

European Assurance Society, In re, Hort's Case, Grain's Case (1875) 45 L. J. Ch. 321; 1 Ch. D. 307; 35 L. T. 766.—C.A. CAIRNS, L.C., JAMES and MELLISH, L.JJ.

Hort's Case, *followed*.
European Assurance Society, In re, Cocker's Case (1876) 45 L. J. Ch. 822; 3 Ch. D. 1; 35 L. T. 290.—C.A.

CAIRNS, L.C.—The case is entirely governed

by the *ratio decidendi* in *Hort's Case*.—p. 825.
JAMES, L.J. and BAGGALLAY, J.A. concurred.

Hort's Case (*supra*), explained and followed.
European Assurance Society, In re, Dowse's Case (1876) 3 Ch. D. 384; 46 L. J. Ch. 402; 35 L. T. 653.—C.A.

JAMES, L.J.—It is impossible to distinguish this case from *Hort's Case*. . . . It was there settled that there could be no claim against assets which, under the deed of settlement, had been transferred to another company. The question is whether the omission from the present policy of the words "according and subject to the provisions of the deed of settlement of the said society," which occurred in *Hort's* policy, can make any difference between that case and this. In each case the directors, *quid* directors, contract that the funds of the society shall be liable, and that must mean shall, according to the deed of settlement, be liable; the omission of these words being, in my opinion, wholly immaterial.—p. 387. MELLISH, L.J. and BAGGALLAY, J.A. concurred.

European Assurance Society, In re, Rivington's Case (1876) 45 L. J. Ch. 804; 3 Ch. D. 10.—C.A. CAIRNS, L.C., JAMES, L.J. and BAGGALLAY, J.A., *applied*.

European Assurance Society, In re, Doman's Case (1876) 45 L. J. Ch. 801; 3 Ch. D. 21; 34 L. T. 929.—C.A. CAIRNS, L.C., JAMES, L.J. and BAGGALLAY, J.A.

Evans v. Coventry (1854) 5 De G. M. & G. 911; 3 Eq. R. 545; 3 W. R. 149.—KNIGHT BRUCE and TURNER, L.J.; *reversing* 3 Drew. 75.—KINDERSLEY, V.-C., *commented on*.

State Fire Insurance Co., In re (1863) 1 De G. J. & S. 634; 11 W. R. 746, 1011.—KNIGHT BRUCE and TURNER, L.J.; *affirming* 1 H. & M. 457.—WOOD, V.-C.

State Fire Insurance Co., In re, applied.
Kearns v. Leaf (1864) 1 H. & M. 681; 10 L. T. 185; 12 W. R. 462.—WOOD, V.-C.

Kearns v. Leaf, distinguished.
Doman's Case, *applied*.
Hort's Case and Grain's Case, referred to.
Argus Life Assurance Co., In re (1888) 58 L. J. Ch. 166; 39 Ch. D. 571; 59 L. T. 689; 37 W. R. 215.—NORTH, J.

Kearns v. Leaf, applied.
Cummins v. Perkins (1898) 68 L. J. Ch. 57; [1899] 1 Ch. 16; 79 L. T. 456; 47 W. R. 214.—C.A. LINDLEY, M.R. and CHITTY, L.J.

Hallett v. Dowdall (col. 478), **Lord Talbot's Case** (col. 478), and **State Fire Insurance Co., In re, referred to.**
Sovereign Life Assurance Co., In re (1892) 62 L. J. Ch. 36; [1892] 3 Ch. 279; 67 L. T. 356; 41 W. R. 1.—C.A. LINDLEY, LOPES and A. L. SMITH, L.J.J.

Hay v. Swedish and Norwegian Ry. (1899) 5 Times L. R. 460.—C.A. ESHER, M.R., COTTON and FRY, L.J.J.; and **Mercantile Investment and General Trust Co. v. International Co. of Mexico** (1891) 7 Times L. R. 616.—C.A. LINDLEY, BOWEN and FRY, L.J.J., *discussed and explained*.
Dominion of Canada Freehold Estate and

Timber Co., In re (1886) 55 L. T. 347.—CHITTY, J., *approved*.

Follitt v. Eddystone Granite Quarries (1892) 61 L. J. Ch. 567; [1892] 3 Ch. 75; 40 W. R. 667.—STIRLING, J. See judgment at length.

Empire Mining Co., In re (1899) 59 L. J. Ch. 345; 44 Ch. D. 402; 62 L. T. 493; 38 W. R. 747; 2 Meg. 191.—NORTH, J., *approved*.

Alabama, New Orleans, Texas and Pacific Junction Ry., In re (1890) 60 L. J. Ch. 221; [1891] 1 Ch. 213; 64 L. T. 127; 2 Meg. 377.—C.A. LINDLEY, BOWEN and FRY, L.J.J.

Alabama, New Orleans, & Co. Ry., In re, principle approved.

English, Scottish and Australian Chartered Bank, In re [1893] 3 Ch. 385; 62 L. J. Ch. 825; 2 R. 574; 69 L. T. 268; 42 W. R. 4.—C.A.; *affirming* V. WILLIAMS, J.

LINDLEY, L.J.—I adhere to what I said there.—p. 408.

LOPES, L.J.—The mode in which the power conferred by sect. 2 of the Joint Stock Companies Arrangement Act of 1870 on a majority of creditors to bind a minority is to be exercised has, to my mind, been very well and correctly laid down in the *Alabama, &c. Ry. Co.'s Case*, already referred to. What I understand to be decided by that case is this, that it is not sufficient for the Court to ascertain that the statutory conditions have been complied with, the Court must also be satisfied that the statutable authority have acted *bona fide*, not adversely to those whom they professed to represent, and that the arrangement contemplated is a reasonable one, such as a man of business would reasonably approve—reasonably with regard to the particular circumstances of the case.—p. 414.

Alabama, & Co. Ry., In re, followed.

Gilles v. Dawson (1893) 20 Rettie 1119.—LORD STORMONTH-DARLING

Jacobs, Ex parte, Jacobs, In re (1875) 44 L. J. Bk. 34; L. R. 10 Ch. 211; 31 L. T. 745; 23 W. R. 251.—JAMES and MELLISH, L.J.J., *principle applied*.

English, Scottish and Australian Chartered Bank, In re, applied.

London Chartered Bank of Australia, In re [1893] 3 Ch. 540; 62 L. J. Ch. 841; 3 R. 696; 69 L. T. 593; 42 W. R. 14.

V. WILLIAMS, J.—I allowed this matter to stand over in order that I might read the judgment of the C. A. in *English, &c. Chartered Bank, In re*, because, the scheme of arrangement in that case being very like the scheme submitted to me for sanction in this case, and the circumstances generally of the two banks not being dissimilar, I thought that it would greatly assist me. . . . It seems to me, then, that the discharge being clearly by operation of law consequent upon pending statutory liquidation, the principles laid down by Mellish, L.J., in *Jacobs, In re*, apply, and that, therefore, there is no need, and it would not be right, to introduce a reservation of rights against sureties into the scheme of arrangement. It seems to me, also, that it is unnecessary, at all events in a case where the arrangement is arrived at pending a winding up by the Court or under supervision, as distinguished from a mere voluntary winding up. . . . As to making provision

that the old shareholders shall not escape liability by a transfer of the new shares while not fully paid, I have the assistance of the judgment in *English, & Co. v. Chartered Bank, In re*. . . I do not think that I can do anything which amounts to a modification of the scheme without submitting it again to the creditors; but I gather that the C. A. does not think that the introduction of a term preserving the liability of the shareholders (the memorandum seems preferable to the articles, since the former cannot be altered) would be a modification of the scheme, although such a matter has been expressly dealt with in some schemes; and the introduction of such a provision into the memorandum might affect the practical working of the scheme, because the old shareholders might be deterred by such a provision from electing to take shares in the new bank.—p. 547.

Cotton v. Imperial and Foreign Agency and Investment Corporation (1892) 61 L. J. Ch. 484; [1892] 3 Ch. 454; 67 L. T. 342.
—CHITTY, J., explained and distinguished.
Paine (or Payne) v. Cork Co. (1900) 69 L. J. Ch. 156. [1900] 1 Ch. 308; 82 L. T. 44; 48 W. R. 325. 7 Man-on 225.
STIRLING, J.—The M.R. there [*Baring-Gould and Sherrington, & Co. v. Syndicate, In re* (supra, col. 394)] appears to be of opinion, as I read his judgment, that it is impossible by articles of association to deprive dissentient members of the benefits conferred on them by sect. 161. Then as to . . . *Cotton v. Imperial, & Co. Corporation*, the sale there purported to be made was not a sale in a winding up, and that was the ground of the decision. It was a sale by a company as a going concern under the power conferred on it by the memorandum of association; and as the L.J. pointed out, the validity of that sale could not be impeached by the liquidator, but the question would be when he received the shares which were the consideration for the contract of sale what he was to do with them. That does not apply to the present case, because this is on the face of it a sale in a winding up.—p. 160.

Cotton v. Imperial, & Co. Investment Corporation, discussed and principle applied.
Paine (or Payne) v. Cork Co. referred to.
Doughty v. Lomagunda Reefs, Ltd. (1902) 71 L. J. Ch. 888; [1902] 2 Ch. 837; 51 W. R. 49; 9 Man-on 418.—HUTKLEY, J. See judgment.
Waterloo Life, & Co. Assurance Co., In re.
Carr's Case (1864) 33 Beav. 542.—ROMILLY, M.R.; and *Times Life Assurance and Guarantee Co., In re* (1870) L. R. 5 Ch. 381; 23 L. T. 181; 18 W. R. 559.—GIFFARD, L.J., distinguished.
Bank of London and National Provincial Insurance Association, In re. Parr's Case (1870) L. R. 10 Eq. 632; 23 L. T. 305; 18 W. R. 977.
BACON, V.-C.—There has been no dissolution; and therefore the case at the Rolls [*Carr's Case*] . . . does not apply. There has been no novation; and therefore the second case that was referred to [*Times, & Co. (In re)*] does not apply.—p. 628. See post, col. 615.

Agra and Masterman's Bank, In re, Pollock, Ex parte (1867) 15 W. R. 554.—WOOD, V.-C., distinguished.
Albert Life Assurance Co., In re (1871) 40 L. J. Ch. 605; L. R. 6 Ch. 381; 24 L. T. 768; 19 W. R. 670.—JAMES, L.J.
O.C.

Albert Life Assurance Co., In re, discussed.
Nicholl v. Eberhardt Mining Co. (1888) 58 L. J. Ch. 399; 5 Times L. R. 73.—KEKEWICH, J.; affirmed, (1889) 59 L. J. Ch. 103; 61 L. T. 489; 1 Meg. 402.—C.A. ESHER, M.R., COTTON and FRY, L.J.J.

City and County Investment Co., In re (1879) 49 L. J. Ch. 195; 13 Ch. D. 475; 42 L. T. 303; 28 W. R. 953.—C.A. JESSEL, M.R., JAMES and BAGGALLAY, L.J.J.; *Bank of Hindustan, China, and Japan, In re, Higgs, Ex parte* (1865) 2 H. & M. 637; 13 W. R. 937.—WOOD, V.-C.; *Zucani v. Nacupai Gold Mining Co.* (1889) 61 L. T. 176.—C.A. ESHER, M.R., COTTON and FRY, L.J.J.; reversing 60 L. T. 23.—KEKEWICH, J.; and *Weston v. New Gunton Co.* (1888) 60 L. T. 805.—KAY, J.; affirmed, 62 L. T. 75.—C.A. COTTON and LOPES, L.J.J.; FRY, L.J. dissenting; and (1891) 64 L. T. 815.—H.L. (C.). HALSBURY, L.C. LORDS WATSON, HERSHELL and MORRIS, applied.

Nicholl v. Eberhardt Mining Co. and Griffith v. Paget (1877) 46 L. J. Ch. 493; 5 Ch. D. 894; 25 W. R. 523.—JESSEL, M.R., distinguished.
Postlethwaite v. Port Philip and Colonial Gold Mining Co. (1889) 59 L. J. Ch. 201; 43 Ch. D. 452; 62 L. T. 60; 38 W. R. 246; 2 Meg. 10.—STIRLING, J. And see post, col. 483.

Higgs' Case; New Zealand Gold Extraction Co. v. Peacock (1893) 63 L. J. Q. B. 227; [1894] 1 Q. B. 622; 9 R. 669; 70 L. T. 110.—C.A. LINDLEY, A. L. SMITH and DAVEY, L.J.J.; and *Griffith v. Paget*, explained.

Wall v. London and Northern Assets Corporation (No 1) (1893) 67 L. J. Ch. 596; [1893] 2 Ch. 469; 79 L. T. 249; 47 W. R. 219.—C.A.
LINDLEY, M.R.—When "amalgamating" a company with another company or persons or firms is spoken of, I confess that I am not prepared to put any sharp definition upon it. I have no doubt that it includes the case put by Lord Hatherley in *Higgs' Case*, and more recently by Lord Davey in *New Zealand, & Co. v. Peacock*. I do not think it necessarily involves the formation of a new company to carry on the business of an old company. I have no doubt it includes that, but I do not think it is confined to that, and I do not think it is understood to be confined to that. I do not see how a company as a business transaction can practically amalgamate with persons or companies carrying on business unless the company does in some way or other sell its assets as a whole. . . . The distribution [of shares, the consideration for the sale], certainly does not taint the consideration with illegality. I think upon the authority of *Griffith v. Paget*, which Stirling, J. acted upon, he was quite justified in saying that it did not affect the validity of the agreement. . . . The only new one is this point about the closure. . . . I am aware of the extremely important distinction drawn by Lord Kilon in *Const v. Harris* (supra, col. 419). . . . I think that principle is as important, and perhaps more important, now than it was sixty or seventy years ago. But that does not mean that a minority who are bent on obstructing business, and resolved on talking for ever, should not be put down. It means that

the majority are not to be tyrannical. After hearing what is to be said, they may say, "We have heard enough." They may say, "We are not bound to listen until everybody is tired of talking and has sat down."—p. 600.

CHITTY, L.J. to the same effect. COLLINS, L.J. concurred.

Griffith v. Paget (*supra*), distinguished.
Beeston Pneumatic Tyre Co., In re (1898) 14 Times L. R. 338.—WRIGHT, J. (*post*, col. 874).

Postlethwaite v. Port Philip and Colonial Gold Mining Co. (*supra*, col. 482), and **Weston v. New Gaston Co.** (*supra*), applied.

Nicholl v. Eberhardt Mining Co. (*supra*), observations of ESHER, M.R. dissented from.
Burdett-Coutts v. True Blue (Hannan's) Gold Mine (1899) 68 L. J. Ch. 692; [1899] 2 Ch. 616; 81 L. T. 29; 48 W. R. 1.—C.A.

LINDLEY, M.R.—So far as the authorities go, it appears to me that this scheme is in principle sanctioned by the decision in *Postlethwaite v. Port Philip Mining Co.* and *Weston v. New Gaston Co.*, though I think this case goes a step further than either of those, or any other which I know of. I have not found any case that goes quite so far, and that made me pause before expressing an opinion upon this; but having looked at the scheme, it appears to me that there is nothing *ultra vires* about it, and if that is so this injunction cannot be sustained. I do not doubt that this injunction has been moved for and encouraged by the query in Buckley's Companies Acts (7th edition), p. 428. It is a doubt not raised by him, but by my predecessor, Lord Esher, in . . . *Nicholl v. Eberhardt Mining Co.* The passage in Mr. Buckley's book is this: "Whether an agreement would be valid by which shares not applied for by the shareholders are to be at the disposal of the new company, *quære*." . . . I answer the query by saying that I dissent from the observations of my predecessor. He was not considering a case like this, but a different case, and I cannot help thinking that he was addressing himself to the question whether he would himself approve the scheme or not; and if in the present case I were addressing my mind to the same question, I might suggest some modification.—p. 697.

ROMER, L.J. to the same effect.

Imperial Land Co. of Marseilles, In re, Vining's Case, L. R. 11 Eq. 109; 23 L. T. 645.—MALINS, V.-C.; *reversed*, (1870) 40 L. J. Ch. 3, 79; L. R. 6 Ch. 96; 19 W. R. 57, 173.—JAMES and MELLISH, L.JJ.

9. SHARES.

Classes of Shareholders.

Northumberland and Durham District Banking Co., In re, Luard, Ex parte (1859) 1 L. T. 202.—KINDERSLEY, V.-C.; *reversed*, (1860) 29 L. J. Ch. 185, 269; 1 De G. F. & J. 533; 6 Jur. (N.S.) 5, 381; 8 W. R. 297.—KNIGHT BRUCE and TURNER, L.JJ.

Ness v. Angus (1849) 18 L. J. Ex. 470; 3 Ex. 805; 6 D. & L. 645; 13 Jur. 874.—EX., principle applied.

Ness v. Armstrong (1849) 18 L. J. Ex. 473; 4 Ex. 21; 7 D. & L. 73; 13 Jur. 874.—POLLOCK, C.B. (for the Court).

Barker v. Buttress (1843) 13 L. J. Ch. 58; 7 Beav. 134.—M.R., *dismissed and approved*, North of England Joint-Stock Banking Co., In re, Gouthwaite, Ex parte (1851) 20 L. J. Ch. 188; 8 Mac. & G. 187; 15 Jur. 137.—TRURO, L.C.

Northern Coal Mining Co., In re, Blakeley's Executors, Ex parte (1852) 3 Mac. & G. 726; 16 Jur. 299.—TRURO, L.C.; *affirming* 19 L. J. Ch. 566; 13 Beav. 133.—LANGDALE, M.R.; and **Gouthwaite, Ex parte, approved**.

Houldsworth v. Evans (1868) 37 L. J. Ch. 800; L. R. 3 H. L. 263; 19 L. T. 211.—H.L. (R.) (*post*, col. 629).

Blakeley's Executors, Ex parte, followed.
Ness v. Armstrong (*supra*), distinguished.
Agriculturist Cattle Insurance Co., In re, Baird's Case (1870) L. R. 5 Ch. 725; 23 L. T. 424; 18 W. R. 1094.—JAMES, L.J.; *reversing* 18 W. R. 857.—ROMILLY, M.R.

Leeds Banking Co., In re, Dobson's Case, Fearnside and Dean's Case (1866) 35 L. J. Ch. 307; L. R. 1 Ch. 231; 12 Jur. (N.S.) 60; 13 L. T. 694; 14 W. R. 255.—KNIGHT BRUCE and TURNER, L.JJ.; *reversing* (1865) 35 L. J. Ch. 75; 11 Jur. (N.S.) 965; 13 L. T. 167; 14 W. R. 72.—KINDERSLEY, V.-C., distinguished.

Leeds Banking Co., In re, Mallorie's Case (1866) 36 L. J. Ch. 141; L. R. 2 Ch. 181; 15 L. T. 458; 15 W. R. 270; *reversing* 36 L. J. Ch. 40; 15 L. T. 236; 15 W. R. 52.—KINDERSLEY, V.-C.

TURNER, L.J.—The case seems to have been considered by the V.-C. as falling, to some extent, within *Dobson's Case*; but I do not think that *Dobson's Case* has any application to the present case. In *Dobson's Case* there was a complete contract by Mr. Dobson; he not only signed the agreement to take the shares, but he paid the money for the shares; and the sole question in *Dobson's Case* was, whether he, having signed the agreement as executor, and paid the money as executor, and taken a receipt for it as executor, was entitled, as between himself and the other members of the company, to say it was the estate, and not himself personally, that was liable for the shares. We held that he could not be entitled to have the shares in the character of executor so as to make the estate liable as between him and his partners; but that he could not, as between him and his partners in the concern, stipulate that the estate, and not he individually, should be liable. That was the principle upon which *Dobson's Case* proceeded.—p. 144. CAIRNS, L.J. concurred.

Electric Telegraph Co. of Ireland v. Bunn, 6 Jur. (N.S.) 1175.—ROMILLY, M.R.; *reversed*, (1860) 29 L. J. Ch. 913; 6 Jur. (N.S.) 123; 9 W. R. 423; S. G. *nom.* Electric Telegraph Co. of Ireland, In re, Bunn's Case, 2 De G. F. & J. 275.—KNIGHT BRUCE and TURNER, L.JJ.

North of England Joint Stock Banking Co., In re, Hall's Case (1849) 19 L. J. Ch. 69; 1 Mac. & G. 307; 1 Hall & Tw. 580; 5 Railw. Cas. 624.—GOTTENHAM, L.C.; *reversing* 3 De G. & Sm. 80.—KNIGHT BRUCE, V.-C., distinguished.
Phoenix Life Assurance Co., In re, Hoare's

Case (1862) 31 L. J. Ch. 504; 2 J. & H. 229; 8 Jur. (N.S.) 713; 10 W. R. 381.—WOOD, v.-o.

Hoare's Case, adhered to.

National Finance Co., In re, Oriental Commercial Bank, Ex parte (1888) L. R. 3 Ch. 791; 18 L. T. 895; 16 W. R. 994.—WOOD and SELWYN, L.JJ.

Hall's Case and Hoare's Case, explained and distinguished.

Buchan's Case (1879) 4 App. Cas. 583.—H.L. (SC.) (post, col. 507).

National Finance Co., In re, followed.

James v. May and Eve (1878) 42 L. J. Ch. 802; L. R. 6 H. L. 328.—H.L. (H.). LORDS CHELMSFORD, COLONSAF and CAIRNS.

National Finance Co., In re; James v. May and Eve; Hemming v. Maddick (1872)

L. R. 7 Ch. 395; 26 L. T. 565; 20 W. R. 433.—JAMES and MELLISH, L.JJ.; and Kains v. Paine (1874) unreported.—JESSEL, M.R., observed on.
Heritage v. Paine (1876) 45 L. J. Ch. 295; 2 Ch. D. 594; 34 L. T. 947.—HALL, v.-o. See judgment.

James v. May and Eve, explained.

Hardoon v. Belihos (1900) 70 L. J. P. C. 9; [1901] A. C. 118; 83 L. T. 573; 49 W. R. 209.—P.O. LORD LINDLEY (for the Court) (post, col. 552).

Application.

Adelphi Hotel Co., In re, Best's Case (1865)

34 L. J. Ch. 523; 11 Jur. (N.S.) 498; 12 L. T. 480; 13 W. R. 762.—KNIGHT BRUCE and TURNER, JJ.; reversing 13 W. R. 632.—ROMILLY, M.R., distinguished.
Life Association of England, In re, Thomsons' Case (1865) 34 L. J. Ch. 525; 4 De G. J. & S. 749; 11 Jur. (N.S.) 574; 12 L. T. 690, 717; 13 W. R. 958.—KNIGHT BRUCE and TURNER, L.JJ.; reversing 13 W. R. 852.—ROMILLY, M.R.

Simpson v. Hesston's Steel and Iron Co. (1870)

25 L. T. 510; 19 W. R. 148.—MALINS, v.-o.; reversed, (1871) 26 L. T. 179; 19 W. R. 614.—JAMES and MELLISH, L.JJ.

Joint Stock Discount Co., In re, Sichel's Case (1867) 37 L. J. Ch. 373; L. R. 3 Ch. 119; 17 L. T. 363; 16 W. R. 292.—CAIRNS, L.C.; reversing 36 L. J. Ch. 814.—ROMILLY, M.R., and International Contract Co., In re, G.H. Levita's Case (1870) 39 L. J. Ch. 673; L. R. 5 Ch. 489; 22 L. T. 395; 18 W. R. 476.—GIFFARD, L.J., not applied.

Hercules Insurance Co., In re, Pugh's Case and Sharman's Case (1872) 41 L. J. Ch. 580; L. R. 13 Eq. 566; 26 L. T. 274.—MALINS, v.-o.

Sichel's Case, referred to.

Albion Assurance Society, In re, Winstone's Case (1879) 48 L. J. Ch. 607; 12 Ch. D. 239; 40 L. T. 833; 27 W. R. 752.—FRY, J. (post, col. 590); Trevor v. Whitworth (1887) 57 L. J. Ch. 28; 12 App. Cas. 409.—H.L. (E.) (supra, col. 405).

Sichel's Case, discussed and distinguished.

General Property Investment Co. v. Matheson's Trustees (1885) 16 Court of Sess. Cas. (4th series) 229, applied.

Bellerby v. Rowland and Marwood's Steamship Co. (1902) 71 L. J. Ch. 641; [1902] 2 Ch. 14.—

G.A.; reversing on this point KKEWICH, J., who had applied *Sichel's Case* (see supra, col. 407).

Pugh's Case and Sharman's Case (supra) and Wheel Emily Mining Co., In re, Cox's Case (1863) 33 L. J. Ch. 145; 4 De G. J. & S. 53; 3 N. R. 97; 9 Jur. (N.S.) 1184; 9 L. T. 493; 12 W. R. 92.—KNIGHT BRUCE and TURNER, L.JJ., distinguished.

Britannia Fire Association, In re, Coventry's Case [1891] 1 Ch. 202; 64 L. T. 185; 60 L. J. Ch. 186; 39 W. R. 328.—G.A. LINDLEY, BOWEN, and FRY, L.JJ.; reversing 63 L. T. 480.—KAY, J.

LINDLEY, L.J.—This is not a case of A. agreeing to take shares for B., but of A. committing a fraud, and not taking shares for himself or any one else.—p. 210.

Coventry's Case, distinguished.

Pugh's Case and Sharman's Case, followed.

Central Klondyke Gold Mining and Trading Co., In re, Savigny's Case (1898) 5 Manson 336. WRIGHT, J.—In *Coventry's Case* there were no applications at all for shares, but sham allotments made by the directors to shareholders, and under those circumstances the Court held that the directors could not be fixed with liability as shareholders, though they might be otherwise liable.—p. 338.

Allotment.

North of England Joint Stock Banking Co., In re, Straffon's Executors' Case (1852) 1 De G. M. & G. 576; 16 Jur. 435.—ST. LEONARDS, L.C. (see judgment); affirming 4 De G. & Sm. 256.—KNIGHT BRUCE, v.-o., and Shortridge v. Bosanquet (1852) 22 L. J. Ch. 48; 16 Beav. 84.—M.R., distinguished.

Newcastle-upon-Tyne Marine Insurance Co., In re, Brown, Ex parte (1854) 19 Beav. 97.—ROMILLY, M.R. (and see post, col. 487); Henderson's Case (1854) 19 Beav. 107.—ROMILLY, M.R.

Shortridge v. Bosanquet, applied.

Escott v. Gray (1878) 47 L. J. C. P. 606; 39 L. T. 121.—G.F.

Brown, Ex parte, and Matlock Old Bath Hydropathic Co., In re, Wheatoroff's Case (1873) 42 L. J. Ch. 853; 29 L. T. 824.—BACON, v.-o., disapproved.

Wincham Shipbuilding Boiler and Salt Co., In re, Hallmark's Case (1878) 47 L. J. Ch. 868; 9 Ch. D. 329; 38 L. T. 660; 26 W. R. 824.—BACON, v.-o., affirmed, G.A. JESSEL, M.R., JAMES and BRAMWELL, L.JJ.

Hallmark's Case, approved.

Dovey v. Cory (1901) 70 L. J. Ch. 753; [1901] A. C. 477.—H.L. (E.) (supra, col. 432).

Newry and Enniskillen Ry. v. Edmunds (1848) 17 L. J. Ex. 102; 2 Ex. 119; 5 Railw. Cas. 275.—EX. (and see post, col. 487), distinguished.

Southampton Docks v. Richards (1840) 1 Man. & Gr. 448; 1 Scott (N.R.) 219; 2 Railw. Cas. 215.—C.P.; and London Grand Junction Ry. v. Freeman (1841) 2 Man. & Gr. 606; 2 Scott (N.R.) 705.—Q.B., followed.

Wolverhampton New Waterworks Co. v. Hawksford (1859) 29 L. J. C. P. 121; 7 C. B. (N.S.) 795.—C.P.; affirmed, (1862) 31 L. J. C. P. 184; 11 C. B. (N.S.) 456; 8 Jur.

(N.S.) 844; 5 L. T. 618; 10 W. R. 153.—
EX. CH.

Wolverhampton New Waterworks Co. v. Hawkesford, explained and approved.

Irish Peat Co. v. Phillips (1861) 30 L. J. Q. B. 363; 1 B. & S. 598; 7 Jur. (N.S.) 1189; 4 L. T. 806; 9 W. R. 873.—EX. CH.; *affirming on other grounds* 30 L. J. Q. B. 114; 7 Jur. (N.S.) 413; 4 L. T. 115; 9 W. R. 416.—CROMPTON and HILL, JJ. O'HANNELL, B. (for the Court).—The Court of Q. B. gave judgment for the defendant. The ground on which they proceeded was, that this case was concluded by *Wolverhampton, &c. Co. v. Hawkesford*, and they indicated very considerable doubt of the propriety of that decision. In that doubt we do not concur, as it does not seem to us that the decision was such as supposed by the Court below. What was decided in that case was, that there was no sealed register at the time of the first call, and unless there was, that the defendant was not then a shareholder liable to calls. The remark that the defendant was not the owner of specific shares, is only in furtherance and illustration of the remark that there was no sealed register. We think that case was rightly decided, but that it was no authority, as supposed, for the decision in the Court below. And some of us concur in that part of the doubt there indicated, namely, whether the want of numbering the shares in the register would of itself be a bar to this action.—p. 366.

Wolverhampton, &c. Co. v. Hawkesford and

Irish Peat Co. v. Phillips, distinguished.

East Gloucestershire Ry. v. Bartholomew (1867) 37 L. J. Ex. 17; L. R. 3 Ex. 15; 17 L. T. 256.—EX.

Wolverhampton, &c. Co. v. Hawkesford, followed.

Burke v. Lechmere (1871) 40 L. J. Q. B. 98; L. R. 6 Q. B. 297; 19 W. R. 565.—Q. B.

East Gloucestershire Ry. v. Bartholomew, followed.

McEwen v. West London Wharves and Warehouses Co. (1871) 40 L. J. Ch. 471; L. R. 6 Ch. 655; 25 L. T. 143; 19 W. R. 837.

JAMES, L.J.—Thereupon it appears to me he has done everything, and the company has done everything which was necessary to make him a complete shareholder, subject only, of course, to the question which was decided at law in *East Gloucestershire Ry. v. Bartholomew*, as to the effect of the clause in the Act which at first sight appears to restrain the company from issuing shares at all, unless a fixed proportion is first paid. Probably the question would have been, and may still be, an arguable one at law, but we convoke ourselves for all purposes entirely bound by the decision which has been come to by the Court of law upon that subject.—p. 473.

MELLISH, L.J. to the same effect.

East Gloucestershire Ry. v. Bartholomew, approved.

Newry &c. Ry. v. Edmunds (supra, col. 486).

New Brunswick and Canada Ry. and

Lund Co. v. Muggieridge (1859) 28 L. J. Ex.

193, 365; 4 H. & N. 160, 580; 5 Jur.

(N.S.) 1131; 7 W. R. 495.—EX. CH.;

Burke v. Lechmere; *Brown, Ex parte*

(supra, col. 486); and *Wolverhampton,*

&c. Co. v. Hawkesford, distinguished.

Portal v. Emmens (1876) 46 L. J. C. P. 179;

1 C. P. D. 201, 664; 35 L. T. 882; 25 W. R. 235.
—C.P.D.; *affirmed*, EX. CH.

Wolverhampton, &c. Co. v. Hawkesford, referred to, Stevens v. Chown (1901) 70 L. J. Ch. 571; [1901] 1 Ch. 894; 84 L. T. 796; 49 W. R. 460; 65 J. P. 470.—FARWELL, J.; *Devonport Corporation v. Tozer* (1902) 71 L. J. Ch. 754; [1902] 2 Ch. 182; 86 L. T. 612.—JOYCE, J.; *Att-Gen v. Ashbourne Recreation Co.* (1902) 72 L. J. Ch. 67; [1903] 1 Ch. 101; 87 L. T. 561; 51 W. R. 125.—BUCKLEY, J.

Portal v. Emmens, distinguished.

Kipling v. Todd (1878) 3 C. P. D. 350; 47 L. J. C. P. 617; 39 L. T. 188; 27 W. R. 84.—C.A.

THESIGER, L.J. (for self, BRAMWELL and BAGGALLAX, L.JJ.).—We cannot agree with the argument of Mr. Benjamin that the *ratio decidendi* was limited to the narrow ground of an estoppel founded upon the special circumstances of the case, although the judgment of Cockburn, C.J., and the concluding passages of the judgment of the M.R., lend some colour to the argument; but we read the judgment as deciding that where, by an Act of Parliament, persons' names are incorporated into a company having a share capital, and the same persons are also named as directors, while the holding of a certain number of shares is prescribed as a qualification for the office of directors, these legal consequences follow: First, each incorporator, *ex necessitate rei*, becomes a member of the company, and as such, and apart from the definition of shareholder given in sect. 3 of the Companies Clauses Consolidation Act, 1845, must be considered as holding at least one share in the company; and each person named as a director must be considered as holding the number of shares constituting the prescribed qualification: Secondly, sect. 36 of the last-mentioned Act, under which the *acere facias* in this and similar cases is issued, authorises its issue against any shareholder. Section 8 of the same Act defines "shareholder" as meaning "shareholder, proprietor, or member of the company," and consequently execution may issue against a person who by the special Act is constituted a director, a member of the company, and therefore a shareholder. The decision in *Portal v. Emmens*, though going to the length we have mentioned appears to us to go no farther, and the facts there proved showed that the defendant on the one hand had done nothing for the purpose of getting rid of his position as director, with its consequent obligations, and on the other hand had done nothing towards satisfying the liability of the plaintiff, under which the company by its special Act itself had come. It is a long step from such a case to the present, where years after directors have resigned their offices, and other persons *de facto* acted in their stead, without any claim being made by the company to treat the original directors as shareholders, a creditor of the company whose claim against it only first arose long after their resignations, attempts to treat those original directors as still shareholders; and we are of opinion that such a claim cannot under the circumstances of this case be supported.—p. 356.

Portal v. Emmens, distinguished, Esparto Trading Co., In re (1879) 48 L. J. Ch. 573; 12 Ch. D. 191; 28 W. R. 146.—HALL, V.-C. (see

supra, col. 416); *applied*, South London Fish Market Co., *In re*, (1888) 39 Ch. D. 324; 60 L. T. 68; 37 W. R. 3; 1 Meg. 92.—C.A. COTTON, FRY and LOPES, L.Js.

Kipling v. Todd (*supra*), *followed*.

Mammatt v. Brett (1885) 54 L. T. 165.—DENMAN and MAYHEW, JJ.

Yelland, Ex parte, Port of London Ship-owners' Loan and Assurance Co., In re (1852) 21 L. J. Ch. 852; 16 Jur. 509.—KNIGHT BRUCE and CRANWORTH, L.Js.; *affirming* 5 De G. & Sm. 395.—PARKER, V.-C.; and **Cookney, Ex parte, Electric Telegraph Co. of Ireland, In re** (1858) 28 L. J. Ch. 12; 3 De G. & J. 170; 26 Beav. 6; 5 Jur. (N.S.) 77; 7 W. R. 22.—KNIGHT BRUCE and TURNER, L.Js., *applied* by the M.R.

Carmichael's Case (1850) 17 Sim. 163.—SHADWELL, V.-O., *distinguished*.

Bloxam, Ex parte, New Theatre Co., In re (1864) 33 L. J. Ch. 519, 574; 4 De G. J. & S. 447; 10 L. T. 772; 12 W. R. 995.—TURNER, L.J.; **KNIGHT BRUCE** *hesitating*; *affirming* 33 Beav. 529.—ROMILLY, M.R.

TURNER, L.J.—In that case [*Carmichael's Case*] there had been no definite agreement to take any number of shares, and no undertaking, no deposit was made, and what was said about the allotment had reference to this circumstance.—p. 576.

Bloxam's Case, distinguished.

Llanharly Hematite Iron Ore Co., In re, Tot-hill, Ex parte (1865) 35 L. J. Ch. 120; L. R. 1 Ch. 85; 11 Jur. (N.S.) 1009; 13 L. T. 485; 14 W. R. 153.—TURNER, L.J.; **KNIGHT BRUCE, L.J.** *doubting*. And see *supra*, col. 415.

Bloxam's Case, followed.

Richmond Hill Hotel Co., In re, Elkington's Case (1867) 36 L. J. Ch. 593; L. R. 2 Ch. 511; 16 L. T. 301; 15 W. R. 665.—

TURNER and CAIRNS, L.Js., *distinguished*.

Richmond Hill Hotel Co., In re, Pellatt, Ex parte (1867) 36 L. J. Ch. 613; L. R. 2 Ch. 527; 16 L. T. 442; 15 W. R. 726.

TURNER, L.J.—The case differed essentially from *Elkington's Case*, for in the latter case there was a formal letter of allotment of the shares, and receipt of the certificates of the shares.—p. 615. **CAIRNS, L.J.**—In that case [*Elkington's Case*] there appeared to the Court to have been two agreements, one an unqualified agreement to take the shares, the other a collateral agreement to pay calls by supplying goods. In the present case . . . as for Mr. Hodges' letter of July 14, that letter being from Mr. Hodges in his individual capacity, did not bind the company to allot shares to Mr. Pellatt. Nor, the company not being bound or having agreed to allot shares, did Mr. Pellatt's formal application of July 20, and the registration of him as holder of the shares, make a completed contract between him and them, in default of a reply by the company to his application, and a communication to him of the fact of the allotment of the shares to him. This view was not opposed to the principle of the decision in *Bloxam's Case*.—p. 615.

Pellatt's Case, distinguished.

International Contract Co., In re, Levita's Case (1867) L. R. 3 Ch. 36; 17 L. T. 337; 16 W. R. 95.

ROLT, L.J. said *Abercorn's (Marquis) Case* (*supra*, col. 414) was very different: he had never applied for shares, but they had been allotted to him, and a fictitious loan entered by way of deposit, and there was no proof that he ever acted, or intended to act as a director. . . . Great reliance was placed upon the *dicta* in *Pellatt's Case*, but if read with the context, they were seen not to be of universal application.—p. 38.

Bloxam's Case and Cookney, Ex parte (*supra*), *distinguished*.

Universal Banking Corporation, In re, Gunn, Ex parte (1867) 37 L. J. Ch. 40; L. R. 3 Ch. 40; 17 L. T. 365; 16 W. R. 97.—ROLT, L.J.

Pellatt's Case and Elkington's Case (*supra*), *discussed*.

Paraguassu Steam Tramroad Co., In re, Black, Hawthorn & Co.'s Case (1872) 42 L. J. Ch. 404; L. R. 8 Ch. 254; 28 L. T. 50; 21 W. R. 249.—C.A. (*post*, col. 605).

Peruvian Rys., In re, Wallis's Case (1868) L. R. 4 Ch. 325, n.—WOOD and SELWYN, L.Js., *followed*.

Peruvian Rys., In re, Robinson's Case (1869) L. R. 4 Ch. 322; 20 L. T. 96; 17 W. R. 454.—SELWYN and GIFFARD, L.Js.; *reversing* 19 L. T. 716.—MALINS, V.-O.

United Ports Co., In re, Beck's Case (1874) 43 L. J. Ch. 531; L. R. 9 Ch. 392; 30 L. T. 346; 22 W. R. 460.—JAMES and MELLISH, L.Js., *distinguished*.

Railway Time Tables Publishing Co., In re, Sandy's Case (1889) 58 L. J. Ch. 504; 42 Ch. D. 98; 61 L. T. 94; 37 W. R. 531; 1 Meg. 208.—C.A. (*post*, col. 513); **Hemp Yarn and Cordage Co., In re, Hindley's Case** (1890) 65 L. J. Ch. 591; [1896] 2 Ch. 121; 74 L. T. 627; 44 W. R. 630; 3 Manson 187.—C.A. LINDLEY, LOPES and KAY, L.Js.; *reversing* 65 L. J. Ch. 322.—V. WILLIAMS, J.

Hemp Yarn and Cordage Co., In re, Hindley's Case; Bultfontein Sun Diamond Mines, In re, Hughes and Norman, Ex parte (1897) 75 L. T. 669; 13 Times L. R. 156.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.Js.; and **Bentley & Co. and Yorkshire Breweries, In re, Harrison, Ex parte** (1893) 69 L. T. 204.—C.A. LINDLEY, LOPES and A. L. SMITH, L.Js., *distinguished*.

Consort Deep Level Gold Mines, In re, Stark's and Elliston's Cases (1897) 66 L. J. Ch. 297; [1897] 1 Ch. 575; 76 L. T. 300; 45 W. R. 227, 420.—C.A.; *reversing* 66 L. J. Ch. 122.—NORTH, J. LINDLEY, L.J.—Speaking generally, an underwriter of shares agrees to take so many, not exceeding a certain number, as a company may require, in order to make up the total number, without which business cannot be commenced; and until the company knows how many it wants from the underwriter, I do not see how it can be in a position to accept his offer. Upon this point I concur with the view taken by Kay, J., in *Hindley's Case*. In *Bultfontein Sun Diamond Mines, In re*, the terms were such that notice of acceptance was inferred from the retention of the letter by the person to whom it was addressed, without more. But no such inference can be fairly drawn in this case, as the number of shares for which the letter was accepted

had to be communicated to the underwriter. . . . So far I agree with the view taken by North, J. He, however, decided that Stark was estopped from denying Akerman's authority to apply for shares in his name: and the learned judge came to this conclusion on the authority of the decision of this Court in *Harrison, Ex parte*, which, however, was a very different case from the present. The facts in *Harrison, Ex parte*, may be shortly stated as follows: Harrison (who carried on business under the name of Pearson & Co.) had signed an underwriting letter which had been accepted by the person to whom it was addressed—that is, Lakeman. By that letter Harrison agreed to subscribe or find subscribers for 300 shares (neither more nor less) in a brewery company, and to apply for them on a particular day: and, in the event of his not applying for them on that day he empowered Lakeman to apply for them in his name. So far as appeared by that letter, there was no condition whatever for the exercise of this power, except—first, the non-application by Harrison for 300 shares on the day named: and secondly, the acceptance by Lakeman of the offer made by the letter to him. Harrison had not applied for the shares, and the acceptance of the offer appeared from Lakeman's signed acceptance on the document itself. In another document (of which the company had no knowledge or notice) Harrison had stipulated that the acceptance of his offer by Lakeman should be communicated to him by a particular day. This was not done, nor was Harrison ever in fact informed before shares were allotted to him that Lakeman had accepted his offer. The Court held that Harrison was estopped from denying that Lakeman had authority to apply for 300 shares in his name. That case turned entirely on the private letter. The case was fought and decided with reference to that, and what was said about estoppel was addressed to the controversy there raised. Whether what was said about estoppel would have been applicable if there had been no private letter it is unnecessary to consider. The point can be reconsidered when it arises, and *Duff's Diamond Mines, In re*, can be considered with it.—p. 300.

A. L. SMITH and RIGBY, L.J. to the same effect.

Consort Deep Level Mines, In re, Stark's Case (*supra*), *applied*.

Gutta Percha Corporation, In re (1899) 15 Times L. R. 183.—BYRNE, J.

Payment—Cash.

London, Hamburg and Continental Exchange Bank, In re, Evans's Case (1867) 36 L. J. Ch. 501; L. R. 2 Ch. 427, 16 L. T. 253; 15 W. R. 513.—L.J. (and see *supra*, col. 405); **South Blackpool Hotel Co., In re, Migotti, Ex parte** (1867) 36 L. J. Ch. 531; L. R. 4 Eq. 238; 16 L. T. 271; 15 W. R. 731.—ROMILLY, M.R.; **South France Wine Growing Districts Co., In re, De Beville, Ex parte** (1868) 38 L. J. Ch. 18; L. R. 7 Eq. 11; 17 W. R. 19.—ROMILLY, M.R.; and **Heyford Co., In re, Pell's Case** (1869) 38 L. J. Ch. 564; L. R. 8 Eq. 222; 17 W. R. 1054.—ROMILLY, M.R.; *reversed on the facts*, 39 L. J. Ch.

120; L. R. 5 Ch. 11; 21 L. T. 320, 412; 18 W. R. 31.—GIFFARD, L.J., *applied*. **China Steamship and Labuan Coal Co., In re, Drummond's Case** (1869) L. R. 4 Ch. 772; 21 L. T. 317; 18 W. R. 2.—GIFFARD, L.J.

Migotti's Case, followed.

Evans's Case; Drummond's Case, and Pell's Case, explained.

Heyford Ironworks Co., In re, Forbes' and Judd's Case (1870) L. R. 5 Ch. 270; 39 L. J. Ch. 422; 22 L. T. 187; 18 W. R. 302.

GIFFARD, L.J.—This case is plain and simple, and is a mere repetition of *Migotti's Case*, which proceeds on the ground that if a man signs the memorandum of association he is bound to take shares from the company, and does not satisfy that obligation by taking them from someone else. It was said in the Court below that *Drummond's Case* and *Pell's Case* are not reconcilable with *Evans's Case*, but this is not so. *Drummond's Case* arose under an agreement for amalgamation, under which shareholders in each company were to take shares in the new company in lieu of their shares in the old. Drummond, who engaged to take shares in the new company, and pay for them, fulfilled his obligation by taking them and giving up his old shares. There was a direct dealing between Drummond and the new company, and the new company received a benefit from him, which satisfied his obligation to them. So in *Pell's Case*, there was a direct agreement between Pell and the company, by which his agreement to take and pay for shares was satisfied, the company receiving property from him instead of money.—p. 273.

HATHENLEY, L.C. to the same effect.

Forbes' and Judd's Case, applied.

Baglan Hall Collieries Co., In re (1879) 39 L. J. Ch. 591; L. R. 5 Ch. 346; 23 L. T. 60; 18 W. R. 49.—GIFFARD, L.J.

Pell's Case, followed.

Bosworthen and Penzance Mining Co., In re, Jones's Case (1870) 40 L. J. Ch. 133; L. R. 6 Ch. 48.—JAMES and MELLISH, L.JJ.

Pell's Case, observed on.

Anglo-Moravian Hungarian Junction Ry., In re, Dent's Case (1873) L. R. 15 Eq. 407; 22 W. R. 45.—JAMES, L.J. (for WICKENS, V.-C.); *affirmed*, 42 L. J. Ch. 474, 857; L. R. 8 Ch. 768; 28 L. T. 264, 888.—SELBORNE, L.C.

Drummond's Case; Pell's Case; Baglan Hall Collieries Co., In re, and Jones's Case, observed on.

Pen'allt Silver Lead Mining Co., In re, Fothergill's Case (1873) 42 L. J. Ch. 481; L. R. 8 Ch. 270; 27 L. T. 124; 21 W. R. 301.—SELBORNE, L.C. JAMES and MELLISH, L.JJ. See judgments at length; and see *post*, col. 496.

Fothergill's Case and Harmony and Montagu

Tin and Copper Mining Co., In re, Spargo's Case (1873) 42 L. J. Ch. 488; L. R. 8 Ch. 407; 28 L. T. 153; 21 W. R. 306.—JAMES and MELLISH, L.JJ.; *observations of MELLISH, L.J., commented on. And see post*, col. 496.

Pen'allt Silver Lead Mining Co., In re, Fraser's Case (1873) 42 L. J. Ch. 358; 28 L. T. 158; 21 W. R. 642.

ROMILLY, M.R.—I cannot help feeling regret at the definition of Melish, L.J. on the subject

as to whether it would be a good plea of payment at law to satisfy the statute. I regret that we should have to discuss what would answer the terms of a good plea of payment at law, because according to the former decisions of this Court there must be what we consider a good payment in equity, and there has been no payment in cash in equity. According to *Mellish, L.J.*, also, this statute has not made the case any different to what it was before. His remarks in giving judgment in *Fothergill's Case*, judging from the report which I am referring to [21 W. R. 301], leave it where it was before.—p. 360.

Dent's Case (supra); Fothergill's Case; Mercantile Trading Co., In re, Schroeder's Case (1871) 40 L. J. Ch. 180; L. R. 11 Eq. 181; 23 L. T. 456; 19 W. R. 93.—*MALINS, V.-C.*; *Spargo's Case, and Baglan Hall Collieries Co., In re (supra), considered.* *Linchouse Works Co., In re, Coates' Case* (1873) 43 L. J. Ch. 538; L. R. 17 Eq. 169; 29 L. T. 636; 22 W. R. 228.—*MALINS, V.-C.*

Coates' Case, followed. *Baglan Hall Collieries Co., In re, commented on.* *Tavarone Mining Co., In re, Pritchard's Case* (1873) 42 L. J. Ch. 768; L. R. 8 Ch. 956; 29 L. T. 363; 21 W. R. 829.—*JAMES AND MELLISH, L.J.*, *distinguished.* *Appletreewick Lead Mining Co., In re* (1874) 43 L. J. Ch. 798; L. R. 18 Eq. 95.—*MALINS, V.-C.*

Dent's Case, approved. *Welton v. Saffery* (1897) 66 L. J. Ch. 362; [1897] A. C. 299; 76 L. T. 505; 45 W. R. 508; 4 *Manson* 269.—*H.L. (R.) (post, col. 515).*

Baglan Hall Collieries Co., In re, and Fothergill's Case, discussed. *Appletreewick Lead Mining Co., In re, distinguished.* *Malaga Lead Mining Co., In re, Firmstone's Case* (1875) 44 L. J. Ch. 617; L. R. 20 Eq. 524; 23 W. R. 867.—*JESSEL, M.R., followed.* *Caribbean Co., In re, Crickmer's Case* (1875) 44 L. J. Ch. 595.—*MALINS, V.-C.*; *affirmed*, (1875) 46 L. J. Ch. 870; L. R. 10 Ch. 614; 24 W. R. 219.—*JAMES AND MELLISH, L.J.*

Baglan Hall Collieries Co., In re, followed. *Leinster Contract Corporation, In re* [1902] 1 Ir. R. 349.—*PORTER, M.R.*

Crickmer's Case, distinguished. *Wedgwood Coal and Iron Co., In re, Anderson's Case* (1877) 7 Ch. D. 75; 47 L. J. Ch. 273; 37 L. T. 560; 26 W. R. 442.—*C.A.*; *reversing* 34 L. T. 943.—*MALINS, V.-C.*

JESSEL, M.R.—A suggestion was made which was not one of the grounds of the *V.-C.*'s judgment, that you cannot have a contract under this section with a director or promoter, and observations were made with reference to dicta of the late learned *Mellish, L.J.* in *Crickmer's Case*, where he said that the contract must be with some person external to the company. As I understand him, what he meant was this. The case before him referred to the mere registration of the articles of association, that is, the articles constituting the company, and it was decided that it was not a sufficient contract. What he meant by "external" was not being a part of

the original constitution of the company, but a contract made by the company as a corporation and somebody else. But that somebody else might be a director or promoter. He did not say he must be a person unconnected with the company, but that the person must be external to the company, that is, a person external in the sense I have mentioned as not being one of the members of the company, merely co-operating in the formation of the company. That appears to me to be the only fair interpretation that can be put upon his words, which is in my opinion consonant with the law of the case.—p. 104.

BAGGALLAY AND THESIGER, L.J. to the same effect.

And see post, col. 500.

Universal Provident Association, In re, Daniell's Case (1857) 26 L. J. Ch. 563; 1 De G. & J. 372; 5 W. R. 877; 3 Jur. (N.S.) 803.—*TURNER, L.J.*; *KNIGHT BRUCE, L.J. doubting, distinguished.*

Western of Canada Oil Lands and Works Co., In re, Carling's Case (1876) 45 L. J. Ch. 5; 1 Ch. D. 115; 33 L. T. 645; 24 W. R. 165.—*C.A.* *JAMES AND MELLISH, L.J.*, *BRAMWELL, B.* and *BRETT, J.*; *reversing* L. R. 20 Eq. 580.—*JESSEL, M.R.* *And see post, col. 500.*

MELLISH, L.J.—Now the argument has been based upon *Daniell's Case*. It is said, "There are two steps in the breach of trust you have committed—the one the allotting of the shares, which makes you a shareholder and a member; and, secondly, the paying them up; and that they are entitled to adopt so much of the transaction as relates to allotting the shares and making you a shareholder, while we repudiate that portion of the transaction which represents the shares as being paid up." *Daniell's Case* is relied on as an authority for this view. Now, in my opinion, there is a material distinction between *Daniell's Case* and the present case. In *Daniell's Case* there was no contract between any third person and the company, entitling that third person to paid-up shares at all. The only contracts which took place were between the directors and the particular director to whom the shares were allotted. It was a case in fact, where the directors made presents of the shares of the company to each other; and in that state of things it was held, and it is not necessary to say whether it was held correctly or not, that *quoad* the allotment the thing may be ratified. *Turner, L.J.* said that was a breach of trust, too, although I confess I should have rather thought the more correct way of putting it would be that *quoad* the allotment of shares to the directors, it was perfectly valid, but *quoad* entering them as paid up, it was a breach of trust, and therefore that which was a breach of trust could be done away with, whereas that which was not a breach of trust must remain.—p. 9.

JAMES, L.J. to the same effect.

Spargo's Case (supra); Carling's Case, and British Provident Life and Guarantee Association, In re, De Ruignere's Case (1876) 46 L. J. Ch. 360; 5 Ch. D. 306; 36 L. T. 329; 25 W. R. 476.—*C.A.* *JAMES, L.J.*, *BRETT AND AMPHLETT, JJ.A.*, *distinguished.*

Church and Empire Fire Insurance Co., In re, Pagin and Gill's Case (1877) 46 L. J. Ch. 779; 6 Ch. D. 681; 37 L. T. 89; 25 W. R. 905.—*HALL, V.-C.*

Spargo's Case (col. 492), *distinguished*.
Church and Empire Fire Insurance Fund, In re, *Andrews' Case* (1878) 8 Ch. D. 126; 47 L. J. Ch. 679; 38 L. T. 266; 26 W. R. 797.—C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.J. *FRISIGER, L.J.*—The facts here are very similar to those in *Spargo's Case*, but they just fall short of what is necessary to make the principle of that case apply. In that case there was a liability on the part of the company to pay in cash, so that a plea of payment by the shareholders could be supported, since such a plea can be supported either by payment in cash or by an agreement to set off a cross demand payable in cash.—p. 128.

Fothergill's Case (col. 492), *followed*.
Spargo's Case, distinguished.
Government Security Fire Insurance Co., In re, *White's Case* (1879) 48 L. J. Ch. 820; 12 Ch. D. 511; 41 L. T. 838; 27 W. R. 895.—C.A. JAMES, BRETT and COTTON, L.J.J.; *reversing* 10 Ch. D. 720.—HALL, V.-C. *And see post*.

Paraguassu Steam Tramroad Co., In re, Ferrao's Case (1874) 43 L. J. Ch. 482; L. R. 9 Ch. 355; 30 L. T. 211; 29 W. R. 836.—JAMES and MELLISH, L.J.J., *applied*.
Regent United Service Stores, In re, *Bentley, Ex parte* (1879) 49 L. J. Ch. 240; 41 L. T. 500; 28 W. R. 165.—FRY, J.

Spargo's Case and Ferrao's Case, followed.
Barrow-in-Furness and Northern Counties Land and Investment Co., In re (1890) 14 Ch. D. 400; 42 L. T. 888.—C.A. JAMES, BRETT and COTTON, L.J.J.

Carling's Case (*supra*), *distinguished*.
Newport and South Wales Shipowners' Co., In re, *Rowland's Case* (1880) 42 L. T. 785.—C.A. JESSEL, M.R., BAGGALLAY and BRAMWELL, L.J.J.; *followed*.
Dominion of Canada Plumbago Co., In re, *Kirby's Case* (1882) 46 L. T. 682.—FRY, J.; *distinguished*.
Ry. Time Tables Publishing Co., In re (1889) 58 L. J. Ch. 504; 42 Ch. D. 98 (*post*, col. 518).

Ferrao's Case, distinguished.
Land Development Association, In re, *Kent's Case* (1888) 39 Ch. D. 259; 57 L. J. Ch. 977; 59 L. T. 449; 36 W. R. 818; 1 Meg. 69.—C.A.; *affirming* 37 Ch. D. 508.—KAY, J.
FRY, L.J.—The effect of the decisions of this Court in *Fothergill's Case* (*supra*, col. 492), *Spargo's Case*, and *White's Case* (*supra*) has been to strike out of the statute [Companies Act, 1867, s. 25] for the purpose of every Court bound by those decisions those words "in cash"; and as this Court is so bound, we are not at liberty to have recourse to these words.—p. 268.

LOPES, L.J.—The authorities have clearly determined . . . that by a payment in cash, according to the words used in this section, is meant any such transaction as would in an action at law for calls on the shares support a plea of payment. . . . It appears to me it [the transaction in the present case] was an agreement between Mr. Kent and the directors that a certain debt due to him from the company, but not payable *in present*, should be applied to his liability, not then existing, but which might arise at some future time. Now, is this a payment, or, in other words, would it support a plea of payment in cash for calls? It is to be

observed no entry was made in the books, and there is no writing off of the amount. I am clearly of opinion it would not. It has been said that this case is like *Ferrao's Case*, and Mr. Kent relies on *Ferrao's Case*. I cannot see that *Ferrao's Case* assists him. On the contrary, I think it is against him; because if that case is looked at it would appear that the principle of it was this. It was not held in that case that the contract or the judge's order was a sufficient payment, but it was held that the actual writing off the amount in the books of the company was equivalent to payment.—p. 271.

COTTON, L.J. also discussed the cases.

Ferrao's Case and Spargo's Case, applied.
Matlock Old Bath Hydropic Co., In re, Maynard's Case (1873) 43 L. J. Ch. 116; L. R. 9 Ch. 60; 29 L. T. 630; 22 W. R. 119.—C.A. SELBORN, L.C. MELLISH and JAMES, L.J.J.; *reversing* 29 L. T. 48; 21 W. R. 882.—BAGGALLAY, V.-C.; and *Kent's Case, distinguished*.

Jones, Lloyd & Co., In re, *Jones' Case* (1889) 58 L. J. Ch. 582; 41 Ch. D. 159; 61 L. T. 219; 37 W. R. 615; 1 Meg. 161.

NORTH, J.—I need not refer in detail to *Kent's Case*, because there the Court held that there was not a present agreement, but merely a contract as to something which was to be done *in futuro*. There being nothing immediately due either from the company in respect of their debt, or from the shareholder in respect of calls upon the shares, there was nothing as to which there could be a payment in cash. In my opinion, there was in the case now before me a present agreement that a sum immediately payable by the company to T. F. Hampton should be applied in paying up in full the shares of the respondents, and that, in my opinion, is equivalent to payment of the shares in cash.—p. 585.

Spargo's Case, commented on.
Johannesburg Hotel Co., In re, *Zoutpansberg Prospecting Co., Ex parte* (1890) 60 L. J. Ch. 391; [1891] 1 Ch. 119; 64 L. T. 61; 39 W. R. 260; 2 Meg. 409.—C.A. HALSBURY, L.C., BOWEN and FRY, L.J.J.

Spargo's Case and Kent's Case, referred to.
Washington Diamond Mining Co., In re (1893) 62 L. J. Ch. 895; [1893] 3 Ch. 95; 2 R. 523; 69 L. T. 27; 41 W. R. 681.—C.A. LINDLEY and KAY, L.J.J.

Spargo's Case, approved and followed.
Laroque v. Beauchemin (1897) 66 L. J. P. C. 59; [1897] A. C. 358; 76 L. T. 473; 45 W. R. 639; 4 Manson 263.—P.C. LORDS HERSHELL, WATSON, MACNAGHTEN, MORRIS and SHAND.

Johannesburg Hotel Co., In re, Zoutpansberg Prospecting Co., Ex parte, Spargo's Case, Ferrao's Case (*supra*, col. 495); and *Laroque v. Beauchemin, approved*.

North Sydney Investment Co. v. *Higgins* (1899) 68 L. J. P. C. 42; [1899] A. C. 263; 80 L. T. 303; 47 W. R. 481; 5 Manson 121.—P.C. LORDS MORRIS and DAVEY and SIR R. COUCH.

Fothergill's Case (*supra*, col. 492), *followed*.
Jarvis & Co., In re (1898) 68 L. J. Ch. 145; [1899] 1 Ch. 193; 79 L. T. 727; 47 W. R. 186; 6 Manson 116.—ROMER, J.

Jarvis & Co., In re, distinguished.

Whitehead Bros., In re (1900) 69 L. J. Ch. 607; [1900] 1 Ch. 804; 82 L. T. 670; 48 W. R. 585.

COZENS-HARDY, J.—I think that this case is quite distinguishable from *Jarvis & Co., In re*. There can be no difficulty about identifying these shares with those in the memorandum.—p. 608.

Whitehead Bros., In re, not followed.**Jarvis & Co., In re, followed.**

Dawday, Ltd., In re (1900) 83 L. T. 47; 48 W. R. 600.—KEKEWICH, J.

Jarvis & Co., In re, and Dawday (Archibald D.), Ltd., In re (1900) 35 L. J. N. C. 412; W. N. (1900) 152.—ROMER, J., followed.

Whitehead Bros., In re, distinguished.

Timmins (Ebenezer) & Sons, In re (1901) 71 L. J. Ch. 121; [1902] 1 Ch. 238; 9 Manson 47, 196.—BUCKLEY, J.

Registered Contract.**Imperial Rubber Co., In re, Bush's Case**

(1874) 43 L. J. Ch. 772; L. R. 9 Ch. 554; 30 L. T. 458; 22 W. R. 699.—JAMES and MELLISH, L.J., explained.

Heaton's Steel and Iron Co., In re, Blyth's Case (1876) 4 Ch. D. 140; 36 L. T. 124; 25 W. R. 200.—C.A. JAMES, L.J., BAGGALLAY and BRETT, J.J.A.

JAMES, L.J.—I think it desirable to say, as the appellant appears to have been misled by the marginal note to *Bush's Case*, that the notion that shares are only issued when the certificates are issued is a blunder which could hardly be attributed to us.—p. 142.

Blyth's Case, distinguished.

British Farmers' Pure Linseed Cake Co., In re (1878) 47 L. J. Ch. 415; 7 Ch. D. 533.—C.A. (post, col. 520).

Blyth's Case, distinguished.

Barangah Oil Refining Co., In re, Arnot's Case (1887) 57 L. J. Ch. 195; 36 Ch. D. 702; 57 L. T. 353.—C.A. OOTTON, BOWEN and FRY, L.J.

OOTTON, L.J.—It is true that James, L.J. in *Blyth's Case*, did say that as between the company and the allottee (from whom Blyth purchased) the shares were at the time fully paid up shares within the meaning of the articles; but, as the contract was not registered, Blyth was liable as the holder of unpaid shares. I am not certain that he did not refer to the particular constitution of that company, the articles of association of which provided that "all shares allotted or issued as the consideration for the purchase of any property were to be considered as fully paid up," and the contract there was to grant and to take simply those shares. It may be said here that the contract was for particular shares, and that it provided, though ineffectually, that they should be shares fully paid up. In *Blyth's Case* the contracting party who contemplated taking the shares had taken them, and allowed them to be put in his name upon the register; and when upon the register with his knowledge, he had dealt with them by transferring them to Mr. Blyth, who was placed on the list of contributors, and who contended that he was under no liability in respect of the shares. In my opinion

that has no bearing upon what has to be decided in the present case. I only refer to it because reference has been made to the observation of James, L.J., the effect of which I have stated.—p. 198.

Arnot's Case, distinguished.

Ry. Time Tables Publishing Co., In re (1889) 58 L. J. Ch. 504; 42 Ch. D. 98 (post, col. 513).

Arnot's Case, followed.

Gunn v. Muirhead (1899) 1 Fraser 1079.—LORD KINNAR (for the Court).

Government Security Fire Insurance Co.,

In re, Mudford's Claim (1880) 49 L. J. Ch. 452; 14 Ch. D. 634; 42 L. T. 825; 28 W. R. 670.—HALL, V.-C., followed.

Government Security Investment Co. v. Dempsey (1880) 50 L. J. Q. B. 199.—DENMAN and LINDLEY, J.J.

Mudford's Claim, followed.

Great Australian Gold Mining Co., In re, Appleyard, Ex parte (1881) 50 L. J. Ch. 554; 18 Ch. D. 587; 45 L. T. 552; 30 W. R. 147.—HALL, V.-C.

Mudford's Claim and Appleyard, Ex parte, questioned.

Addlestone Linoleum Co., In re (1887) 57 L. J. Ch. 249; 37 Ch. D. 191; 58 L. T. 428; 36 W. R. 57, 227.—C.A. COTTON, LINDLEY and LOPES, L.J.

LINDLEY, L.J.—I cannot agree with *Dure Hail Rolling Mills Co., In re* (post, col. 513), and *Plunkington Tube Co., In re* (post, col. 513), where it was held that shares in limited companies could be issued at a discount. . . . The principle on which *Houldsworth v. City of Glasgow Bank* (post, col. 509), was decided by the H. L. was, that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money: he must not, directly or indirectly, receive back any part of it; and this appears to me to govern the present case. I think that the cases before Hall, V.-C.—*Mudford's Claim* and *Appleyard, Ex parte*—cannot be relied on. In each of those cases there were old debts in payment of which the shares had been given, and this might support the decisions that there was a right to prove; but, in my opinion, the orders were wrong in form. Liberty might perhaps have been given to prove for the old debts, but liberty could not, I think, be properly given to prove for the calls.—p. 254.

LOPES, L.J.—I will assume that the contract here was to issue fully paid-up shares, though I doubt it. Then *Houldsworth v. City of Glasgow Bank* decides that a shareholder cannot claim damages against the company of which he is a member for misrepresentations by which he was induced to take his shares. The proper remedy is rescission of the contract. Here rescission has become impossible, and the shareholder has no remedy at all against the company. It is urged that this case may be distinguished from *Houldsworth v. City of Glasgow Bank*, because there damages were claimed for misrepresentations, here for breach of contract; but that does not appear to me to be a substantial distinction.

Our decisions may be inconsistent with *Mudford's Claim* and *Appleyard, Ex parte*, but I do not think these cases are to be relied on.—*ib.*

Addlestone Linoleum Co., In re (*supra*), *applied*, New Chile Gold Mining Co. In re (1888) 57 L. J. Ch. 1042; 38 Ch. D. 475; 59 L. T. 506; 36 W. R. 909.—*NORTH, J.*; *disallowed*, *Wragg (E. J.), Ltd.*, In re (1897) 66 L. J. Ch. 419; [1897] 1 Ch. 796.—*C.A. (post, col. 500).*

Poole Fire Brick and Blue Clay Co., In re, Hartley's Case (1875) 44 L. J. Ch. 95, 240; L. R. 10 Ch. 157; 32 L. T. 106; 23 W. R. 203.—*C.A. CAIRNS, L.C. and MELLISH, L.J.*; *affirming* L. R. 18 Eq. 542.—*JESSEL, M.R., distinguished. See post, col. 500.*

Smith v. Brown (1896) 65 L. J. P. C. 89; [1896] A. C. 614; 75 L. T. 213; 45 W. R. 132.—*P.C.*

LORD HOBHOUSE (for self, *HALSBURY, L.C., LORDS HERSHELL, WATSON, MACAGHTEN, MORRIS and DAVEY and SIR R. COUCH*).—Their lordships have been furnished with a copy of the agreement in *Hartley's Case*. It was made between a Mr. Boden of the one part, and a Mr. Field of the other part. Field is described as the agent of a company then being formed, and of the promoters thereof. Boden agrees to sell and Field to purchase certain property at the price of £6,000, to be paid as to £800, by an equivalent amount of fully paid-up shares in the intended company, and as to £1,200, in cash after the registration of the company. If the company should fail within thirty days of registration to adopt the agreement the vendor was to be at liberty to annul the sale. After the formation of the company, but before the registration of the agreement under the Act of 1867, 200 of the vendor's paid-up shares were issued to his assignee or nominee Hartley. After the issue, registration of the agreement, which had been previously overlooked, was effected. Then the 200 issued shares were cancelled, and 240 new ones allotted to Hartley. Those proceedings gave rise to two questions: first, the official liquidator put Hartley on the list in respect of the 200 cancelled shares; and the question was whether the cancellation was valid. The Court held that it was; pointing out that 200 paid-up shares were part of the purchase-money, and that if they were not granted the vendor would to that extent be still unpaid. Owing to inadvertence, the 200 shares first issued were liable to calls, and in rectifying that mistake the company were only doing without suit what the Court would have ordered them to do. Their lordships notice these facts because in the report of the case in L. R. 18 Eq. 542, and L. R. 10 Ch. 157 the statement of the case is confined to the cancelled shares, and except for one passage in Lord Cairns's judgment, there is nothing to show that the sufficiency of the agreement was in controversy. But from other reports (44 L. J. Ch. 240; 32 L. T. 106; and 23 W. R. 203), it is clear that the official liquidator put Hartley on the list in respect of the 240 new shares as well as the 200 cancelled ones, and that the sufficiency of the agreement came into question with respect to those shares, and was upheld in both Courts, and that Mellish, L.J. expressed his concurrence with Lord Cairns. . . . The only document purporting to be an agree-

ment which has been registered in the present case, and the only document therefore which it is necessary to consider, is that of July 30th, 1888. The Courts below regard it as a contract sufficient to comply with the exigencies of sect. 57 of the Companies Act of 1874 [New South Wales]. In the opinion of their lordships that document is not a contract in any proper sense of the word. It is nothing more than a resolution by certain persons interested in a mining property setting forth the manner in which they proposed to put the property before the public. It does not create, nor was it intended to create any legal rights, duties, or obligations as between the persons expressed to be parties to it. It was a contract in form only. The persons interested in the property and the shareholders in the company to be registered were just the same persons over again in a different guise; they had, as stated above, already distributed the whole of the share capital among themselves. In *Hartley's Case* there was a genuine sale, and a genuine purchase, and a genuine bargain to pay the price by paid-up shares issued to the vendor, who could enforce the bargain under peril of annulling the sale.—p. 98.

Smith v. Brown, distinguished and explained

London Health. Electrical Institute, In re (1897) 75 L. T. 658; 3 Manson 338.—*V. WILLIAMS; affirmed.* 76 L. T. 98; 45 W. R. 566.—*C.A. (post, col. 561).*

Smith v. Brown, distinguished.

Pell's Case (*supra*, col. 491), **Anderson's Case** (*supra*, col. 493), and **Theatrical Trust, In re, Chapman's Case** (1895) 64 L. J. Ch. 488; [1895] 1 Ch. 771; 13 R. 462; 72 L. T. 461; 43 W. R. 553; 2 Manson 304.—*V. WILLIAMS, J., approved.*

Wragg (E. J.), Ltd., In re (1897) 66 L. J. Ch. 419; [1897] 1 Ch. 796; 76 L. T. 397; 45 W. R. 557; 4 Manson 179.—*C.A. LINDLEY, A. L. SMITH and RIGBY, L.JS.* See the judgments, where all the cases are discussed.

May's Metal Separating Syndicate, In re, Smithson's Case (1898) 68 L. J. Ch. 46; 79 L. T. 663; 5 Manson 342.—*WRIGHT, J., followed.*

Northern Creosoting and Sleeper Co., In re (1898) 79 L. T. 407; 5 Manson 347.—*BYRNE, J.*

Carling's Case (*supra*, col. 494); **Hartley's Case** (*supra*, col. 499); **Kirby's Case** (*supra*, col. 495), and **New Eberhardt Co., In re, Menzies, Ex parte** (1889) 59 L. J. Ch. 73; 43 Ch. D. 118; 62 L. T. 301; 38 W. R. 97; 1 Meg. 441.—*C.A. COTTON, BOWEN and FRY, L.JS., followed.*

Common Petroleum Engine Co., In re, Elsner and McArthur's Case (1895) 65 L. J. Ch. 76; [1895] 2 Ch. 759; 13 R. 840; 73 L. T. 338; 44 W. R. 361; 2 Manson 598.—*ROMER, J.*

Common Petroleum Engine Co., In re, Elsner and McArthur's Case, adapted.

Coolgardie Consolidated Gold Mines, In re (1898) 14 Times L. R. 277.—*WRIGHT, J.*; and **Jackson & Co., In re** (1898) 68 L. J. Ch. 190; [1899] 1 Ch. 348; 79 L. T. 682; 6 Manson 125.—*KEKEWICH, J., distinguished.*

Transvaal Exploring Co. v. Albion (Transvaal)

Gold Mines (1899) 68 L. J. Ch. 670; [1899] 2 Ch. 370; 48 W. R. 108; 7 Manson 51.

BYRNES, J.—In the case that I have before me the company is bound to issue shares, if at all, as fully paid up—that is to say, the contract if acted upon binds the company to issue fully paid-up shares, and does not confer a power upon or reserve a power to the company to pay otherwise than by means of fully paid-up shares. On the other hand I have been referred to *Coolgarvie, &c. Mines, In re*, before Wright, J. There the contract provided that the directors of the purchasing company might discharge it either wholly in cash or partly in cash and partly in fully paid-up shares, so that it appears that there was no final determination that the shares to be given as the purchase price were to be otherwise than in cash. So also in *Jackson & Co., In re*, the determination was left to the directors whether they should pay wholly or partly in cash, shares, or debentures.—p. 672.

Karakshoma Exploring and Prospecting Syndicate, In re, Pyke and Gibson's Case (1897) 66 L. J. Ch. 675; [1897] 2 Ch. 451; 77 L. T. 82; 26 W. R. 37; 4 Manson 249.—**C.A. LINDLEY, LOPES and CHITTY, L.J.** *discussed*.

New Eberhardt Co. In re (*supra*), *followed*.

Maynards, Ltd., In re (1898) 67 L. J. Ch. 186; [1898] 1 Ch. 515; 78 L. T. 150; 46 W. R. 346.—**KEKEWICH, J.**

Maynards, Ltd., In re, overruled.

Karakshoma, &c. Syndicate, In re, distinguished.

Frost & Co., Ltd., In re (1899) 68 L. J. Ch. 544; [1899] 2 Ch. 207; 80 L. T. 849; 48 W. R. 39.—**C.A. : affirming** (1899) 67 L. J. Ch. 691; [1898] 2 Ch. 556; 79 L. T. 269; 47 W. R. 27.—**ROMER, J.**

A. L. SMITH, L.J.—That case [*Karakshoma, &c. Syndicate, In re*] turned upon an agreement which did not, in my opinion show any consideration at all, because it merely referred to an earlier agreement in this way—"for the considerations therein mentioned." It has been said that to constitute a contract in writing within sect. 25 of the Companies Act, 1867, the consideration must be shown. I agree, but in the cited case the contract did not show any consideration at all. . . . The judgments in the decided cases appear to me to go this length—that the particularity in the statement of the consideration need only show the nature and not the details of the consideration. I wish to point out that where on the face of the agreement which is filed the nature of the consideration is stated, that is all that sect. 25 requires. I therefore agree with the decision of Romer, J. in this case, and not with that of Kekewich, J. in *Maynards, Ltd., In re*, a case in which the point now raised was not fully argued.—p. 547.

RIGBY and V. WILLIAMS, L.J. to the same effect.

Frost & Co., Ltd., In re, distinguished.

Watson & Co., In re (1899) 68 L. J. Ch. 660; [1899] 2 Ch. 509; 81 L. T. 85; 48 W. R. 40; 7 Manson 97.

KEKEWICH, J. (after discussing *Karakshoma, &c. Syndicate, In re*, and *Frost & Co., Ltd., In re*) concluded: "Now, the purchaser here does not see the 'nature of the consideration;' it is only stated to be the sale and purchase of

property. It may be copyhold, freehold, or leasehold, or anything that fairly comes within the meaning of property. I do not understand the L.J. to say in *Frost & Co., Ltd., In re*, that there need be no statement of the nature of the consideration; and, as I have pointed out, it is distinctly stated by V. Williams, L.J., and concurred in by the other L.J.J., that the reference to another contract will not suffice. To my mind, this case does not come within the decision of the C. A. in *Frost & Co., Ltd., In re*, and a sufficient contract has not been filed.—p. 662.

Karakshoma, &c. Syndicate, In re (*supra*), *explained*

African Gold Concessions and Development Co., In re, Markham and Dart's Case (1899) 68 L. J. Ch. 724; [1899] 2 Ch. 480; 81 L. T. 145.—**C.A. : affirming** 68 L. J. Ch. 215; [1899] 1 Ch. 414; 80 L. T. 282; 47 W. R. 509; 6 Manson 84.—**WRIGHT, J.** *See post*, col. 521.

SIR F. JEUNE.—It seems to be perfectly clear that the object of that section [sect. 25] is that it should be shown and made public what shares are not to be taken as liable to be paid for in full in cash. That has to be shown by a contract, and a contract determining it otherwise—determining, that is to say, that something else is to be given or has been given for them. It is necessary, inasmuch as it is provided that there should be a contract, that it should be shown what the consideration is; that is substantially what was held in *Karakshoma, &c. Syndicate, In re*; it is not necessary that it should be shown in detail, because, although some part of the argument addressed to us appears to be based on this ground, it is not the object of that section to determine whether the company made a good bargain or not.—p. 726. *See now Companies Act, 1898* (61 & 62 Vict. c. 26).

Rescission of Contract.

Universal Provident Life Association, In re.

Bell's Case (1856) 26 L. J. Ch. 137; 22 Beav. 35; 2 Jur. (N.S.) 844.—**ROMILLY, M.R.**; and **Holt's Case** (1856) 22 Beav. 48.—**ROMILLY, M.R., approved**

North of England Joint-Stock Banking Co., In re, Dodgson's Case (1849) 3 De G. & Sm. 85; 14 Jur. 386.—**KNIGHT BRUCE, V.-C., discussed.**

Royal British Bank, In re, Brockwell's Case (1857) 26 L. J. Ch. 855; 4 Drew. 205; 3 Jur. (N.S.) 879; 5 W. R. 858.—**KINDERSLEY, V.-C.**

Brockwell's Case, overruled.

Royal British Bank, In re, Mixer's Case (1859) 4 De G. & J. 575; 1 L. T. 19; 7 W. R. 677.—**CAMPBELL, L.C., KNIGHT BRUCE and TURNER, L.J.**

CAMPBELL, L.C.—Has not the authority of that case been much shaken?—p. 683.

[In the headnote it is stated that this decision overrules *Brockwell's Case*.]

Royal British Bank, In re, Mixer's Case, discussed.

Western Bank of Scotland v. Aitkin (1867) L. R. 1 H. L. (Sc.) 145 (*post*, col. 508).

Bell's Case (*supra*), *approved*.

Life Assurance of England, In re, Blake, Ex parte (1865) 34 L. J. Ch. 278; 34 Beav. 639;

11 Jur. (N.S.) 359; 12 L. T. 43; 13 W. R. 486.—
ROMILLY, M.R.

Blake's Case (*supra*), *distinguished*.

Hallows v. Fernie (1868) L. R. 3 Ch. 467; 18 L. T. 340; 16 W. R. 873.—CHELMSFORD, L.C.
And see *supra*, col. 411

Blake's Case, *approved*.

Hallows v. Fernie, *distinguished*.
Scottish Petroleum Co. In re, Anderson's Case (1881) 17 Ch. D. 373, 50 L. J. Ch. 269; 43 L. T. 723; 29 W. R. 372.

MALINS, V.-C.—But *Hallows v. Fernie* is mainly relied upon. I should be bound by that case if the circumstances were similar. But in that case Mr. Hallows applied for shares in a company with certain gentlemen named as directors; and payment was made by him on application and allotment. Some of the directors retired. Now when a company is once constituted every man knows that there is a liability to change in the body of the directors; you cannot make men perpetual directors; and if, in this case, Mr. Gibson and Mr. Ross had remained directors after the allotment of the shares, then those who applied for shares must have taken them subject to the chance of the directors changing, as they may change, by death or resignation, and cannot complain if those on whom they relied do not remain in the company. They must take the chance of that. In *Hallows v. Fernie* the allotment was made in May, and the shareholder did not apply to be released until the month of September following—in fact he did not file his bill until April in the next year, a period of eleven months. Lord Chelmsford, L.C. puts it entirely on the ground that the shareholder had received the allotment and retained the shares.—p. 377.

Anderson's Case, *approved*.

Scottish Petroleum Co. In re, Wallace's Case (1883) 23 Ch. D. 413; 49 L. T. 348; 31 W. R. 846.—C.A. (*post*, col. 510).

Russian (Vyksounsky) Iron Works Co., In re,

Stewart's Case (1866) 35 L. J. Ch. 738; L. R. 1 Ch. 574; 12 Jur. (N.S.) 755; 14 L. T. 659, 817; 14 W. R. 948.—KNIGHT BRUCE and TURNER, L.J., *explained*.

Russian, &c. Co. In re, Taite's Case (1867) 36 L. J. Ch. 475; L. R. 3 Eq. 795; 16 L. T. 843; 15 W. R. 891.—WOOD, V.-C.

Stewart's Case, *distinguished*.

Russian (Vyksounsky) Iron Works, In re, Whitehouse's Case (1867) L. R. 3 Eq. 790; 15 W. R. 891.—WOOD, V.-C.

Stewart's Case, *principle applied*.

Metropolitan Coal Consumers' Association, In re, Karberg's Case (1892) 61 L. J. Ch. 741; [1892] 13 Ch. 1.—C.A. (*post*, col. 512).

Whitehouse's Case, *explained*.

London and Provincial Electric Lighting Co., In re (1886) 55 L. T. 670.—CHITTY, J.

Cachar Co., In re, Lawrence's Case (1867)

36 L. J. Ch. 490; L. R. 2 Ch. 412.—TURNER and CAIRNS, L.J., *followed*.

Russian (Vyksounsky) Iron Works Co., In re, Kincaid's case (1867) 36 L. J. Ch. 499; L. R. 2 Ch. 412; 16 L. T. 222; 15 W. R. 571.—TURNER and CAIRNS, L.J.,

Lawrence's Case, *distinguished*.

Oriental Commercial Bank, In re, Alabaster, Ex parte (1868) 38 L. J. Ch. 82; L. R. 7 Eq. 273; 17 W. R. 134.—GIFFARD, V.-C. (*supra*, col. 477).

Briggs, Ex parte, Hop and Malt Exchange

and Warehouse Co., In re (1866) 35 L. J. Ch. 320; 35 Beav. 273; L. R. 1 Eq. 488; 12 Jur. (N.S.) 322; 14 L. T. 39.—ROMILLY, M.R., *distinguished*.

New Brunswick and Canada Ry. v. Muggeridge (1860) 30 L. J. Ch. 242; 1 Dr. & Sm. 363; 7 Jur. (N.S.) 132; 3 L. T. 651;

9 W. R. 193.—KINDERLEY, V.-C., *principle applied*.

Central Ry. of Venezuela v. Kisch (1867) 36 L. J. Ch. 849; L. R. 2 H. L. 99; 16 L. T. 500; 15 W. R. 821.—H.L. (E.). CHELMSFORD, L.C., LORDS GRANWORTH, ROMILLY and COLONASAY, *affirming* S. C. *nom.* Kisch v. Central Ry. of Venezuela (1865) 34 L. J. Ch. 545; 3 De G. J. & S. 722.—KNIGHT BRUCE and TURNER, L.J., *And see post*, col. 510.

Briggs, Ex parte, *applied*.

Murray, In re, Dickson v. Murray (1887) 57 L. T. 223.—STIRLING, J.

New Brunswick, &c. Ry. v. Muggeridge

and Central Ry. of Venezuela v. Kisch, *applied*

Deposit and General Life Assurance Co. v.

Ayeseough (1856) 26 L. J. Q. B. 29; 6 Bl. & Bl. 761; 2 Jur. (N.S.) 812; 4 W. R. 611.—CAMPBELL, C.J., COLERIDGE and CROMPTON, J., *dismissed*.

Aaron's Reefs, Ltd. v. Twiss (1896) 65 L. J. P. C. 54; [1896] A. C. 273; 74 L. T. 794.—H.L. (IR.) (*supra*, col. 396).

Henderson v. Royal British Bank (1857) 26

L. J. Q. B. 112; 1 H. & N. 685, n.; 3 Jur. (N.S.) 111; 5 W. R. 206.—Q.B., *followed*.

Dossett v. Harding, Powis v. Harding (1857) 26 L. J. C. P. 107; 1 C. B. (N.S.) 533; 3 Jur. (N.S.) 139.—C.P.; Daniell v. Royal British Bank (1857) 1 H. & N. 681; 3 Jur. (N.S.) 119.—EX.

Central Ry. of Venezuela v. Kisch (*supra*), *principle applied*.

Reese River Mining Co., In re, Smith's Case (1867) 36 L. J. Ch. 618; L. R. 2 Ch. 604; 15 W. R. 882.—TURNER and CAIRNS, L.J., *affirmed* (*post*, col. 505).

Reese River Mining Co., In re, Smith's Case,

and Ship's Case, Scottish and Universal Finance Bank, In re (1865) 2 De G. J. & S. 544; 11 Jur. (N.S.) 331; 12 L. T. 256; 13 W. R. 599.—KNIGHT BRUCE and TURNER, L.J., *affirmed*, *nom.* Downes v. Ship (*post*), *considered*.

Henderson v. Royal British Bank, adopted.

Oakes v. Turquand; Overend, Gurney & Co., In re (1867) 36 L. J. Ch. 949; L. R. 2 H. L. 325; 16 L. T. 808; 16 W. R. 1201.—H.L. (E.).

CHELMSFORD, L.C.—*Henderson v. Royal British Bank*... seems to me, unless the law has been altered by the Companies Act, 1862, to be an authority of great weight against the appellant. Lord Campbell, in describing the attempt of a shareholder to relieve himself from liability under similar circumstances to those in which

the appellant is placed, expressed his opinion in the strongest language. He said: "It would be monstrous to say, he having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it on the faith that he was a shareholder." The decision in this case was considered so satisfactory that it was followed by the Court of C. P. in *Dossett v. Harding*, and by the Court of Ex. in *Danwell v. Royal British Bank* without anything more being said in either Court than an expression of acquiescence in the judgment. *Henderson v. Royal British Bank* being supported by such a weight of authority, will materially influence my opinion upon the present case, unless I can be satisfied that the Companies Act, 1862, has placed creditors and shareholders in a different relation to each other than that in which they previously stood.—p. 962

LORDS CRANWORTH and COLONSAY to the same effect.

And see post, cols. 511, 611.

Ship's Case, affirmed.

Oakes v. Turquand, referred to.

Downes v. Ship (1868) 37 L. J. Ch. 642; L. R. 3 H. L. 343; 19 L. T. 74; 17 W. R. 84.—H.L. (B).
LORDS CRANWORTH, WESTBURY and COLONSAY.

Oakes v. Turquand and Downes v. Ship, distinguished.

Oriental Commercial Bank, *in re*, Alabaster, *Ex parte* (1868) 38 L. J. Ch. 32; L. R. 7 Eq. 278; 17 W. R. 134.—GIFFARD, V.-C. (*supra*, col. 477).

Downes v. Ship, principle applied.

Metropolitan Coal Consumers' Association, *in re*, Karberg's Case (1892) 61 L. J. Ch. 741; [1892] 3 Ch. 1.—O.A. (*post*, col. 612).

Smith's Case and Central Ry. Co. of Venezuela v. Kisch (supra), distinguished.

Canadian Native Oil Co., *in re*, Fox's Case (1868) 37 L. J. Ch. 257; L. R. 5 Eq. 118.—ROMILLY, M.R. *And see post*, col. 510.

Smith's Case, followed.

Henderson v. Lacou (1867) L. R. 5 Eq. 249; 17 L. T. 527; 16 W. R. 328.—WOOD, V.-C.

Smith's Case, adhered to.

Oakes v. Turquand, applied.

Kent v. Freehold Land and Brickmaking Co. (1868) 37 L. J. Ch. 653; L. R. 3 Ch. 493; 16 W. R. 990.—CAIRNS, L.C.; *reversing* L. R. 4 Eq. 588; 17 L. T. 77.—WOOD, V.-C. *And see post*, col. 510.

Smith's Case, applied.

Estates Investment Co., *in re*, Pawle's Case (1869) 38 L. J. Ch. 318; 412; L. R. 4 Ch. 497; 17 W. R. 599.—SELWYN and GIFFARD, L.J.; *affirming* 25 L. T. 100.—ROMILLY, M.R. *And see post*, col. 510.

Smith's Case, affirmed.

Oakes v. Turquand, discussed.

Reese River Silver Mining Co. v. Smith (1869) 39 L. J. Ch. 849; L. R. 4 H. L. 64; 17 W. R. 1024.—H.L. (E.). HATHERLEY, L.C., LORDS WESTBURY, COLONSAY and CAIRNS. *See judgments, and see post*, col. 510.

Canadian Native Oil Co., *in re*, Fox's Case (*supra*), *distinguished.*

Anglo-Bunabian Steam Navigation and Colliery Co., *in re*, Walker's Case (1868) 37 L. J. Ch. 651; L. R. 6 Eq. 30; 16 W. R. 749.—ROMILLY, M.R.

Oakes v. Turquand (supra, col. 504), distinguished.

Warren's Blacking Co., *in re*, Pentelow's Case (1869) 39 L. J. Ch. 8; L. R. 4 Ch. 178; 20 L. T. 50; 17 W. R. 257.—SELWYN and GIFFARD, L.JJ. GIFFARD, L.J.—*In that case the transaction was complete; it was a contract voidable on the part of the shareholder but not of the directors.*—p. 11.

Pentelow's Case, distinguished.

Aberaman Ironworks, *in re*, Peck's Case (1869) L. R. 4 Ch. 533; 20 L. T. 340; 17 W. R. 508.—SELWYN and GIFFARD, L.JJ.

GIFFARD, L.J.—*As regards Pentelow's Case*, we certainly went to the extreme verge of the cases of that character, and we based our decision upon this, that the contract was conditional, and that, in point of fact, Mr. Pentelow had a right to assume throughout that his name was not on the share register. The ground on which we distinguished *Pentelow's Case* from *Oakes v. Turquand* does not exist here.—p. 535.

Oakes v. Turquand and Kent v. Freehold Land Co. (supra, col. 505), principle applied.

London and County General Agency Association, *in re*, Hare's Case (1869) L. R. 4 Ch. 503; 20 L. T. 156; 17 W. R. 628.—SELWYN and GIFFARD, L.JJ.

London and County General Agency Association, *in re*, Hare's Case, *followed.* Empire Assurance Corporation, *in re*, Challis's Case, Somerville's Case (1871) 40 L. J. Ch. 431; L. R. 6 Ch. 266; 23 L. T. 882; 19 W. R. 453.—HATHERLEY, L.C. (*supra*, col. 478); *applied.* Scottish Petroleum Co., *in re*, Wallace's Case (1883) 23 Ch. D. 413 (*post*, col. 510); *distinguished.* Lennox Publishing Co., *in re*, Storey, *Ex parte* (1890) 62 L. T. 791 (*post*, col. 511).

Oakes v. Turquand, distinguished.

Waterhouse v. Jamieson (1870) L. R. 2 H. L. (Sc.) 29.

HATHERLEY, L.C.—I think, my lords, that the principles upon which your lordships decided the *Overend and Gurney* Case have really no bearing whatever upon the present question. Mr. Oakes had undoubtedly become a member of the company; he knew all the objects for which it was founded, and the terms of its constitution, and he entered into the ordinary engagements. Then he said: True it is I have entered into those engagements; but I seek to be relieved from them because I was induced to enter into them by misrepresentations, without which I should not have become a shareholder. But this House held that whatever rights he might have acquired against those who made the fraudulent representations, he had, as regarded the outer world, executed an instrument by which every creditor had a right to believe that he was bound, and that he could not extricate himself after the winding-up, although before the winding-up he might have instituted proceedings to liberate himself from the engage-

ments into which he had been led by those misrepresentations. But here the only engagement Mr. Waterhouse entered into was to pay up the 5l. per share upon all the shares which he had taken. His case rests upon two grounds: first, that the deed itself so stated; and secondly, that his acquisition of the shares was in direct conformity with the representations of the deed, and that the shares were handed over to him accordingly. Although it is true (as some of the learned judges observed) that there is nothing in the Act of Parliament which renders it a part of the duty of the directors to state in the memorandum of association what amount has been paid up, I do not conceive that that by itself can vary the position of this gentleman when he stands upon the contract he has entered into, and says: "You cannot make a new contract for me."—p. 33. LORDS CHELMSFORD, WESTBURY and COLONSAÏ concurred.

And see post, col. 611.

Waterhouse v. Jamieson (*supra*), *discussed*.
London Celluloid Co., In re (1888) 57 L. J. Ch. 843; 39 Ch. D. 190.—C.A. (*post*, col. 520).

Oakes v. Turquand (*supra*, col. 504), *applied*.
Stone v. City and County Bank, Collins v. City and County Bank (1877) 47 L. J. C. P. 681; 3 C. P. D. 282; 38 L. T. 9.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Lumsden v. Buchanan (1865) 4 Macq. H. L. (Sc.) 950; Court Sess. Cas. 3rd series, vol. ii. p. 695.—WESTBURY, L.C., LORDS CRANWORTH and KINGSDOWN, *followed*.
Muir v. City of Glasgow Bank (1879) 4 App. Cas. 387; 40 L. T. 339; 27 W. R. 603.—H.L. (Sc.).

CAIRNS, L.C.—I ought to observe that in *Lumsden v. Buchanan* the words in the deed and the register were "trustees for Mrs. E. B." not "as trustees." In a case, however, in the same bank, which occurred immediately afterwards, *Lumsden v. Peddie* (Court Sess. Cas. 3rd series, vol. v. p. 34), Peddie was *curator bonis* to Mrs. Broomfield, and he accepted stock in these words: "I, the said D. S. Peddie, as *curator bonis* foresaid, do hereby agree to take and accept the said capital stock, and as such bind and oblige myself, &c." The Lord Ordinary, in that case, and afterwards the Court of Session, held that the case was governed by *Lumsden v. Buchanan*, and that the introduction of the word "as" made no difference. From this decision there was no appeal. The Lord Justice Clerk, in giving judgment in that case observed, "It is now well settled that in this or any the like company no one can become a partner with a limited liability, or with any other liabilities than such as are borne in common by all the partners." My lords, this decision must be taken along with that of *Lumsden v. Buchanan*, and shows what was then understood in Scotland to be established as the law in such cases.—p. 362. LORDS HATHERLEY, PENZANCE, O'HAGAN, SELBORNE, BLACKBURN and GORDON concurred.

Muir v. City of Glasgow Bank, *applied*, Bell's Case (1879) 4 App. Cas. 550.—H.L. (Sc.). SAME. LAW LORDS; *discussed*, *Buchanan's Case* (1879) 4 App. Cas. 583.—H.L. (Sc.). CAIRNS, L.C., LORDS HATHERLEY, O'HAGAN, SELBORNE and GORDON.

Buchanan's Case, *discussed*, Barton v. L. & N. W. Ry. (1890) 59 L. J. Q. B. 33; 24 Q. B. D. 77; 62 L. T. 164; 38 W. R. 197.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ. *See Forged Transfers Act, 1891* (54 & 55 Vict. c. 43).

Lumsden v. Buchanan, Andrew Buchanan's Case, *explained*.

Cunninghame v. City of Glasgow Bank (1879) 4 App. Cas. 607.—H.L. (Sc.). CAIRNS, L.C., LORDS O'HAGAN, SELBORNE, BLACKBURN and GORDON.

LORD SELBORNE.—I should like to make one observation, and one only, upon . . . *Lumsden v. Buchanan*, so far as regards Dr. Andrew Buchanan. It is not at all necessary to consider to what extent and for what purposes that ought to be regarded as an authority which this House would hold to be binding on itself, in a case similar in its circumstances; but it may be useful to guard against the citation of that case as an authority for purposes to which it is certainly inapplicable, and I therefore think it worth while to take notice of what I suppose to have been the ground of that decision. The House, I suppose, considered that every entry upon a register ought to have reference to some title; that the antecedent title there was shown to be that of the other trustees, not including either by name, or by reference, or by any collective form of designation, Dr. Andrew Buchanan; and probably the House may have thought that there might have been too much confusion and uncertainty and misconception as to the effect of the form of registration adopted, to make it safe to attribute it to any other title than that which was actually produced, a title not extending to Dr. Andrew Buchanan. That I have always supposed to be the ground of the decision—the House did not think there was any transfer intended; and it could not possibly have thought, on the facts before it, that the deed of accession, by which the other trustees agreed to take the shares from the company, was subscribed by or on behalf of Dr. Andrew Buchanan. Under these circumstances the House seems to have disregarded the registry, although it was perfectly well known to Dr. Andrew Buchanan and acted upon by him, because they could not connect it with the antecedent title.—p. 612.

Oakes v. Turquand and Muir v. City of Glasgow Bank (*supra*), *followed*.
Cree v. Somervail (1879) 4 App. Cas. 648; 41 L. T. 833; 28 W. R. 34.—H.L. (Sc.). CAIRNS, L.C., LORDS HATHERLEY, O'HAGAN, BLACKBURN and GORDON.

Oakes v. Turquand, *discussed*.
Nassau Phosphate Co., In re (1876) 45 L. J. Ch. 584; 2 Ch. D. 610; 24 W. R. 692.—HALL, V.-C.; *Tennent v. City of Glasgow Bank* (1879) 4 App. Cas. 615.—H.L. (Sc.). CAIRNS, L.C., LORDS HATHERLEY, SELBORNE and GORDON. *And see post*, col. 510.

Clarke v. Dickson (1858) 27 L. J. Q. B. 223; El. Bl. & El. 148; 4 Jur. (N.S.) 832.—Q.B., *discussed*.
Western Bank of Scotland v. Addie (1867) L. R. 1 H. L. (Sc.) 145.—CHELMSFORD, L.C., LORDS CRANWORTH and COLONSAÏ.

Western Bank of Scotland v. Addie, distinguished.

Mackay v. Commercial Bank of New Brunswick (1874) 43 L. J. P. C. 31; L. R. 5 P. C. 394; 30 L. T. 180; 22 W. R. 473.—P.C. See "PRINCIPAL AND AGENT."

Western Bank of Scotland v. Addie, commented on *add* followed.

Houldsworth v. City of Glasgow Bank (1880) 5 App. Cas. 307; 42 L. T. 194; 28 W. R. 677.—H.L. (S.C.). CATRNS, L.C., LORDS SELBORNE, HATHERLEY and BLACKBURN.

LORD SELBORNE.—The real doctrine which Lord Cranworth in *Addie's Case* meant (as I understand him) to affirm was one of substance and not of form: "An attentive consideration" (he said) "of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds; but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." The words in this passage "to the extent to which the companies have profited by those frauds," may perhaps require some enlargement or explanation; but, subject to that qualification, I am of opinion that this doctrine is in principle right, and that the present case is one in which (as in the case of *Addie*) there would be a miscarriage of justice, if the distinction which it involves were not attended to. . . . I do not understand that there was really any difference between Lord Chelmsford and Lord Cranworth in that case [*Addie's*]; both appear to me to have founded their judgments upon those views of the law of agency on the one hand, and of fraud on the other, to which I have already referred. One expression, indeed, of Lord Cranworth, in that part of his judgment which relates to the question of damages ("He comes too late"), might possibly, if it were not qualified by the subsequent context, have been taken to mean that even if the unregistered company had been liable to be sued for damages, by its public officer, down to the time of registration, that liability would not have been among the "debts and obligations" transferred by 20 & 21 Vict. c. 49, s. 8, to the registered company. Lord Cranworth was, I think, too good a lawyer and too accurate a thinker to have placed any such narrow (I had almost said unreasonable) construction upon such words in such a statute. He made to my mind, his real meaning plain by what he went on to say: from which it is apparent that if the *Western Bank* had been incorporated before, and not after, the frauds then in question, the corporation would not, in his opinion, have been liable for those frauds in an action of this kind for damages and that, my lords, is precisely the present case.—p. 328.

Western Bank of Scotland v. Addie, discussed. Adam v. Newbigging (1888) 57 L. J. Ch. 1066; 13 App. Cas. 308.—H.L. (E.) (*post*, col. 510); *dicta disapproved*, Derry v. Peek (1889) 58 L. J.

Ch. 864; 14 App. Cas. 337.—H.L. (E.) (*supra*, col. 403).

Tennant v. City of Glasgow Bank (*supra*, col. 508) and **Houldsworth v. City of Glasgow Bank**, *dicta* of LORD CATRNS followed. Hull and County Bank, in re. Burgess's Case (1880) 49 L. J. Ch. 541; 15 Ch. D. 507; 43 L. T. 45; 28 W. R. 792.—JESSEL, M.R.

Houldsworth v. City of Glasgow Bank, distinguished.

Great Australian Gold Mining Co., in re. Appleyard, Ex parte (1881) 50 L. J. Ch. 554; 18 Ch. D. T. 687; 45 L. T. 552; 30 W. R. 147.—HALL, V.-C. (*supra*, col. 498).

Tennant v. City of Glasgow Bank, distinguished. Taurine Co., in re (1883) 53 L. J. Ch. 271; 25 Ch. D. 118; 49 L. T. 514; 32 W. R. 129.—O.A. (*post*, col. 543); *explained and applied*, Carling v. London and Leeds Bank (1887) 56 L. J. Ch. 321 (*post*); *discussed*, Adam v. Newbigging (1888) 57 L. J. Ch. 1066; 13 App. Cas. 308; 59 L. T. 267; 37 W. R. 97.—H.L. (E). HATSURRY, L.C., LORDS WATSON, FITZGERALD and HERSCHEL; *affirming with a variation* S. C. *non*. Newbigging v. Adam (1886) 56 L. J. Ch. 275; 84 Ch. D. 582; 55 L. T. 794; 35 W. R. 597.—O.A. COTTON, BOWEN and FRY, L.J.J. *And see* "FRAUD."

Houldsworth v. City of Glasgow Bank, explained.

Addlestone Lanoleum Co., in re (1887) 57 L. J. Ch. 249; 37 Ch. D. 191; 58 L. T. 428, 36 W. R. 227.—O.A. (*supra*, col. 498).

Estates Investment Co., in re, Ashley, Ex parte (1870) 39 L. J. Ch. 354; L. R. 9 Eq. 263; 22 L. T. 83; 18 W. R. 395.—ROMILLY, M.R., *distinguished*.

Estates Investment Co., in re, McNiell's Case (1870) 39 L. J. Ch. 822; L. R. 10 Eq. 503; 23 L. T. 297; 18 W. R. 1102, 1126.—ROMILLY, M.R.

Reese River Silver Mining Co. v. Smith (*supra*, col. 505), *approved*.

Redgrave v. Hurd (1881) 51 L. J. Ch. 118; 20 Ch. D. 1; 45 L. T. 485; 30 W. R. 251.—O.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J.J.

Oakes v. Turquand (*supra*, col. 504).

Kent v. Freehold Land Co. (*supra*, col. 505).

Reese River Silver Mining Co. v. Smith.

Estates Investment Co., in re, Pawle's Case (*supra*, col. 505).

McNiell's Case.

Ashley's Case.

Discussed and explained.

Fox's Case (*supra*, col. 505), *observed on*.

Central Ry. Co. of Venezuela v. Kisch (*supra*, col. 504), *distinguished*.

Scottish Petroleum Co., in re, Wallace's Case (1883) 23 Ch. D. 413; 49 L. T. 348; 31 W. R. 846.—BAGGALLAY, LINDLEY and FRY, L.J.J. *And see post*, col. 511.

Scottish Petroleum Co., in re, Wallace's Case, explained and applied. Carling v. London and Leeds Bank (1887) 56 L. J. Ch. 321; 56 L. T. 115; 35 W. R. 344.—STIRLING, J.; *discussed*, Faure Electric Accumulator Co. v. Philp (1888) 58 L. T. 528.—HAWKINS, J.

Fox's Case (*supra*, col. 505), commented on and distinguished.

Wallace's Case (*supra*), distinguished.

Oakes v. Turquand (*supra*, col. 504), applied. Lennox Publishing Co. In re, Storey, Ex parte (1890) 62 L. T. 791; 2 Meg. 266.—KAY, J.

Oakes v. Turquand, distinguished, National Debenture and Assets Corporation, In re (1891) 60 L. J. Ch. 533; [1891] 2 Ch. 505; 64 L. T. 512; 39 W. R. 707.—C.A. (*supra*, col. 385); referred to, *Boaler v. Broadhurst* (1892) 8 Times L. R. 398.—STIRLING, J.

Wallace's Case, discussed.

Cleveland Iron Co. In re, Stevenson, Ex parte (1867) 16 W. R. 95.—L.J., distinguished.

General Ry. Syndicate, In re, Whiteley's Case (1900) 69 L. J. Ch. 250; [1900] 1 Ch. 365; 82 L. T. 134; 48 W. R. 440.—C.A.; reversing (1899) 68 L. J. Ch. 365; [1899] 1 Ch. 770; 80 L. T. 868; 6 Manson 244.—WRIGHT, J.

LINDLEY, M.R.—We have to consider what effect the new practice introduced by the Judicature Acts has upon the rules which have been laid down over and over again upon this question of taking proceedings to get a name removed from the register of members of a company when winding-up proceedings are imminent. Unquestionably the old practice was settled, and the old rule was laid down by the Court in *Scottish Petroleum Co. In re* [*Wallace's Case*], the decision in which nobody quarrels with. . . . A man could not get the right to rescind by simply defending an action for calls. That may account for the decision of Rolt, L.J., in *Stevenson, Ex parte*. . . . Whether *Stevenson, Ex parte*, were a little too far or not it is quite unnecessary to consider. One can easily, by working it out, see that it might lead to very extraordinary results; because, supposing that in an action for calls the defendant pleaded that he had been induced to take his shares by fraud, and that question were tried out and he won, it would be very difficult to see how he could be made a contributory after that. No doubt the decision may be explained, but I say nothing more about it. We are asked to extend what Rolt, L.J. did under the old practice to a case which has arisen under the new practice, which has entirely altered the procedure. In effect, what the appellant has done has been sufficient to take the legal steps before the commencement of the winding up to have his name taken off the register and the shares taken out of his name.—p. 252. V. WILLIAMS and ROMER, L.JJ. concurred.

Wallace's Case, followed.

Bank of Syria, In re, Owen and Ashworth's Claim, Whitworth's Claim (1900) 70 L. J. Ch. 82; [1901] 1 Ch. 115; 83 L. T. 547; 49 W. R. 100; 8 Manson 105.—C.A. ALVERSTONE, C.J., HIGBY and V. WILLIAMS, L.JJ.; reversing on one point 69 L. J. Ch. 412; [1900] 2 Ch. 272; 83 L. T. 165.—WRIGHT, J.

Metropolitan Coal Consumers' Association, In re, Wainwright's Case (1889) 59 L. J. Ch. 281; 62 L. T. 30; 1 Meg. 463.—KAY, J.; affirmed, [1890] 68 L. T. 429.—C.A. COTTON, FRX, and LOPES, LJJ.; not followed on point of payment

of interest, L. C. & D. Ry. v. S. E. Ry. (1891) 64 L. T. 501.—KEKEWICH, J.

Wainwright's Case, considered.

Metropolitan Coal Consumers' Association, In re, Karberg's Case (1892) 61 L. J. Ch. 741; [1892] 3 Ch. 1; 66 L. T. 700.—C.A. LINDLEY, BOWEN and KAY, LJJ.; reversing, 66 L. T. 184.—KEKEWICH, J.

LINDLEY, L.J.—This is an application by Mr. Karberg to be struck off the list of contributors . . . and to recover the money he paid for his shares on their allotment to him. His ground is that he was induced to take shares in the company by a misrepresentation in the company's prospectus. He says it was the same as that which in *Wainwright's Case* this Court decided to be a misrepresentation, entitling Wainwright to have his name removed from this list. Wainwright, however, applied for his shares after the company was registered and on the faith of a prospectus issued by the company after its formation. Karberg, on the other hand, applied for his shares before the company was formed and on the faith of a prospectus issued by the promoters. In *Wainwright's Case* the prospectus in effect stated that Lord Brabourne and Admiral Mayne were members of the council of association, which was not true, and the company knew before they allotted shares to Wainwright that Lord Brabourne had refused to be on the council. In *Karberg's Case* the prospectus stated in effect that Lord Brabourne and Admiral Mayne would be members of the council, which is a different thing. Moreover, the company accepted Karberg's application for shares before the company knew that either Lord Brabourne or Admiral Mayne had refused to be on the council. The two cases, therefore, are dissimilar in many material respects.—p. 744.

Karberg's Case, followed.

Canadian District Meal Co. In re, Tamplin's Case, W. N. (1892) 94, 146.—C.A. LINDLEY, BOWEN and A. L. SMITH, LJJ.

Karberg's Case, explained.

Lynde v. Anglo-Italian Hemp Spinning Co. (1895) 65 L. J. Ch. 96, [1896] 1 Ch. 178; 73 L. T. 502.

ROMER, J.—Suppose the company is expressly informed that a person has been induced to apply for shares by reason of representations made by another person, are they not bound to inquire as to these representations if they allot shares; and if they do not inquire, and the representations are untrue, is not the allottee entitled to rescind? This seems to me to be the essence of the decision in *Karberg's Case*.—p. 97.

Karberg's Case, distinguished.

Metals Constituents, In re (1902) 71 L. J. Ch. 323; [1902] 1 Ch. 707; 86 L. T. 291; 50 W. R. 492; 2 Manson 196.

BUCKLEY, J.—In *Karberg's Case* the acceptance of the application for shares by the allotment of the shares was the acceptance of an offer made on the terms of the prospectus, although that prospectus was issued by the promoters. In the present case no allotment to Lord Lurgan was necessary. His signature to the memorandum of association made him on registration a member of the company, and bound him, not only in favour of the company, but in favour of every

other person who became a member of the company.—p. 325.

Foulkes v. Quartz Hill Consolidated Gold Mining Co. (1883) 1 Cab. & E. 156.—C.A.; *reversing* POLLOCK, B. *commented upon*.
Brinsmead & Sons, Ltd., *In re*, Tomlin's Case (1897) 67 L. J. Ch. 11; [1898] 1 Ch. 104; 77 L. T. 521; 46 W. R. 171; 4 Manson 384.
WRIGHT, J.—As regards *Foulkes v. Quartz Hill, &c. Co.*, it is unfortunate that the decision of the C. A. in that case was not fully reported, as it is a very important one; but I doubt whether the Court intended to lay down the rule so absolutely as is stated in the note to the report—namely, "The C. A. reversed the above decision, holding that the issue of the writ was a definite election to rescind, and that this election was not affected by the subsequent voting at the meeting." I do not think that note goes quite so far as the note in Mr. Palmer's book, *Company Precedents*, 7th ed. pt. 2, p. 353.—p. 14.

Issue.

Ince Hall Rolling Mills Co., In re (1882) 23 Ch. D. 545, n.; 30 W. R. 945.—CHITTY, J.; and **Plaskynaston Tube Co., In re** (1883) 23 Ch. D. 542.—CHITTY, J.; *disapproved*, *Addlestone Linoleum Co., In re* (1887) 57 L. J. Ch. 249; 37 Ch. D. 191.—C.A. (*supra*, col. 498); *overruled*, *Almada and Tiritio Co., In re*, Allen's Case (1888) 57 L. J. Ch. 706; 38 Ch. D. 415; 59 L. T. 159; 36 W. R. 593; 1 Meg. 28.—C.A. COTTON, FRY and LOPES, L.JJ.

Almada and Tiritio Co., In re, followed.

Zoedone Co., In re, Higgins, *Ex parte* (1889) 60 L. T. 383; 1 Meg. 158.—CHITTY, J.

Stapleford Colliery Co., In re, Barrow's Case (1880) 49 L. J. Ch. 498; 14 Ch. D. 432; 42 L. T. 891.—C.A. JESSE, M.R., JAMES and BAGGALLAY, L.JJ.; *varying* (1879) 41 L. T. 55; 28 W. R. 270.—BACON, V.-C., *followed*.

Almada and Tiritio Co., In re, distinguished.
Railway Time Tables Publishing Co., In re, Sandys, *Ex parte* (1889) 42 Ch. D. 98; 58 L. J. Ch. 504; 61 L. T. 94; 37 W. R. 531; 1 Meg. 208.—C.A.; *affirmed, nom.* *Welton v. Saffery*, (*post*, col. 515).

COTTON, L.J.—What was that case? [*Almada and Tiritio Co., In re.*] In answer to an offer made by the company, a man had made an application to take certain shares at a discount, and in fact his name was put on the register; but he never assented in any way to his name being on the register, and as soon as ever he found that his name was in fact on the register he applied to this Court to be relieved from what had been done by the company under the contract, which was one that could not be enforced, and which did not give the company any right so long as the matter still remained in contract only, to put him on the register. Therefore there was wanting in that case the material point here, namely, the assent of the shareholder to her name being on the register in respect of these shares. Then *Beck's Case* [*supra*, col. 490] was referred to; but the mistake on which the applicant was there relying was not a mistake in law, but a mistake in fact. Beck had applied to have shares allotted to him on certain terms, and the directors had allotted the shares to him on different terms. The lords justices held that, although Beck did ask for a certificate of the shares after he had

received the notice of allotment on those different terms, yet he could not be taken to have given his assent to the new terms, the reasonable inference being that he had asked for the certificate of the shares in order to find out the real truth.—p. 113.

LINDLEY, L.J.—*Arnott's Case* [*supra*, col. 497] . . . went on this principle—that there was waiting what you have here, namely, an assent of the shareholder to keep the shares which were put in his name. Then there is *Carling's Case* [*supra*, col. 494]. That was a directors' qualification case, in which the facts were totally different. The directors had got, and were registered in respect of paid-up shares, which had been issued in pursuance of a duly registered contract. They got them by a gross breach of trust which was very much like a fraud, and the contention of the liquidator was that they were liable to be put on the list of contributories in respect of unpaid-up shares. The Court said: "No, they have got shares which are paid up and which cannot be treated as otherwise than paid up, and your remedy against them is for breach of trust, for which there is another and a distinct mode of relief." That has nothing to do with this case or any case similar to this.—p. 116.
BOWEN, L.J. to same effect.

Almada and Tiritio Co., In re, approved.

Oregon Gold Mining Co. of India v. Roper (1892) 61 L. J. Ch. 337; [1892] A. C. 125; 66 L. T. 427; 41 W. R. 90.—H.L. (E.). HALSBURY, L.C., LORDS WATSON, HERSCHELL, MACNAGHTEN and MORRIS. *And see post*, col. 517.

Oregon Gold Mining Co. of India v. Roper, explained.

Pioneers of Mashonaland Syndicate, In re (1893) 62 L. J. Ch. 507; [1893] 1 Ch. 731; 3 R. 265; 68 L. T. 163; 41 W. R. 492.

V. WILLIAMS, J.—The contrast drawn by Lord Herschell in *Oregon Gold Mining Co. of India v. Roper* is not a contrast between a company which is now a going concern and a company in liquidation. The contrast which he draws is a contrast between the rights of a company and the rights of the creditors of a company. Lord Herschell is there really saying that the company has no right to enforce payment of the difference between the amount paid and the full amount of the shares, but that its creditors have such a right. That being so, and there being no right of creditors in question at all in the present case, the only rights are those of shareholders; and, if the case were to rest on Lord Herschell's judgment, on which the petitioner relied, a shareholder is no more right to come and enforce by petition this liability of the shareholders to whom shares have been issued at a discount than he had, in Lord Herschell's opinion, in that case to enforce it by an action.—p. 508.

Oregon Gold Mining Co. of India v. Roper, applied.

Eddystone Marine Insurance Co., In re (1893) 62 L. J. Ch. 742; [1893] 3 Ch. 9; 2 R. 516; 69 L. T. 863; 41 W. R. 642.—C.A. LINDLEY, LOPES and A. L. SMITH, L.JJ.

Eddystone Marine Insurance Co., In re, distinguished.

Leinster Contract Corporation, In re [1902] 1 Ir. R. 349.—PORTER, M.R.

Eddystone Marine Insurance Co., In re, and Almada and Tiritio Co., In re (supra), explained.

and not applied, Theatrical Trust, In re, Chapman's Case, Brandon's Case, Greville's Case (1895) 64 L. J. Ch. 448; [1895] 1 Ch. 771; 13 R. 462; 72 L. T. 461; 43 W. R. 553; 2 Manson 304.—V. WILLIAMS, J.; discussed, Wragg (E. J.), Ltd., In re (1897) 66 L. J. Ch. 419; [1897] 2 Ch. 796.—C.A. (*supra*, col. 500)

Railway Time Tables Publishing Co., In re (*supra*, col. 513), *affirmed*.

Oreogum Gold Mining Co. of India v. Roper (*supra*), *explained and applied*.

Weldon R. Saffery (1897) 66 L. J. Ch. 362; [1897] A. C. 299; 76 L. T. 505; 45 W. R. 508; 4 Manson 269.—H.L. (E.). HALSBURY, L.C. LORDS WATSON, MACNAGHTEN, MORRIS and DAVEY: LORD HERSCHELL *dissenting*.

HALSBURY, L.C.—In respect of the liability to pay up the shares so far as it is necessary to satisfy creditors and the cost of winding up, I believe no doubt exists in the minds of any of this House. Since the *Oreogum Gold Mining Co.'s Case* in this House, it would be impossible to contend that that question is not covered by authority. But it is said that where the only object in making a call is to settle the rights of the shareholders *inter se*, the law laid down in the *Oreogum Case* does not conclude the question. I am unable to accede to that view. . . . Whether for the purpose of settling the rights *inter se*, or for the purpose of satisfying creditors, it appears to me that the statute forces the company and shareholder alike to conform to the rule laid down, that a share for a fixed amount shall make the person agreeing to take that share liable for that amount. I think that is the decision in the *Oreogum Case*. . . . In truth, though no form reserved by the discussion in the *Oreogum Case*, I think the *Oreogum Case* does decide the question now in debate, and whether they were bonus shares upon which nothing was paid, or discount shares upon which 10s only was paid, the holders of those shares are, in my judgment, liable to make good for any company purporting the amount of the money which, upon the face of the share, they undertake to pay.—p. 364.

LORD WATSON.—The decision of the House in the *Oreogum Gold Mining Co.'s Case* carries that construction [of sect. 25 of the Companies Act, 1867] thus far, that no member of a limited company, who is not protected by a proper contract, duly registered in terms of the clause, can have a good defence against payment of such proportion of the nominal amount of his shares as has not been paid in cash, when payment is required by the liquidator for the purpose of meeting the claims of creditors of the company or the cost of liquidation.—p. 365.

LORD HERSCHELL also discussed the *Oreogum Gold Mining Co.'s Case*, and dissented from the view of the C.A. in *Weymouth, &c. Steam Packet Co., In re* (*post*, col. 572).—p. 568.

LORD MACNAGHTEN.—Your lordships were reminded that there was a judicial decision, for several years unversed, which sanctioned the issue of shares at a discount. That is so. But it must be remembered that at the time when that decision was pronounced the current of authority had drifted somewhat away from the true principles of the Act of 1862. As soon as those principles were re-asserted and re-established by your lordships' House in *Trevor v. Whitworth* [*supra*, col. 406], it became clear again—clear, I think, beyond argument—that

the shares of a company limited by shares could not be issued at a discount. The issue of shares at a discount is just as much an unauthorised reduction of capital as the purchase by a company of its own shares. And so it was held by the C.A. in the *Almida and Tivita Case* [*supra*, col. 513], and afterwards in this House in the *Oreogum Gold Mining Co.'s Case*. Speaking for myself, I must say I do not think that the *Oreogum Case* laid down any new law. It was no new departure. The governing principle is stated as plainly and as emphatically in *Dent's Case* [*supra*, col. 493] by the L.C. (Lord Selborne), as it was by any of the noble and learned lords who took part in the *Oreogum Case* in 1892. Holding, as this House afterwards held in the *Oreogum Gold Mining Co.'s Case*, that the memorandum of association of a limited company has the effect of prescribing as well as of limiting the liability of its members, Lord Selborne points out, as has been pointed out over and over again, that, with certain exceptions not material for the present purpose, sect. 12 of the Act of 1862 forbids any alteration in the conditions contained in the memorandum. "It is," says his lordship, "quite certain that, under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void." Nothing can be more to the point than that. So far the *Oreogum Gold Mining Co.'s Case* goes; but it was not, I think, meant to go further. And, indeed, several of the noble and learned lords who took part in the judgment in that case guarded themselves against being supposed to determine or prejudice the present question. It may be that the principle on which the decisions in *Dent's Case* and the *Oreogum Case* proceed leave little room for the appellant's contention. Still, if it could be shown that the appellant has any equity to be relieved from further liability—if the Court could be "satisfied of the justice of the case," to use the words of the Act of 1862—I do not think the decision in the *Oreogum Case* would be a fatal bar. Nor, with all deference to the view thrown out by the C.A. in *Weymouth, &c. Steam Packet Co., In re*, would it be a sufficient objection that the contract, if there be a contract, was one with the company and not with the shareholders. If directors, being duly authorised in that behalf, invite persons to take shares on certain terms varying the rights of members *inter se*, acceptance of the invitation must, I think, establish a contractual relation between the members themselves.—p. 374.

LORD DAVEY.—The question now before the House was, it is true, left open in the *Oreogum Case*, but the solution of it seems to me logically and necessarily to follow from what was decided in that case. . . . It is familiar law that no article can be valid or binding upon the shareholders which is in conflict with the memorandum or with the general law. Nor does it admit of doubt that shareholders equally with creditors have the right to invoke the conditions contained in the memorandum, and resist any infraction of them; and, in fact, until the winding up takes place a creditor has no right to do so. That was the principle on which both the cases of *Hutton v. Scarborough Cliff Hotel* [*supra*, col. 387] were decided. Doubts have been entertained as

to the correctness of the decisions in those cases, and it has been thought that the priority between existing shareholders and the holders of new share capital created under a power is one of those matters of internal management which, if not expressly settled by the memorandum, may be settled by the articles. Dissent from the decision in the second case of *Hutton v. Scarborough Cliff Hotel Co.* [*supra*, col. 387] has been expressed by one of your lordships in this House, and it has recently not been followed in the C.A.—*Andrews v. Gas Meter Co.* [*supra*, col. 389].—p. 378.

Wetton v. Saffery, principle applied.

Peveril Gold Mines, In re (1897) 67 L. J. Ch. 77; [1898] 1 Ch. 122; 77 L. T. 505.—C.A. LINDLEY, M.R., CHITTY and V. WILLIAMS, L.J.J. LINDLEY, L.J.—Lord Macnaghten, in his speech in *Wetton v. Saffery*, says this: "These companies"—that is, companies registered with limited liability—"are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors—perhaps even more; shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern. Their security in a great measure depends on the directors adhering to the requirements of the Act." . . . Section 79 [of the Act of 1862] specifies the circumstances under which a company may be dissolved by the Court, and sect. 82 states who are the persons who may apply to the Court for an order for the dissolution. Any article which is contrary to this, which says that the company was formed on the terms that its life should not be determined under the circumstances provided by the Act, or that the right of a contributory to petition for its dissolution as provided by the Act should be limited in any way, is an attempt to enforce upon the shareholders limitations which would be at variance with the provisions of the Act. . . . It is not an answer to say that such an article is only a means for enabling a contributory to waive his individual rights.—p. 80.

Peveril Gold Mines, In re, applied.

Paine v. Cork Co. (1900) 69 L. J. Ch. 156; [1900] 1 Ch. 308.—STIRLING, J. (*supra*, col. 481).

Ooregum Gold Mining Co. of India v. Roper, applied. *Karashkoma Exploring and Prospecting Syndicate*, In re (1897) 66 L. J. Ch. 675; [1897] 2 Ch. 451.—C.A. (*supra*, col. 501); *discussed*, *Frost & Co., Ltd.*, In re (1899) 68 L. J. Ch. 544; [1899] 2 Ch. 207.—C.A. (*supra*, col. 501); *principle applied*, *Bellerby v. Rowland and Marwood's Steamship Co.* (1902) 71 L. J. Ch. 541; [1902] 2 Ch. 14.—C.A. (*supra*, col. 408).

Ooregum Gold Mining Co. of India v. Roper, referred to.

Burrows v. Matabelo Gold Reefs and Estates Co. (1901) 70 L. J. Ch. 434; [1901] 2 Ch. 23; 84 L. T. 478; 49 W. R. 428, 500; 17 Times L.R. 364.—C.A. RIGBY, V. WILLIAMS and STIRLING, L.J.J., *not followed*. *Holder v. Dexter* (1902) 71 L. J. Ch. 781; [1902] A. C. 474; 87 L. T. 811; 7 Com. Cas. 268; 9 Manson 378.—H.L. (B). HALSBURY, L.C.,

LORDS SHAND, DAVEY, BRAMPTON and ROBERTSON; *reversing* S. C. *non*. *Dexter v. United Gold Coast Mining Properties* (1901) 17 Times L. R. 708.—C.A. RIGBY, COLLINS and ROMER, L.J.J.

Calls.

Glamorganshire Iron and Coal Co. v. Ayscough (1866) 1 F. & F. 947.—WILLES, J., *followed*.

Bwlch-y-Plwm Lead Mining Co. v. Baynes (1867) 36 L. J. Ex. 183; L. R. 2 Ex. 324; 16 L. T. 597.—BRAMWELL, B. (for the Court).

Bwlch-y-Plwm, &c. Co. v. Baynes, referred to. *Oakes v. Turquand* (1867) 36 L. J. Ch. 949; L. R. 2 H. L. 325, (*supra*, col. 504); *applied*, *Murray*, In re, *Dickson v. Murray* (1887) 57 L. T. 223.—STIRLING, J.

L. & N. W. Ry. v. M'Michael (1851) 20 L. J. Ex. 233; 6 Ex. 273; 6 Railw. Cas. 495.—EX.; *Birkenhead, Lancashire and Cheshire Ry. v. Webster* (1851) 20 L. J. Ex. 234.—EX.; *Ambergate Ry. v. Norcliffe* (1851) 6 Ex. 629.—EX. CH.; and *Waterford, Wexford, Wicklow and Dublin Ry. v. Dalbiac* (1851) 20 L. J. Ex. 227; 6 Ex. 443; 6 Railw. Cas. 753.—EX., *followed*.

Jennings, In re, *Belfast and County Down Ry.*, Ex parte (1851) 1 Ir. Ch. R. 654.—BRADY, L.C.; *reversing* *ib.* 236.

Inspection of Register.

Rex v. Wilts and Berks Canal Navigation (1835) 3 A. & E. 477; 3 N. & M. 344.—Q.B., *explained*.

Holland v. Dickson (or Crystal Palace Co.) (1888) 37 Ch. D. 669; 57 L. J. Ch. 502; 58 L. T. 846; 36 W. R. 320; 4 Times L. R. 285. CHITTY, C.—There [*Rex v. Wilts, &c. Navigation*] the question being one of fact—whether there had been a refusal—it was held and decided that there had been no refusal. . . . Some observations undoubtedly fell from the judges to the effect that when a demand is made the person to whom it is made should be informed *bona fide* of the object of that request, but I am satisfied that . . . it was not intended by the judges, and could not have been intended to import into the statute (which contains words very similar to those in the one before me [Companies Clauses Act, 1845, s. 45]) something to prevent inspection which was not to be found in the statute. The right, then, is to have access to the book, and the directors of the company are wrong in saying that the plaintiff shall have access to part only of the book when the right of access is not so limited by the statute. Then it was contended that the remedy in this case was by *mandamus*, and *Glossop v. Heston and Isleworth Local Board* (1879) 49 L. J. Ch. 89; 12 Ch. D. 102; 40 L. T. 736; 28 W. R. 111.—C.A.], which deals with the subject of prerogative *mandamus*, was cited. This, however, is not a case in which the writ of prerogative *mandamus* would apply, but simply the case of a private owner of stock with a statutory right to see the books, and of an interference by the defendants with that statutory right. It seems to me to follow that when the statutory right of an individual is interfered with, an injunction would have been granted by the old Court of Chancery, and at any rate ought now to be granted by the High Court.—p. 672.

Forrest v. Manchester, Sheffield and Lincolnshire Ry. (1861) 4 De G. F. & J. 126; 7 Jur. (N.S.) 887; 4 L. T. 666; 9 W. R. 818.—**WESTBURY, L.C.** (*see supra*, col. 468); and **Rogers v. Oxford, Worcester and Wolverhampton Ry.** (1858) 2 De G. & J. 662.—**KNIGHT BRUCE** and **TURNER, L.J.J.**, *distinguished*.

Mutter v. Eastern and Midlands Ry. (1888) 38 Ch. D. 92; 57 L. J. Ch. 615; 59 L. T. 117; 36 W. R. 401; 4 Times L. R. 377.—**C.A. LINDLEY, COTTON** and **BOWEN, L.J.J.**

LINDLEY, L.J.—The authorities relied upon by Mr. Wright for this purpose, of which *Forrest v. Manchester, &c. Ry.* was the leading case, do not go the length for which he contended. Those were cases in which a nominee of a rival company not only had taken shares for the purposes of a rival company, but assumed to have a common interest with all the other shareholders, and to represent them in a suit which he instituted in his own name on behalf of himself and them. It has been held that in a suit of that kind, if a person does not really represent the interest of those whom he purports to represent, exception may be taken to him personally, and relief be denied him which would be afforded if it were true that he represented those whom he affects to represent in that form of action. This is not a case of that kind. The plaintiff does not come forward here as representing any other shareholders. This is not an action on behalf of himself and others, it is an action brought by him in his own personal interest, and does not profess to be anything else. That class of cases, therefore, does not touch this, nor am I aware of any case which warrants Mr. Wright's contention.—p. 104.

Mutter v. Eastern and Midlands Ry., principle applied.

Nelson v. Anglo-American Land Mortgage Agency Co. (1896) 66 L. J. Ch. 112; [1897] 1 Ch. 130; 75 L. T. 482; 45 W. R. 171.—**STIRLING, J.**

Mutter v. Eastern and Midlands Ry. and Nelson v. Anglo-American Land, &c. Co., followed.

Boord v. African Consolidated Land and Trading Co. (1897) 67 L. J. Ch. 451; [1897] 1 Ch. 596; 77 L. T. 553; 46 W. R. 150; 14 Times L. R. 116.—**NORTH, J.**

Nelson v. Anglo-American Land, &c. Co. and Credit Co. In re (1879) 48 L. J. Ch. 221; 11 Ch. D. 256; 27 W. R. 380.—**HALL, v.-c.**, *applied*.

Bevan v. Webb (1901) 70 L. J. Ch. 536; [1901] 2 Ch. 59; 84 L. T. 609; 49 W. R. 548.—**C.A. COLLINS** and **STIRLING, L.J.J.**

Boord v. African, &c. Trading Co., overruled. Mutter v. Eastern and Midlands Ry., distinguished.

Balaghat Gold Mining Co. In re (1901) 70 L. J. K. B. 866; [1901] 2 K. B. 665; 85 L. T. 8; 49 W. R. 625; 17 Times L. R. 660.—**C.A.**

A. L. SMITH, M.R.—What **Lindley, L.J.** said in *Mutter v. Eastern and Midlands Ry.* at the conclusion of his judgment—namely, "Upon the ground therefore that in this case the right to take a copy cannot be denied without rendering the right to inspect practically useless, I am of opinion that the order appealed from was

correct"—does not apply to the present case at all, because here the person upon payment can get what he wants.—p. 867. **V. WILLIAMS, L.J.**, concurred.

STIRLING, L.J.—It [*Mutter v. Eastern and Midlands Ry.*] was not a decision on sect. 32 of the Companies Act, 1862, but on sect. 23 of the Companies Clauses Act, 1863. The latter section is absolutely silent on the question of taking copies.—p. 868.

Certificate—Estoppel.

British Farmers' Pure Lined Cake Co., In re (1878) 47 L. J. Ch. 415; 7 Ch. D. 533.—**C.A. JESSEL, M.R., JAMES** and **THESSIGER, L.J.J.**; *affirmed, nom. Burkinshaw v. Nicolls* (1878) 48 L. J. Ch. 179; 3 App. Cas. 1004; 39 L. T. 308; 26 W. R. 819.—**H.L. (E.). CAIRNS, L.C., LORDS HATHERLEY, SELBORNE, BLACKBURN,** and **GORDON.**

Burkinshaw v. Nicolls, explained.

Newport and South Wales Shipowners' Co., In re, Rowland's Case (1880) 42 L. T. 785.—**C.A. JESSEL, M.R., BAGGALLAY** and **BRAMWELL, L.J.J.**

Burkinshaw v. Nicolls, applied.

Hall & Co., In re (1877) 57 L. J. Ch. 288; 37 Ch. D. 712; 58 L. T. 156.—**STIRLING, J.**

Burkinshaw v. Nicolls, distinguished.

London Celluloid Co., In re, Bayley and Hanbury, Ex parte (1888) 39 Ch. D. 190, 57 L. J. Ch. 843; 59 L. T. 109; 36 W. R. 673; 1 Meg. 45.—**C.A.**

COTTON, L.J.—In *Burkinshaw v. Nicolls* share certificates were issued which represented the shares to be fully paid up. A person to whom some of them were issued sold the shares in the ordinary course of business to a person who bought on the faith of that representation, without anything to put them on inquiry whether it was true, and the H. L. held that as against such a purchaser the company and the liquidator were bound by the statement, on the ground that it was evidence on which as against the company the purchaser was entitled to rely that the shares had been paid up in cash. . . . Here the appellants cannot say that any representation was made either to Sauvé or themselves on which they were entitled to rely that the shares had been paid up in cash, and they are, therefore, unable to avail themselves of *Burkinshaw v. Nicolls*. . . . A contract by the company not to enforce payment of the calls on a share not effectually paid up would, I apprehend, be *ultra vires*. *Waterhouse v. Jamieson* (*supra*, col. 506) was referred to as showing that the liquidator is in no better position than the company, but the case only decided that the liquidator was bound by a statement of the company as to the amount of capital that had been paid up, a statement the falsehood of which he had no reason for suspecting, and on the faith of which statement he had taken his shares.—pp. 200—202.

BOWEN, L.J. to the same effect.

FRY, L.J.—*Waterhouse v. Jamieson* and *Burkinshaw v. Nicolls* merely decided that in those cases the company as a matter of evidence was estopped from denying that the shares had been paid up in cash. In the present case there are no facts whatever from which it can be inferred that either of the appellants believed the shares

he took to have been paid up in cash, and neither of them says that he did so. They say that they believed the agreement to have been registered, but that is nothing to the purpose. They, therefore, cannot claim the benefit of estoppel.—p. 207.

London Celluloid Co., In re, applied.

Burkinshaw v. Nicolls, not applied.

National Pure Water Engineering Co., In re, **Ford** (1892) 3 Times L. R. 500.—C.A. LINDLEY, BOWEN and KAY, JJ.

Burkinshaw v. Nicolls, explained and applied.

Building Estates Brickfields Co., In re, **Parbury's Case** (1895) 65 L. J. Ch. 104; [1896] 1 Ch. 100; 73 L. T. 506; 44 W. R. 107; 2 Manson 616.—V. WILLIAMS, J.

Parbury's Case, approved.

Veuve Monnier et Ses Fils, In re, **Bloomenthal's Case** (1896) 65 L. J. Ch. 748; [1896] 2 Ch. 525; 74 L. T. 670; 44 W. R. 577; 3 Manson 193.—C.A. LINDLEY, LOPES and RIGBY, L.J.J. *reversed, non.* **Bloomenthal v. Ford** (1897) 66 L. J. Ch. 253; [1897] A. C. 156; 76 L. T. 205; 45 W. R. 449; 4 Manson 156.—H.L. (E.). HALSBURY, L.C., LORDS HERSCHELL, MACNAGHTEN, MORRIS and SHAND. *And see post*, col. 524.

Parbury's Case, not applied.

Burkinshaw v. Nicolls and Bloomenthal v. Ford, distinguished.

African Gold Concessions and Development Co., In re, **Markham and Darter's Case** (1899) 68 L. J. Ch. 215; [1899] 1 Ch. 414; 80 L. T. 282; 47 W. R. 509; 6 Manson 84; *affirmed, supra*, col. 502.

WRIGHT, J.—It is argued for the applicants that the statements in the certificates that the shares are fully paid estops the liquidator from denying both the fact of payment in cash and the sufficiency of the filed contract. . . . They knew that they had not paid cash, and they cannot have supposed that the company was making them a payment of shares which some one else had paid for in cash. This excludes the application of **Parbury's Case**. . . . It is said that the observations of Lord Cairns in **Burkinshaw v. Nicolls** are an authority in favour of the applicant's contention. I do not so understand his language. When he there speaks of a representation that sect. 25 has been complied with, I understand him to mean complied with by payment in cash. Nor can I find in **Bloomenthal v. Ford** any suggestion that there can be any other estoppel in such a case than an estoppel against denial of payment in cash or of power to issue the shares.—p. 219.

Bahia and San Francisco Ry., In re, Tritten, In re (1868) 37 L. J. Q. B. 176; L. R. 3 Q. B. 584; 9 B. & S. 844; 18 L. T. 467; 16 W. R. 862.—Q.B., *followed. And see col. 537.*

Hart v. Frontino, &c. Gold Mining Co. (1870) 39 L. J. Ex. 93; L. R. 5 Ex. 111; 22 L. T. 30.—EX.

Bahia and San Francisco Ry., In re, and Hart v. Frontino, &c. Gold Mining Co., discussed.

Simm v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Spurling

(1879) 49 L. J. Q. B. 392; 5 Q. B. D. 188; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280.—C.A. BRAMWELL, BRETT and COTTON, L.J.J.; *affirming* LINDLEY, J. (*and see col. 524*); **Sheffield Corporation v. Barclay** (*post*, col. 525).

Bahia and San Francisco Ry., In re, explained.

Ottos Kopje Diamond Mines, In re (1892) 62 L. J. Ch. 166; [1893] 1 Ch. 618; 2 R. 257; 68 L. T. 138; 41 W. R. 258.—C.A.

BOWEN, L.J.—It was said that **Bahia, &c. Ry., In re**, shows that there was a cause of action in the nature of an implied warranty upon the certificate, or a breach of warranty arising out of the stipulation. A certificate is not like a promissory note; it does not transfer a chose in action, it is only a representation of an implied contract. **Bahia, &c. Ry.** was in truth an attempt, which was successful, to make the company liable in the absence of fraud upon the estoppel created by the certificate. The way in which the Court made the company liable was this: They said that if the certificate had been intended to have been acted upon, it became a document the truth of which the company could not deny as against the person to whom it was intended to be shown: and, therefore, it precluded them as against such transferees from denying the truth of what it contained. They could not be in any better position than if the statement were true; but that only obliged the company to act if the title were good. Until, therefore, the company do something which ought not to be done, or omit to do something which ought to be done, as between them and the true owner of the shares no cause of action would arise. . . . I know of no case where it has been held that a man is bound to act upon a document at the moment that it is presented to him, without being allowed time to consider it. I do not think it was intended in **Cawley & Co., In re** [*post*, col. 546], to decide that a company was not entitled to time to consider a transfer: and in **Société Générale de Paris v. Walker** [*post*, col. 586] Lord Blackburn held that they were entitled.—p. 170.

LINDLEY, L.J. to the same effect. A. L. SMITH, L.J. concurred.

Simm v. Anglo-American Telegraph Co., discussed.

Foster v. Tyne Pontoon and Dry Docks Co. (1893) 63 L. J. Q. B. 50.—COLLINS, J. *And see post*, col. 524.

Bahia and San Francisco Ry., In re, followed.

Simm v. Anglo-American Telegraph Co., distinguished.

Balkis Consolidated Co. v. Tomkinson (1893) 63 L. J. Q. B. 134; [1893] A. C. 396; 1 R. 178; 69 L. T. 598; 42 W. R. 204.—H.L. (E.). HERSCHELL, L.C. and LORDS MACNAGHTEN and FIELD; *affirming* (1891) 60 L. J. Q. B. 558; [1891] 2 Q. B. 614; 64 L. T. 816; 39 W. R. 693.—C.A.

HERSCHELL, L.C. (after discussing **Bahia, &c. Ry., In re**, and **Hart v. Frontino Gold Mining Co.**) said: I have no hesitation in expressing my concurrence in the law laid down by the Court of Q. B. in **Bahia, &c. Ry., In re**. The reasoning of Blackburn, J. in pronouncing judgment in that case appears to me to be sound and in accordance with the law, and I think it would be very mischievous to cast any doubt on the

authority of that case. The appellants argued, however, and correctly, that the present case is distinguishable from that in the *Q. B.* inasmuch as it is not the purchasers who are seeking to render the company liable by way of estoppel, but the vendor of the shares, who himself received the certificate from the company. Does that, in the circumstances which your lordships have to consider, make any difference? If the company must have known, as was said in the *Bahia Case*, that persons wanting to purchase shares might act upon the statement of fact contained in the certificate, it must equally have been within the contemplation of the company that a person receiving the certificate from them might, on the faith of it, enter into a contract to sell the shares. The plaintiff did enter into such a contract, and thereby altered his position by rendering himself liable to the persons with whom he contracted to sell the shares. All the elements necessary to create an estoppel would appear, therefore, to be present. The appellants, however, relied upon the decision in *Simm v. Anglo-American Telegraph Co.* as showing that one who receives from a company a certificate that he is the proprietor of shares therein is not in the same position as regards his rights by estoppel against the company as a transferee from him would be. In that case Burge, who was the buyer of stock in the defendant company, received in pursuance of his purchase a transfer of the stock purporting to be executed by Coates, who was the registered owner of stock to the amount purchased. The transfer was, in fact, forged by a clerk in Coates's employ. Burge having borrowed money from a bank, the stock was transferred to Ingelow as trustee for the bank, and the company registered Ingelow as the owner, and issued a certificate accordingly. The advance having been repaid by Burge, the bank's trustee became trustee for him. The company having discovered the forgery, and refused to recognise Ingelow as the owner of the shares, an action was brought by Burge and Ingelow to compel the company to recognise their title. It was held by the *C. A.* that they had no title by estoppel as against the company. The grounds for the decision appear to have been twofold: in the first place, that Burge had not altered his position by reason of the statement in the certificate; in the next place, that he had himself, by producing to them a forged transfer, induced the company to insert the name of his nominee as the proprietor of the stock. Neither of these grounds applies in the case before your lordships. . . . *Ashbury, Sr. Co. v. Riche* [*supra*, col. 441], which was much pressed upon your lordships in the argument for the appellants, appears to me to have no bearing on the question at issue between the parties to this appeal. The argument was put, as I understand, in this way: The company, it was said, are only authorised to issue a limited number of shares; and to hold it liable by estoppel, as is sought to be done in this case, to a person who is not the proprietor of any of those shares, would in effect enable them to contract a liability in respect of shares beyond their authorised issue. I do not think this argument is a sound one. A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not by reason thereof become a shareholder—p. 138.

LORD MACNAGHTEN to the same effect.

LORD FIELD.—In *Simm's Case* the *C. A.* held, and I agree with them, that there was no duty upon the company to inquire of a registered holder whether the signature was genuine, although it was the practice of the company to do so.—p. 142.

Bahia and San Francisco Ry., In re (*supra*), distinguished, *Bishop v. Balkis Consolidated Co.* (1890) 59 L. J. Q. B. 565; 25 Q. B. D. 512; 39 W. R. 99; 2 Meg. 292.—*C.A.* *ESHER, M.R.* LINDLEY and BOWEN, L.J.; referred to, *Whitchurch (Geo.), Ltd. v. Cavanagh* (*post*, col. 525).

Bishop v. Balkis Consolidated Co., considered. Concessions Trust, In re. *McKay's Case* (1896) 65 L. J. Ch. 909; [1896] 2 Ch. 757; 75 L. T. 298; 3 *Manson* 274.—*V. WILLIAMS, J.*

Balkis Consolidated Co. v. Tomkinson (*supra*), applied.

Foster v. Tyne Pontoon and Dry Docks Co. (*supra*, col. 522), explained.

Simm v. Anglo-American Telegraph Co. (*supra*, col. 521), distinguished.

Bloomenthal v. Ford (col. 521) and **Bishop v. Balkis Consolidated Co.**, not applied.

Dixon v. Kennaway & Co. (1900) 69 L. J. Ch. 651; [1900] 1 Ch. 833; 82 L. T. 527; 7 *Manson* 446.

FARWELL, J.—The proposition which is . . . referred to in *Foster v. Tyne Pontoon, &c. Co.*, comes, I think, to this—if the broker is insolvent at the date of action brought, then it lies on the defendant to show that no money ever could have been recovered against him, and that consequently the plaintiff has not suffered by resting on his position. . . . *Simm v. Anglo-American Telegraph Co.* was a case of estoppel against estoppel. The transferee in that case sent a forged transfer to the office of the company and asked the company to act on it. He had at least as good means as the company of knowing whether it was a genuine transfer or not. There is nothing of that sort here. . . . In *Simm v. Anglo-American Telegraph Co.* there was nothing about resting on the transfer, and there was nothing to show the state of solvency or insolvency of the transferor at the time of the action brought. . . . *Balkis Consolidated Co. v. Tomkinson* is a valuable authority for all the propositions which I have to determine, because the *H. L.* there held that the person who got the certificate was entitled to rely on the statement in the certificate that the person therein mentioned was the proprietor of the specified shares. The damage in that case arose from the fact that the statement in the certificate put Tomkinson in a position to sell the shares, and in reliance on that position he sold the shares, with the result that he suffered loss in consequence of the company's refusal to register the purchaser. In order to recover in an action of this sort, the plaintiff must show that he either has acted on the certificate to his detriment, or has rested on it to his detriment. Tomkinson in that case, acted upon the certificate to his detriment; in the present case the plaintiff has rested upon it to her detriment. She has remained satisfied until the time for redress from her broker is past and gone. To my mind, therefore, this case comes within the principle of *Balkis Consolidated Co. v. Tomkinson*. *Bloomenthal v. Ford* is not so applicable, because there the

allottee was the person relying on the estoppel. . . . *Bishop v. Balkis Consolidated Co.*, also, does not seem to me to be applicable. That was a case of certification, and "certificate" and "certification" are two distinct things.—p. 505.

Bishop v. Balkis Consolidated Co., approved.

Whitechurch (George), Ltd. v. Cavanagh (1901) 71 L. J. K. B. 400; [1902] A. C. 117; 85 L. T. 849; 50 W. R. 218; 9 Mans. 351.—H.L. (E.). HALSBURY, L.C., LORDS MACNAGHTEN, SHAND, JAMES OF HEREFORD, DAYEY, BRAMPTON and ROBERTSON.

Simn v. Anglo-American Telegraph Co., judgment of LINDLEY, J. dissented from. Sheffield Corporation v. Barclay (1902) 72 L. J. K. B. 8; [1905] 1 K. B. 1; 87 L. T. 479.—ALVERSTONE, C.J.

Dividends.

Stuart's Trusts, In re (1876) 46 L. J. Ch. 86; 4 Ch. D. 213; 35 L. T. 788; 25 W. R. 295.—BAGG, V.-C., *distinguished*.

South Llanharan Colliery Co., In re, Jagon, Ex parte (1879) 12 Ch. D. 503; 41 L. T. 567; 28 W. R. 194.—C.A. JAMES, BRETT and COTTON, L.JJ.

COTTON, L.J.—It is true that in *Stuart's Trusts, In re*, the sum payable was held to be part of the profits; but in that case it was expressly stipulated that the payment under the guarantee should be applied as dividend. So that the question was avoided by the special form of the contract.—p. 510.

Davidson v. Gillies (1879) 50 L. J. Ch. 192, n.; 16 Ch. D. 347, n.; 44 L. T. 92, n.—JESSEL, M.R.; and **Dent v. London Tramways Co.** (1880) 50 L. J. Ch. 190; 16 Ch. D. 344; 44 L. T. 91.—M.R., *explained*.

Lee v. Neuchatel Asphalte Co. (1889) 58 L. J. Ch. 408; 41 Ch. D. 1; 61 L. T. 11; 37 W. R. 321; 1 Meg. 140.—C.A. COTTON, LINDLEY and LOPES, L.JJ. See judgments at length.

Lee v. Neuchatel Asphalte Co., applied.

Bolton v. Natal Land and Colonization Co. (1891) 61 L. J. Ch. 281; [1892] 2 Ch. 124; 65 L. T. 786.—ROMER, J.

Lee v. Neuchatel Asphalte Co. and Bolton v. Natal Land, &c. Co., approved.

Verner v. General and Commercial Investment Trust (1894) 63 L. J. Ch. 456; [1894] 2 Ch. 239; 7 R. 170; 70 L. T. 516; 1 Mans. 136.—C.A. LINDLEY, KAY and A. L. SMITH, L.JJ.

Lee v. Neuchatel Asphalte Co. and Verner v. General and Commercial Investment Trust, discussed and applied.

Wilmer v. McNamara & Co. (1895) 64 L. J. Ch. 516; [1895] 2 Ch. 245; 13 R. 518; 72 L. T. 552; 43 W. R. 519.

STIRLING, J.—Under the circumstances *Lee v. Neuchatel Asphalte Co.* applies to this extent, that it is a distinct authority that dividends may be paid although the assets are not sufficient to make up the share capital. Beyond this, that case does not assist in point of decision; for there it was held, as a conclusion of fact, that the assets of the company were at the period in question of greater value than when it was first formed. I think, however, as has already been

pointed out and acted upon in *Verner v. General, &c. Trust* that the C.A. there laid down principles which go far beyond what was required for the decision of that particular case, and, amongst others, this—that in determining whether a dividend may or may not be paid, regard is to be had to the constitution of the company and to the articles of association. . . . My attention was pointedly called to the opening sentences of the judgment delivered by Kay, L.J., in *Verner v. General, &c. Trust*. The observations . . . appear, however, to be mainly directed to the case of a company engaged in buying and selling, and were not treated by the L.J. himself as applicable to the case actually before him, that of a company whose business consisted in making investments. In the present case, the defendant company carries on the business of carriers; it does not buy and sell, and such loss as has occurred does not arise from the company having received a less price than it originally gave for a portion of its assets. I think that under these circumstances I ought not to apply the observations in question to the present case any more than they were applied by Kay, L.J., in *Verner v. General, &c. Trust* to the case then before him.—pp 519—521.

Lee v. Neuchatel Asphalte Co., discussed.

Wragg (E. J.), Ltd., In re (1897) 66 L. J. Ch. 419; [1897] 1 Ch. 796.—C.A. (*supra*, col. 500).

Verner v. General and Commercial Investment Trust (*supra*), discussed.

City Property Investment Trust Corporation v. Thorburn (1897) 25 Rettie 361.—LORDS TRAYNER, YOUNG and MONCRIEFF.

Lee v. Neuchatel Asphalte Co. and Verner v. General and Commercial Investment Trust, applied.

National Bank of Wales, In re, Cory's Case (1899) 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99.—C.A. (*supra*, col. 398).

Lubbock v. British Bank of South America

(1892) 61 L. J. Ch. 498; [1892] 2 Ch. 198; 67 L. T. 74; 41 W. R. 108.—CHITTY, J.; and **Verner v. General and Commercial Investment Trust, discussed.**

Foster v. New Trinidad Lake Asphalte Co. (1900) 70 L. J. Ch. 123; [1901] 1 Ch. 208; 49 W. R. 119; 8 Mans. 47.

BYRNE, J.—It is clear, I think, that an appreciation in total value of capital assets, if duly realised by sale or getting in of some portion of such assets, may in a proper case be treated as available for purposes of dividend. This, I think, is involved in the decision in *Lubbock v. British Bank of South America*, cited with approval by Lord Lindley in *Verner v. General and Commercial Investment Trust*. . . . If I rightly appreciate the true effect of the decisions, the question of what is profit available for dividend depends upon the result of the whole accounts (capital as well as profit and loss) fairly taken for the year; and although dividends may be paid out of earned profits in proper cases, even where there has been a depreciation of capital, I do not think that a realised accretion to the estimated value of one item of the capital account can be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.—p. 125.

Lee v. Neuchatel Asphalte Co. and Verner v. General and Commercial Investment Trust (*supra*), discussed and applied.
Barrow Hematite Steel Co. In re (1900) 69 L. J. Ch. 869; [1900] 2 Ch. 846.—COZENS-HARDY, J.; *affirmed on the facts*, [1901] 71 L. J. Ch. 13; [1901] 2 Ch. 740.—G.A. (*supra*, col. 408).

Verner v. General and Commercial Investment Trust, dictum of LINDLEY, J., explained.

Lee v. Neuchatel Asphalte Co., explained.
Bond v. Barrow Hematite Steel Co. (1902) 71 L. J. Ch. 246; [1902] 1 Ch. 353; 86 L. T. 10; 50 W. R. 295; 9 Manson 69. 17 Times L. R. 709.—FARWELL, J. See judgment.

Brander v. Brander (1789) 4 Ves. 800; 4 R. R. 348.—ROSSLYN, L.C.: **Irving v. Houston** (1802) 4 Paton Sc. App. 521.—H.L. (SC.). ELDON, L.C. and LORD ROSSLYN; **Paris v. Paris** (1804) 10 Ves. 185; 7 R. R. 379.—ELDON, L.C.: **Clayton v. Gresham** (1804) 10 Ves. 288.—ELDON, L.C.: **Witts v. Steere** (1807) 14 Ves. 363; 9 R. R. 192.—ELDON, L.C.: **Hodgens, Ex parte, Hodgins**. In re (1847) 11 Ir. Eq. R. 99.—BRADY, L.C.: **Barclay v. Wainwright** (1807) 14 Ves. 60; 9 R. R. 245.—ALDOX, L.C.: **Freston v. Melville** (1818) 16 Sim. 183.—SHADWELL, V.-C.: **Ward v. Combe** (1836) 7 Sim. 634.—SHADWELL, V.-C.: and **Price v. Anderson** (1847) 15 Sim. 473.—SHADWELL, V.-C., discussed.

Barton's Trusts. In re (1868) 37 L. J. Ch. 194; L. R. 5 Eq. 238; 17 L. T. 594; 16 W. R. 362.—WOOD, V.-C., approved.

Bouch v. Sproule (1887) 56 L. J. Ch. 1037; 12 App. Cas. 385; 57 L. T. 345; 36 W. R. 198.—H.L. (E.). LORDS HERSCHELL, WATSON, BRAMWELL and FITZGERALD: *reversing* S. C. nom. **Bouch**. In re **Sproule** *r. Bouch* (1885) 54 L. J. Ch. 665; 29 Ch. D. 635; 52 L. T. 366; 33 W. R. 621.—G.A. BAGGALLAY, BOWEN and FRY, L.Js.; and *restoring order of* KAY, J.

Brander v. Brander and Irving v. Houston, distinguished.

Barton's Trusts, In re, approved.

Bouch v. Sproule, applied.
Cunliff's Trustees v. Cunliff (1900) 8 Fraser 202.—COURT OF SESSION.

Bouch v. Sproule, discussed and applied, **Alsbery**. In re **Sugden v. Alsbery** (1890) 60 L. J. Ch. 29; 45 Ch. D. 237; 63 L. T. 576; 39 W. R. 136; 2 Meg. 846.—NORTH, J.; *commented on*, **Northage**. In re **Ellis v. Barfield** (1891) 60 L. J. Ch. 488; 64 L. T. 625.—NORTH, J.; *referred to*, **Armitage**. In re **Armitage v. Garnett** (1893) 63 L. J. Ch. 110; [1893] 3 Ch. 837; 7 R. 290; 69 L. T. 619.—G.A. LINDLEY, LOPES and A. L. SMITH, L.Js.

Rowley v. Unwin (1855) 2 K. & J. 138.—WOOD, V.-C.; **Northage**, In re **Ellis v. Barfield**, and **Tindal**, In re (1892) 9 Times L. R. 24.—CHITTY, J., discussed.

Bouch v. Sproule, principle applied, but *not distinguished on the facts*.

Malam, In re **Malam v. Hitchens** (1894) 63 L. J. Ch. 797; [1894] 3 Ch. 578; 19 R. 38; 71 L. T. 655.—STIRLING, J.

Bouch v. Sproule, considered, **Bridgewater Navigation Co.** In re (1891) 60 L. J. Ch. 415;

[1891] 2 Ch. 817; 64 L. T. 576.—G.A. LINDLEY, LOPES and KAY, L.Js.; *varying* [1901] 1 Ch. 155; 2 Meg. 334.—NORTH, J., distinguished, **Despard**, In re **Hancock v. Despard** (1801) 17 Times L. R. 24.—KEKEWICH, J.

Bridgewater Navigation Co., In re, applied, **Bishop v. Smyrna and Cassaba Ry.** (No. 2) (1895) 64 L. J. Ch. 806; [1895] 2 Ch. 596; 13 R. 803; 73 L. T. 337; 2 Manson 875.—KEKEWICH, J.; distinguished, **Crichton's Oil Co.** In re (1902) 71 L. J. Ch. 531; [1902] 2 Ch. 86.—G.A. (*post*, col. 574).

Forfeiture.

Home Counties and General Life Assurance Society, In re **Woollaston's Case** 28 L. J. Ch. 723, n.—KINDERSLEY, V.-C.; *reversed*, (1859) 28 L. J. Ch. 721; 4 De G. & J. 437, 5 Jur. (N.S.) 617, 853; 7 W. R. 540, 645.—KNIGHT BRUCE and TURNER, L.Js.

Johnson v. Lyttle's Iron Agency (1877) 46 L. J. Ch. 786; 5 Ch. D. 687; 36 L. T. 528; 25 W. R. 548.—G.A. JAMES, MELISH and BAGGALLAY, L.Js., explained.
Jackson v. Northampton Street Tramways Co. (1886) 55 L. T. 91.—STIRLING, J.

Maturin v. Tredennick (1864) 10 L. T. 331; 12 W. R. 740.—WOOD, V.-C., followed.
Mount Morgan (West) Gold Mine. In re (1887) 56 L. T. 622.—KAY, J.

Surrender.

Agriculturist Cattle Insurance Co., In re, **Brotherhood's Case** (1862) 31 Beav. 365.—ROMILLY, M.R.; *affirmed*, 31 L. J. Ch. 861; 4 De G. F. & J. 566; 8 Jur. (N.S.) 926; 7 L. T. 142; 10 W. R. 852.—KNIGHT BRUCE and TURNER, L.Js., distinguished.
And see post.

Agriculturist, &c. Co., In re, **Spackman's Case** (1865) 34 L. J. Ch. 321; 11 Jur. (N.S.) 207; 12 L. T. 130; 13 W. R. 479.—WESTBURY, L.C.; *reversing* 10 Jur. (N.S.) 911; 11 L. T. 13; 12 W. R. 1133.—ROMILLY, M.R.; *affirmed, post*.

Spackman's Case, distinguished.
Agriculturist, &c. Co., In re, **Belhaven's (Lord) Case** (1865) 34 L. J. Ch. 503; 3 De G. F. & J. 83, 41; 11 Jur. (N.S.) 572; 12 L. T. 595; 13 W. R. 849.—KNIGHT BRUCE and TURNER, L.Js. *And see post*, col. 529.

Spackman's Case, followed.
Belhaven's (Lord) Case (*supra*), distinguished.
Agriculturist Cattle Insurance Co., In re, **Stanhope's Case** (1866) 35 L. J. Ch. 296; 1 R. 1 Ch. 161; 12 Jur. (N.S.) 79; 14 L. T. 468; 14 W. R. 266.—CRANWORTH, L.J.; *reversing* 11 Jur. (N.S.) 872.—ROMILLY, M.R.

Brotherhood's Case (*supra*), distinguished.
Agriculturist Cattle Insurance Co., In re, **Stewart's Case** (1866) 35 L. J. Ch. 750; L. R. 1 Ch. 296; 12 Jur. (N.S.) 611; 14 L. T. 841; 14 W. R. 954.—CHELMSFORD, L.C.; *reversing* 12 Jur. (N.S.) 469; 14 L. T. 537; 14 W. R. 816.—ROMILLY, M.R.; **Spackman v. Evans** (1865) 37 L. J. Ch. 732; L. R. 3 H. L. 171; 19 L. T. 151.—H.L. (E.). LORDS CRANWORTH, CHELMSFORD and COLONAY; LORDS ST. LEONARDS and ROMILLY dissenting; *affirming* S. C. nom. **Agriculturist Cattle Insurance Co.**, In re, **Spackman's Case** (*supra*).

Brotherhood's Case, *followed*.

Stewart's Case (*supra*), *not followed*.

Agriculturist Cattle Insurance Co., In re, Smallcombe's Case (1867) L. R. 3 Eq. 769; 15 W. R. 501.—ROMILLY, M.R.: *affirmed*, *nom.* Evans v. Smallcombe (1868) 37 L. J. Ch. 798; L. R. 3 H. L. 249; 19 L. T. 207.—H.L. (E.). CAIRNS, L.C. and LORD CRANWORTH: LORD CHELMSFORD *dissenting*.

Spackman v. Evans, *discussed*.

Phosphate of Lime Co. v. Green (1871) L. R. 7 C. P. 43; 25 L. T. 636.—C.P. (*supra*, col. 395).

Spackman v. Evans; Evans v. Smallcombe; and Houldsworth v. Evans (1868) 37 L. J. Ch. 800; L. R. 3 H. L. 263; 19 L. T. 211.—H.L. (E.). CAIRNS, L.C. and LORD CHELMSFORD: LORD CRANWORTH *dissenting*, *distinguished*.

Ashbury Railway Carriage, & Co. v. Riche (1875) 44 L. J. Ex. 183; L. R. 7 H. L. 653; 33 L. T. 451; 24 W. R. 794.—H.L. (E.) (*supra*, col. 441).

London and Mediterranean Bank, In re, Wright's Case, L. R. 12 Eq. 331; 24 L. T. 899; 19 W. R. 947.—WIGKENS, V.C.: *reversed*. (1871) 41 L. J. Ch. 1; L. R. 7 Ch. 55; 25 L. T. 471; 20 W. R. 45.—HATHERLEY, L.C.

Belhaven's (Lord) Case (*supra*, col. 528), *observed on*.

Dixon v. Evans (1872) 42 L. J. Ch. 139; L. R. 5 H. L. 606.—H.L. (E.): *reversing* S. C. *nom.* Agriculturist Cattle Insurance Co., In re, Dixon's Case (1869) 39 L. J. Ch. 134; L. R. 5 Ch. 79; 21 L. T. 238, 446; 18 W. R. 77.—GIFFARD, L.J.; and *affirming* 38 L. J. Ch. 567; 17 W. R. 1036.—ROMILLY, M.R.

LORD WESTBURY.—I think, therefore, that this case stands wholly independent of those cases which have been decided. *Belhaven's (Lord) Case* is a much stronger case than anything that I ask your lordships to decide now. How the decision in *Belhaven's (Lord) Case* was arrived at, it is not necessary to inquire; but undoubtedly, if Lord Belhaven was justly relieved from a deliberate contract, which he entered into, and which was perfected, there is much greater reason for relieving the appellant from the completion of a conditional contract which he was induced to enter into, and which as the condition was not performed, never became in fact or in law a binding contract.—p. 144. LORDS COLONSAI and CAIRNS concurred.

Dixon v. Evans, *dictum* of LORD WESTBURY *approved*.

Norwich Provident Insurance Society, In re, Bath's Case (1878) 5 Ch. D. 334; 47 L. J. Ch. 601; 38 L. T. 297; 26 W. R. 441.—C.A. JESSEL, M.R., JAMES and BAGGALLAY, L.J.J.

JESSEL, M.R.—It seems to me that principle—and authority, so far as it goes, that is the *dictum* of Lord Westbury in *Dixon's Case*—point to one conclusion, that corporations must have such a power [to compromise claims brought against them] as an incident to their existence.—p. 340.

Transfer.

Coles v. Bank of England (1839) 10 A. & E. 437; 3 P. & D. 521.—Q.B., *questioned*.

Howard v. Hudson (1853) 22 L. J. Q. B. 341; 2 EL. & BL. 1; 17 Jur. 855; 1 W. R. 325.—Q.B.

Coles v. Bank of England, *commented on*.

Bank of Ireland v. Evans' Charities (Trustees) (1855) 5 H. L. Cas. 389; 3 W. R. 573.—H.L. (TR.).

PARKE, B. (for the JUDGES).—Much reliance was placed in the course of the argument on *Coles v. Bank of England* as an authority for the admission of evidence of negligence not immediately connected with the particular transfer. The case furnishes no such authority. On considering the judgment of Lord Denman it seems clear that the Court adopted the argument of the counsel for the bank, that the principal question was, whether it could be made liable to replace stock transferred by a person professing to act for the proprietor, after the proprietor has recognised the transfer by receiving dividends on the reduced amount. This negligent conduct of the plaintiff in receiving dividends on the sum to which the stock was reduced by a forged transfer, was treated by the Court as evidence of the ratification of these transfers, by which the stock was reduced to that amount, and on that ground the Court seems to have proceeded.... Whether that case is altogether satisfactory, is not a matter now to be considered by us. It is enough to say that it does not apply to the case now before your lordships.—p. 411.

CRANWORTH, L.C.—Whether [in *Coles v. Bank of England*] I should have arrived upon the question of fact at the same conclusion is a matter upon which I do not feel myself called to speculate. That certainly seems to me to be rather a strong result.—p. 414.

LORD BROUGHAM.—I agree in the doubt insinuated rather than expressed by the learned judges, and more plainly intimated by my noble and learned friend, as to how *Coles v. Bank of England* might have been determined if it had not been disposed of in the way in which it was.—p. 415.

And see post, col. 531.

Bank of Ireland v. Evans' Charities (Trustees) and Taylor v. Great Indian Peninsula Ry. (1859) 28 L. J. Ch. 285, 709; 4 De G. & J. 559; 5 Jur. (N.S.) 1087; 7 W. R. 637.—KNIGHT BRUCE and TURNER, L.J.J., *applied*. *And see post*, col. 537.

Coles v. Bank of England, *overruled*.

Swan v. North British Australasian Co. (1863) 32 L. J. Ex. 273; 2 H. & C. 175; 7 H. & N. 603; 10 Jur. (N.S.) 102; 11 W. R. 862.—EX. CH. KEATING, J. *dissenting*. *See post*, col. 537.

Taylor v. Great Indian Peninsula Ry., *distinguished*.

Hawkins v. Maltby (1868) 37 L. J. Ch. 58; L. R. 3 Ch. 188; 17 L. T. 897; 16 W. R. 209.—CHELMSFORD, L.C. (*see post*, col. 548).

Swan v. North British Australasian Co., *explained*. *And see post*, col. 532.

Hunter v. Walters (1871) L. R. 7 Ch. 75; 41 L. J. Ch. 175; 25 L. T. 765; 20 W. R. 218.—C.A. HATHERLEY, L.C., JAMES and MELLISH, L.J.J.; *affirming* (1870) L. R. 11 Eq. 292.—MALINS, V.-G.

MELLISH, L.J.—In my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed

really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts on the faith of the deed being valid, and who accepts an estate under it. I do not think that *Swan v. North British Australasian Co.*—a decision of which the learned V.-C. disapproves—is really a direct authority upon that question; because in that case a transfer of shares had been executed in blank: the person who executed it owned shares in two companies, and gave authority to the broker to fill them up with shares in one company, which were afterwards transferred to an innocent person. There the Court said that the whole thing was a forgery, and that the negligence of the transferor in executing the deed in blank was not the real and proximate cause of the loss, which was the forgery of the broker in filling the deeds up with shares differing from those which he was authorised to fill them up with. That decision does not go to the extent of saying that if the broker had filled them up with the same shares which he was authorised to insert, and therefore had done what he was authorised to do, that then, because it was void at law from being executed in blank, nevertheless the principal might not have been estopped.—p. 87.

Bank of Ireland v. Evans' Charities (Trustees) and Swan v. North British & Co. (supra), referred to.

Coles v. Bank of England (supra), questioned.
Baxendale v. Bennett (1878) 47 L. J. Q. B. 624; 3 Q. B. D. 525; 26 W. R. 899.—C.A. BRAMWELL, BAGGALLAY and BRETT, L.JJ.

Bank of Ireland v. Evans' Charities (Trustees) (supra), explained and applied.

Merchants of the Staple of England v. Bank of England (1887) 21 Q. B. D. 160; 57 L. J. Q. B. 418; 36 W. R. 880; 52 J. P. 580.—C.A.: affirming 56 L. T. 665.—WILLS and DAY, JJ.

BOWEN, L.J.—In *Bank of Ireland v. Evans' Charities (Trustees)*, it seems to me to be clear that Parke, B., whose opinion was adopted by the learned lords who gave the judgment of the H. L., laid it down as the opinion of himself and the other judges, that the negligence which would deprive the plaintiff of his right to insist that the transfer in that case was invalid, must be negligence in or immediately connected with the transfer itself, and what he meant by that language I do not think can be left in doubt, first of all because he in using it expresses his concurrence with the Irish Ex. Ch. [12 Ir. L. R. 365], . . . in respect of that proposition, and because subsequently he proceeds to enlarge upon it and explain it himself. I have taken the trouble to verify the references to these judgments; and it appears to me that they all in different language and with different degrees perhaps of lucidity adopt the view that there was a difficulty in the way of the defence, which arose from the fact that the carelessness of the plaintiff in that particular case, even if it furnished an occasion for the loss which was sustained afterwards, had not directly led to it. But we are not left to pick out the meaning of Parke, B., from reference to the judgment of the Court below. He proceeds to explain what he means, and says, "If such negligence," that is, the negligence charged in the particular case, "could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-

book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney." That that is the true explanation of what is not ambiguous or difficult language to interpret follows, it seems to me, from the decision of the Ex. Ch., by which we are bound in *Swan v. North British & Co.* and by the judgment of Blackburn, J., who, as the M.R. has pointed out, corrects a definition given by Wilde, B. in the Court below. He corrects it by saying that negligence to work an estoppel must be a proximate negligence, and it will not do if it is merely a remote one.—p. 174.

ESHER, M.R. and FRY, L.J. to the same effect.

Bank of Ireland v. Evans' Charities (Trustees) and Merchants of the Staple v. Bank of England, considered.

Bank of England v. Vagliano (1891) 60 L. J. Q. B. 145; [1891] A. C. 107; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.—H.L. (E.). See "BILLS OF EXCHANGE."

Imperial Mercantile Credit Association, In re, Marino's Case (1867) 36 L. J. Ch. 468; L. R. 2 Ch. 596; 16 L. T. 368; 15 W. R. 688.—TURNER and CAIRNS, L.JJ., discussed.
Tahiti Cotton, & Co., In re, Sargent, Ex parte (1874) L. R. 17 Eq. 273; 43 L. J. Ch. 425; 22 W. R. 815.

JESSEL, M.R.—Although there are some expressions in the judgment of Turner, L.J., in *Marino's Case*, which would seem to favour the view put forth on behalf of the company, I doubt whether they go to the full extent contended for. I do not think the L.J. meant to do more than express his assent to the argument of Mr. Giffard, who relied on the fact that the transfer had not been executed by the transferee. At all events, I think I am not bound by that case to decide that in this company transfers must necessarily be by deed.—p. 278.

Sargent, Ex parte, and Tees Bottle Co., In re, Davies' Case (1876) 33 L. T. 834.—MALINS, V.-C., applied.

Dodds v. Hills (1865) 2 H. & M. 424; 12 L. T. 129.—WOOD, V.-C., distinguished.
Ortigosa v. Brown (1878) 47 L. J. Ch. 168; 38 L. T. 145.

HALL, V.-C.—The present case is not like *Dodds v. Hills*, in which the transferee was able to complete his title without any further act to be done by the transferor.—p. 172.

Dodds v. Hills, distinguished.

Roots v. Williamson (1888) 57 L. J. Ch. 995; 38 Ch. D. 485 (post, col. 539).

Swan v. North British, & Co. and Tayler v. Great Indian Peninsula Ry. (supra, col. 530), applied.

Sargent, Ex parte, observed on.

France v. Clark (1884) 53 L. J. Ch. 585; 26 Ch. D. 257; 50 L. T. 1; 32 W. R. 166.—C.A.
SELBORNE, L.C. (for self, **COTTON and LINDLEY, L.JJ.**).—*Sargent, Ex parte*, was decided upon

an application to rectify the register of a company by substituting the name of Sargent for that of Fry, who, being the registered owner of certain shares, had signed a transfer in blank to Cannon by way of security, and Cannon had transferred it in the same state to Sargent, who afterwards filled in his own name. Sargent does not appear to have claimed to stand as more than a transferee, with a right to get in the legal title of such interest as Cannon had when he handed over the documents: and Jessel, M.R. relied upon the power of every mortgagee "to re-borrow and to transfer his security." There were several communications between Fry and Sargent after the transfer, which may perhaps have been thought to amount to ratification, and Jessel, M.R. said that Mr. Fry's own counsel had admitted Sargent's equitable rights to have the shares transferred to him, which admission, in his lordship's judgment, covered the legal right also. If the case is to be thus explained, it is not an authority in point on the present occasion—if not, we should not be prepared to follow it—p. 588.

And see post, col. 537.

Swan v. North British, &c. Co., dicta discussed. Scholfield v. Londesborough (Earl) (1896) 65 L. J. Q. B. 593; [1896] A. C. 514; 75 L. T. 254; 45 W. R. 124.—H.L. (E.) (see "BILLS OF EXCHANGE"); *headnote corrected*, Union Credit Bank v. Mersey Docks and Harbour Board (1899) 68 L. J. Q. B. 842; [1899] 2 Q. B. 205; 81 L. T. 44.—BIGHAM, J.

Sargent, Ex parte (supra), applied.

Ireland v. Hart (1902) 71 L. J. Ch. 276; [1902] 1 Ch. 522 (post, col. 541).

Pinkett v. Wright (1849) 12 L. J. Ch. 119;

2 Hare 120; 6 Jur. 1102.—WIGRAM, V.-C.:

affirmed, nom. Murray v. Pinkett (1846) 12

Ch. & P. 764.—H.L. (E.), *principle applied*.

Martin v. Sedgwick (1846) 9 Beav. 333; 10

Jur. 463.—M.R., *distinguished*.

Clark v. Holland (1854) 24 L. J. Ch. 13; 19 Beav.

262; 18 Jur. 1007; 2 W. R. 402.—ROMILLY, M.R.

Hudson v. Revett (1829) 5 Bing. 368; 2

M. & P. 603; 7 L. J. (O.S.) O.P. 145; 30

R. R. 649.—O.P., *distinguished*. And see

post, col. 537.

Dearle v. Hall (1828) 3 Russ. 1; 2 L. J.

(O.S.) Ch. 62; 27 R. R. 1.—LYNDHURST,

L.C., *limited*. And see post, col. 536, and

"ASSIGNMENT."

Martin v. Sedgwick, held overruled.

Pinkett v. Wright; Littledale, Ex parte,

Pearse, In re (1855) 24 L. J. Bk. 9; 6 De

G. M. & G. 714; 1 Jur. (N.S.) 385; 3 W. R.

307.—L.C. and L.J.; **Stewart, Ex parte,**

Shelley, In re (1864) 34 L. J. Bk. 6; 4

De G. J. & S. 648; 11 Jur. (N.S.) 25; 11

L. T. 554; 13 W. R. 356.—L.C.; **Boulton,**

Ex parte, Sketchley, In re (1857) 26

L. J. Bk. 45; 1 De G. & J. 163; 3 Jur.

(N.S.) 425; 5 W. R. 446.—L.J.; **Union**

Bank of Manchester, Ex parte, Jackson,

In re (1871) 40 L. J. Bk. 57; L. R. 12

Eq. 354; 24 L. T. 951; 19 W. R. 872.—

V.-C.; and **Agra Bank, Ex parte, Worcester,**

In re (1868) 37 L. J. Bk. 28; L. R. 3 Ch.

555; 18 L. T. 886; 16 W. R. 879.—L.J.,

discussed.

Société Générale de Paris v. Tramways Union

Co. (1884) 14 Q. B. D. 424; 54 L. J. Q. B. 177;

52 L. T. 912.—C.A.; *reversing* 1 Cab. & Ell. 296.

—LOPES, J.: *affirmed* (post, col. 536).

BRETT, M.R.—It was suggested at one time that the only meaning of that Act of Parliament (Companies Act, 1862), was that the company need not take notice on the register of any trusts—need not enter the trusts upon the register—so that the register would be kept simple and clear. After considering the matter I cannot accept that argument. For the moment it struck me very much; but although it was said to have been the suggestion of Westbury, L.C., in *Stewart, Ex parte*, yet I do not think his suggestion went that length, and I certainly do not think that that can be the meaning of the Act of Parliament. . . . With regard to *Agra Bank, Ex parte*, my own view of it is this, that the Court assumed without fully considering the point which is now before us, that by reason of notice the shares were not in the order and disposition of the bankrupt, and therefore that case does not in any way decide the present point. Whether the Court may have overlooked the considerations which have been called to our attention in this case or not, is not material to consider when that case is treated, not upon appeal from it, but merely as an authority for a legal proposition.—pp. 439–441.

COTTON, L.J.—There is, I think, one decision only which can be quoted by the plaintiffs as in their favour, *Martin v. Sedgwick*. In that case, as reported, Lord Langdale held that the interest of a *cestui que trust* of shares must be postponed to the claim of a person holding a security apparently effectual only in equity, created by the trustee of the shares, of which he had given notice to the company, on the ground that the *cestui que trust* had given no notice to the company. If this was in fact the decision, this Court is not bound by it, and, I think, should decline to follow it, and indeed it must be considered as having been overruled by *Pinkett v. Wright*, afterwards affirmed in the H.L. But in *Boulton, Ex parte*, Turner, L.J. expressed himself in terms which strongly support the plaintiffs' contention. . . . The opinion which he expressed was not necessary for the decision of the case before him, which was one under the order and disposition clauses of the Bankruptcy Act. . . . In my opinion we ought not to be induced by respect for what he said to apply the rule established in *Dearle v. Hall* to dealings with property, to which in principle that rule is in our opinion not applicable.—p. 447.

LINDLEY, L.J.—The plaintiffs' title is also equitable only. They held a transfer in blank, and then filled it up, but notwithstanding the reference to it by the transferor in his letters of indemnity the transfer in its complete state was never seen by him, nor is there any evidence to show that he knew how it was filled up or the state in which it was, when it is contended that he ought to be treated as having re-delivered it. Had there been such evidence I should have been prepared to infer a delivery after the transfer had been duly filled up on the authority of *Hudson v. Revett*. . . . It has been held, and I think properly, that shares in companies governed by the Companies Act, 1862, are not choses in action within the meaning of the reputed ownership clause, sect. 15, of the Bankruptcy Act, 1869: *Union Bank of Manchester, Ex parte*. . . . Under the circumstances of the case before Lord

Westbury [*Stewart, Ex parte*], it would have been a gross breach of faith towards the bankers and against their own interests, if the directors had allowed the shares to be transferred to the prejudice of the bankers. Lord Westbury's decision, therefore, was perfectly correct, but it is no authority for the general proposition that a company registered under the Companies Act, 1866 (or 1862), is bound to take notice of the beneficial interest in shares held by its members, or is bound to prevent a transfer by such members, simply because notice of a trust or equitable security is given to the company. I understand Lord Westbury's view to have been clearly contrary to such a proposition. *Littledale, Ex parte*, and *Boulton, Ex parte*, show that if shares in dock and railway companies are equitably assigned or are left standing in the name of a bankrupt, they pass to his assignees under the order and disposition clause, if no notice of the assignment is given to the company, but do not so pass if notice is given. In *Littledale, Ex parte*, the giving of the notice was considered as essential to perfect the equitable title, and as preventing a transfer by the registered shareholder—see 6 De G. M. & G. 734. Now, as the Companies Clauses Consolidation Act contains a section exonerating the companies to which it applies from noticing trusts, (and it did certainly apply to the company in question in *Boulton, Ex parte*, and probably also to the others,) these cases go a long way. In *Littledale, Ex parte*, however, the attention of the Court was not called to the trust section, but in *Boulton, Ex parte*, it was, and it is curious to observe how cautious the Court was. In *Boulton, Ex parte*, it was contended that the company had notice of the assignment, but the Court held the contrary. There was, therefore, nothing in that case to take the shares out of the reputed ownership of the bankrupt. Knight Bruce, L.J. said: "Whether the security could have been made safe against bankruptcy without a transfer I do not say: a transfer, however, was not promised, intended, or expected on either side." Turner, L.J. went a little further, and says this, "On the other hand it was contended on the part of the respondent that the shares could be equitably mortgaged, and that no notice to the company was required, but that if notice was required there was in this case sufficient notice. It is not necessary, I think, to give any opinion upon the question whether there can be a valid equitable mortgage of railway shares, and I do not mean therefore to give any opinion upon that point, but assuming that such mortgages can be made, I am of opinion that all the requisites which are essential to mortgages of other choses in action must be observed, and that notice to the company was therefore necessary." I understand this observation to mean in substance: "Assume that a notice to the company would have been effectual to take the shares out of the order and disposition of the bankrupt, still, as there was no notice, they were in his order and disposition." *Agri Bank, Ex parte*, appears at first sight to offer more difficulty. The C.A. there held that shares registered in the name of a bankrupt were not in his order and disposition, inasmuch as the share certificates had been deposited by him with his bankers as a security for a loan, and the directors knew it, although the bankers had given no notice to the company of their security. The Court there came to the conclusion that the directors

could not properly have permitted a transfer, and it certainly looks as if the Court thought that the company was bound to recognise the equitable title of the bankers. This may have been so as regards the company then in question. The company was called the San Pedro del Monte Silver Mining Company, and it does not appear under what statute, if any, it was formed. No statutory enactment relating to the non-recognition of trusts was referred to in argument or noticed by the Court. Under these circumstances it would not be safe to take this case as deciding more than that the shares there in question were not in the order and disposition of the bankrupt, inasmuch as the directors knew that the shares were not in fact the bankrupt's property. There are many other decisions on the reputed ownership clause, and its application to shares in companies, but they go no further than those I have noticed. When carefully examined, none of the cases on the reputed ownership clause decide that it is the duty of companies registered under the Companies Act, 1862 (or governed by any other statute containing such a clause as sect. 30), to attend to notices of equitable assignments of their shares.—pp. 449—454.

[The L.J. also expressed his disapproval of *Morin v. Sedgwick*, and held that *Dearle v. Hall* did not apply.]

Société Générale de Paris v. Tramways Union (*supra*), discussed and not applied. **Stewart, Ex parte**, and **Dearle v. Hall** (*supra*, col. 533), considered.

Rearden v. Provincial Bank of Ireland (1896) 1 Ir. R. 532.—C.A. (*post*, col. 541).

Société Générale de Paris v. Tramways Union Co., followed.

Hopkinson v. Rolt (1861) 34 L. J. Ch. 468; 9 H. L. Cas 514; 5 L. T. 90; 9 W. R. 900.—H.L. (E.), distinguished. See *post*, col. 538. And see "MORTGAGE."

Bradford Banking Co. v. Briggs (1885) 31 Ch. D. 19; 53 L. T. 846; 33 W. R. 887.—C.A. **BRETT, M.R., BAGGALLAY and FRY, L.J.**; reversing 29 Ch. D. 149; 52 L. T. 643; 33 W. R. 730.—FIELD, J.; reversed (*post*, col. 537).

Bradford Banking Co. v. Briggs, followed. **Miles v. New Zealand Alford Estate Co.** (1866) 55 L. J. Ch. 801; 32 Ch. D. 266; 54 L. T. 582; 34 W. R. 669.—C.A. **COTTON and FRY, L.J.**; **BOWEN, L.J. dissenting**.

Hibblewhite v. M^r Morine (1840) 9 L. J. Ex. 217; 6 M. & W. 200; 2 Railw. Cas. 51.—**PARKER, B.** (for the Court), applied.

France v. Clark (1884) 53 L. J. Ch. 585; 26 Ch. D. 25 (*supra*, col. 532).

Hibblewhite v. M^r Morine, approved.

Dearle v. Hall (*supra*), distinguished.

Société Générale de Paris v. Walker (1885) 11 App. Cas. 20; 55 L. J. Q. B. 169; 54 L. T. 389; 34 W. R. 662.—H.L. (E.). **HALESBURY, L.C., LORDS SELBORNE, BLACKBURN, WATSON and FITZGERALD**; affirming S. C. nom. **Société Générale de Paris v. Tramways Union Co.** (*supra*, col. 533).

[The company was incorporated under the Companies Act, 1862. The articles of association provided that the shares should be transferable only by deed; that lost certificates might be renewed upon satisfactory proof of the loss,

or, in default of proof, upon a satisfactory indemnity being given; and that the company should not be bound by or recognise any equitable interest in shares. Each certificate stated, under the company's seal, that no transfer of any portion of the shares represented by the certificate would be registered until the certificate had been delivered at the company's office.]

LORD SELBORNE—The C.A., without reference to the certificates, thought the principle of *Dearle v. Hall* inapplicable to shares of this kind; and I agree with them. I do not understand in what respect a notice not operative as against the company or its officers can have the effect of "perfecting" the equitable assignee's title. No authority was cited to show that the doctrine of *Dearle v. Hall* had been applied to such shares; and the reasons for that doctrine are, in my judgment, not applicable. The case is not like those under the bankrupt laws, in which the fact, or presumption of a continuance (after a change in the equitable title) of the prior state of "order and disposition," or reputed ownership, "with the consent of the true owner," has to be in some way disproved. But in the case before your lordships that was actually done by the company's engagement under the deed in the respondents' possession, which could not have been done by any mere notice.—p. 30.

LORD BLACKBURN discussed *Taylor v. G. Indian Peninsula Ry.* (*supra*, col. 530), *Swan v. V. British Australasian Co.* (*supra*, col. 530), and *Bahia and San Francisco Ry.* *In re* (*supra*, col. 521).

Stewart, Ex parte, and Agra Bank, Ex parte (*supra*, col. 533), *referred to*.

Société Générale de Paris v. Walker, applied.

Colonial Bank v. Whitney (1886) 56 L. J. Ch. 43; 11 App. Cas. 426; 55 L. T. 362; 34 W. R. 705; 3 Morrell 207.—H. L. (E.). *And see post*, col. 559, and "BANKRUPTCY."

Goodright v. Carter v. Straphan (1774) Cowp. 201.—MANSFIELD, C.J., and **Hudson v. Revett** (*supra*, col. 533), *distinguished*.

Hibblewhite v. M'Morine and Franco v. Clark (*supra*), *discussed*.

Powell v. London and Provincial Bank (1893) 62 L. J. Ch. 795; [1893] 2 Ch. 555; 2 R. 482; 69 L. T. 421; 41 W. R. 545.—C. A.

LINDLEY, L.J.—It is said there is a doctrine as to re-delivery to the effect that if a man executes a deed—that is to say, seals it—and then afterwards acknowledges it as his own, that will amount to a delivery. That may be true, and in *Goodright v. Straphan* that doctrine was carried to a considerable length; but in that case there was no alteration at all. The first authority which has been cited, in which there was an alteration, is *Hudson v. Revett*. There the person who had sealed the deed knew what the alteration was. It was altered in his presence, and he knew exactly the state in which the deed was. Knowing the condition in which it was, he assented to it as his deed, and it was held that amounted to a re-delivery. I follow that; but there is nothing of the sort here.—p. 801.

BOWEN, L.J. to the same effect.

KAY, L.J., after referring to *Hibblewhite v. M'Morine*, continued.—In *Franco v. Clark* it was decided most distinctly by Selborne, L.C., that registration where the deed itself is incomplete does not perfect the title of the transferee at all.—p. 804.

Bradford Banking Co. v. Briggs (*supra*, col. 536).—C.A., *reversed*, and judgment of **FIELD, J. restored**.

Société Générale de Paris v. Walker (*supra*), *discussed*. *And see post*.

Hopkinson v. Rolt (*supra*, col. 536), *principle applied*.

Colonial Bank v. Whitney (*supra*), *referred to*. **Bradford Banking Co. v. Briggs** (1886) 56 L. J. Ch. 364; 12 App. Cas. 29; 56 L. T. 62; 35 W. R. 521.—H. L. (E.).

HALSBURY, L.C.—I have had an opportunity of considering the reasons of the noble and learned lord (Lord Blackburn) for the view he entertains, and in which I concur, that the judgment of the C. A. should be reversed, and the judgment of Field, J. restored. Nor should I desire to add anything to what he is about to urge, but I see some reference to the words of Lord Selborne with respect to the proposition that sect. 30 of the Companies Act renders it impossible for any company to be affected by notice of any trust, expressed, implied, or constructive. I was a party to the judgment of your lordships' House in . . . *Société Générale, &c. v. Walker*, and I certainly never imagined myself to be agreeing to a decision which could establish any such proposition, and the noble and learned lord, in whose words I have expressed my concurrence, gave no such reasons for his judgment. No such proposition was necessary for the decision of the case, and I wish to guard myself on the present occasion from being supposed to have so held.—p. 365.

LORD BLACKBURN.—Field, J. thought the point concluded by the decision of this House in *Hopkinson v. Rolt*. It was argued that the terms of the art. 103 here prevented the application of that case. Field, J. did not put such a construction on the article. . . . The M.R. (Sir W. B. Brett) and Baggallay, L.J. both expressed an opinion that inasmuch as the art. 103 stipulated for a "first and permanent" lien, the decision of this House in *Hopkinson v. Rolt* did not apply. Fry, L.J. did not go so far as to dissent from their opinion, but he certainly did not rest his judgment on that ground. As I understand it, the principle of *Rolt v. Hopkinson* is explained by Lord Campbell, L.C., and it is this: The owner of property does not, by making a pledge or mortgage of it, cease to be owner of it any further than is necessary to give effect to the security which he has thus created. And if the security is, as that in *Hopkinson v. Rolt* was, a security for present and also for future advances, the pledgee or mortgagee, though not bound to make fresh advances, may, if he pleases, do so, and will, if the property at the time of the further advance remains that of the pledgor, have the security of that property. . . . It seems to me to depend entirely on what I cannot but think a principle of justice, that a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor. . . . I cannot assent to what I understand to be the reasoning of the M.R. and Baggallay, L.J. on the construction of the 103rd article. . . . This brings me to the second point on which all three judges of the C.A. agreed. . . . The effect of that section [Companies Act, 1862, s. 30] was much discussed in a case of *Société Générale de Paris v. Tramways Union Co.* decided by the C. A. on December 18, 1884. And of that

decision the judges in the present case were aware. It was affirmed in this House under the name *Société Générale de Paris v. Walker*, not entirely for the same reasons, on December 17, 1885. The judges in the present case deciding, as they did, on July 14, 1885, could not know of that latter decision. I think that in order to bring this case within the principle of *Hopkinson v. Rolt*, it is not necessary to establish any trust as against the company. . . . The Earl of Selborne in *Société Générale de Paris v. Walker* said: "I think that according to the true and proper construction of the Companies Act, 1862, and of the articles of this company, there was no obligation upon this company to accept, or to preserve any record of, notices of equitable interests or trusts if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust." I do not think it necessary to express any opinion as to this, for I do not think that the appellants in this case seek to affect the respondents with a trust; they seek no more than to affect them, in their capacity of traders, with knowledge of their (the appellants') interest.—pp. 367, 368.

LORD FITZGERALD.—The judgment of Fry, L.J. rests on the point arising on sect 30 of the Companies Act, in reference to which he seems to be of opinion that notice of the pledge to the company should not be deemed effectual for any purpose, and that the effect of the section is to exclude the application of *Hopkinson v. Rolt*. I cannot agree that the notice had no operation. . . . Although my noble and learned friend has correctly quoted the opinion of Lord Selborne on the effect of sect. 30, yet it is observable that the other noble lords who took part in the decision of the *Société Générale v. Walker* expressly refrain from deciding the case on that ground, and I do not find that Lord Selborne expressed any opinion that the notice may not have been operative for other purposes.—p. 369.

Colonial Bank v. Whinney (*supra*, col. 537), *as used*.

Shamnat v. Mason (1899) 69 L. J. Q. B. 8; [1899] 2 Q. B. 679; 81 L. T. 485; 48 W. R. 142.—RIDLEY and DARLING, JJ.: Butler, In re (1899) [1900] 2 Ir. R. 153.—BOYD, J.

Bradford Banking Co. v. Briggs (*supra*), *approved*, Bank of Africa v. Salisbury Gold Mining Co. (1892) 61 L. J. P. C. 34; [1892] A. C. 281; 66 L. T. 237; 41 W. R. 47.—P.C. LORDS WATSON, HOBHOUSE, MACNAGHTEN and HANNEN, and SIR R. COUCH; *considered*, Rearden v. Provincial Bank of Ireland (1896) 1 Ir. R. 532.—C.A. (*post*, col. 541); *explained*, West v. Williams (1898) 68 L. J. Ch. 127; [1899] 1 Ch. 132; 79 L. T. 575; 47 W. R. 308.—C.A. See "MORTGAGE."

Société Générale de Paris v. Walker (*supra*, col. 536), and **Nanney v. Morgan** (1887) 57 L. J. Ch. 811; 37 Ch. D. 346; 58 L. T. 238; 36 W. R. 677.—C.A. COTTON, L.J., SIR J. HANNEN and LOPES, L.J., *observed on and distinguished*. And see *post*, col. 541.
Roots v. Williamson (1888) 57 L. J. Ch. 995; 38 Ch. D. 485; 58 L. T. 808; 36 W. R. 758.
STIRLING, J., after reading from Lord Selborne's judgment in *Société Générale de Paris v. Walker*, said: In reading this passage, the provisions of the articles of association of the company are doubtless to be borne in mind. So reading it, I think it may be inferred that the

following propositions are sanctioned by his lordship's authority. First, a merely inchoate title by an unauthorised transfer is not equivalent, for the purpose of defeating a pre-existing equitable title, to a legal estate in the shares. Secondly, the title by transfer is to be deemed inchoate only (within the meaning of the last proposition) if not until a complete legal title is acquired, at all events unless and until all necessary conditions have been fulfilled to give the transferee as between himself and the company a present, absolute, and unconditional right to have the transfer registered before the company are informed of the existence of a better title. Thirdly, a company having notice of a prior equitable title are not necessarily bound to act upon a transfer which confers an inchoate title only, so as to effectuate a fraud till then incomplete. Lord Blackburn's speech in the same case is also of importance. . . . It would seem, therefore, to be his lordship's opinion that a company receiving a transfer for registration are not bound to act on it at once, even though in order, but are entitled to a reasonable time to make inquiries; and that if before the expiration of such reasonable time notice is given to them of the existence of a prior equitable title, they are not necessarily bound to proceed further. The inference seems to be that, until the company have in some way shown their acceptance of the transfer, the legal title is incomplete. Lord Watson concurs. Lord Fitzgerald does not consider it necessary to decide the point. The L.C. (Lord Halsbury) concurs with Lord Blackburn. *Nanney v. Morgan* . . . has an important bearing on the question at what point the legal title to shares becomes complete. That case was decided with reference to shares in a company governed by the Companies Clauses Act, 1845; but the *ratio decidendi* throws some light upon the question in the present case. The leading judgment is delivered by Cotton, L.J. . . . The reasoning on which these judgments are based seems to show that the transfer is not complete until everything has been done which is necessary to put the transferee into the position of the transferor; or possibly a narrower view may be, that where the transfer has to be left with the company, still it does not take effect until the officers of the company have examined it, and accepted it as properly left. . . . The officers of the company charged with the duty of receiving the transfer must examine it, and ascertain whether it complies with the requirements of the deed of settlement; and if it does not, it is their duty to reject it; and I think it follows, both from what is laid down by Lord Blackburn in *Société Générale de Paris v. Walker*, and by the C. A. in *Nanney v. Morgan*, that it is not until this has been done and the transfer has been accepted by the company as a proper transfer, that it becomes effectual as between the company and the transferee. . . . In that case [*Dodd v. Hills* (*supra*, col. 532)] a sole trustee of shares executed a transfer of the shares and delivered it with the certificates to a mortgagee, who had no notice of the trust, but who afterwards received notice of the trust, and then got the transfer registered by the company. And the case may therefore be cited as an authority for the proposition, that where a person having an inchoate title completes his title by getting in the legal estates, he will not, as an ordinary rule, be deprived in favour of a person having only an equitable title of the advantage he has thereby obtained. But

in the present case the company had notice of the breach of trust before the transfer was sent to them for registration (which does not appear to have been the case in *Dodd v. Hills*), and the legal title never was completed. This distinguishes the present case from *Dodd v. Hills*, and it is therefore unnecessary for me to consider whether all the propositions laid down by the V.-C. in that case are entirely consistent with the more recent decisions.—pp. 999–1001.

Société Générale de Paris v. Walker and Roots v. Williamson, applied.

Moore v. North Western Bank (1891) 60 L. J. Ch. 627; [1891] 2 Ch. 599; 64 L. T. 456; 40 W. R. 93.—ROMER, J.

Société Générale de Paris v. Walker, referred to.

Ottos Kopje Diamond Mines, In re (1892) 62 L. J. Ch. 666; [1893] 1 Ch. 618; 2 R. 257; 68 L. T. 138; 41 W. R. 258.—C.A. (*supra*, col. 522).

Société Générale de Paris v. Walker; Roots v. Williamson, and Moore v. North Western Bank, referred to.

Ireland v. Hart (1902) 71 L. J. Ch. 276; [1902] 1 Ch. 522; 86 L. T. 35; 50 W. R. 315; 9 Manson 209.—JOYCE, J.

Nannay v. Morgan (*supra*, col. 589) and **Ireland v. Hart, referred to.**

Rimmer v. Webster (1902) 71 L. J. Ch. 561; [1902] 2 Ch. 163; 86 L. T. 491; 50 W. R. 517.—FARWELL, J.

Binney v. Ince Hall Coal and Cannel Co. (1866) 35 L. J. Ch. 363; 14 L. T. 382.—KINDERSLEY, V.-C., *discussed and approved.*

New London and Brazilian Bank v. Brocklebank (1882) 51 L. J. Ch. 117; 21 Ch. D. 302; 47 L. T. 3; 30 W. R. 737.—C.A. JESSEL, M.R., LINDLEY and HOLKER, L.JJ.

New London, &c. Bank v. Brocklebank, discussed and not applied.

Perkins, In re, Mexican Santa Barbara Mining Co., Ex parte (1890) 59 L. J. Q. B. 226; 24 Q. B. D. 618; 38 W. R. 710; 7 Morrell 32; 2 Meg. 197.—C.A. COLE-RIDGE, C.J., ESHER, M.R. and FRY, L.J., *explained.*

Rearden v. Provincial Bank of Ireland (1896) 1 Ir. R. 532.—C.A. PALLES, C.B., FITZGIBBON and WALKER, L.JJ.

New London, &c. Bank v. Brocklebank, explained and applied.

Borland's Trustee v. Steel Bros. & Co. (1900) 70 L. J. Ch. 51; [1901] 1 Ch. 279; 49 W. R. 120.—FARWELL, J.

Borland's Trustee v. Steel Bros. & Co., referred to.

Casey v. Bentley [1902] 1 Ir. R. 376.—C.A. (*see post*, col. 552).

Harrison, Ex parte, Cannock and Bugeley Colliery Co., In re (1884) 53 L. J. Ch. 1182; 26 Ch. D. 522; 51 L. T. 324; 32 W. R. 1011.—RAGON, V.-C.; *reversed*, (1885) 54 L. J. Ch. 554; 28 Ch. D. 363; 63 L. T. 189.—C.A. SELBORNE, L.O., BRETT, M.R. and COTTON, L.J.

British Provident Life and Fire Assurance Society, Grady's Case (1863) 32 L. J. Ch. 326; 1 De G. J. & S. 488; 9 Jur. (N.S.) 631; 1 N. R. 407; 8 L. T. 98; 11 W. R. 355.—WESTBURY, L.O., *adhered to.*

Laue, Ex parte, British Provident, &c. Society, In re (1863) 33 L. J. Ch. 84; 1 De G. J. & S.

504; 10 Jur. (N.S.) 25; 9 L. T. 461; 12 W. R. 60.—WESTBURY, L.O.; *reversing* 9 Jur. (N.S.) 1267; 9 L. T. 281.—KINDERSLEY, V.-C.

Gresham Life Assurance Society, In re, Penney's Case (1872) 42 L. J. Ch. 183; L. R. 8 Ch. 446; 28 L. T. 150; 21 W. R. 186.—JAMES and MELLISH, L.JJ., *followed.*
Coalport China Co., In re (1895) 64 L. J. Ch. 710; [1895] 2 Ch. 404; 12 R. 462; 73 L. T. 46; 44 W. R. 38; 2 Manson 532.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

LINDLEY, L.J.—I am aware that the articles were not quite the same, but the M.R. there [Penney's Case] had held not only that the directors were bound to act *bona fide* (which, of course, they are), but that they were bound to preserve some kind of evidence that they had acted *bona fide*, so that the Court might see it. The C.A. said, "No, that is not part of their business. Show us that they have not acted properly, give us some evidence of that kind, and we have ample power to interfere."—p. 711.

Joint Stock Discount Co., In re, Shepherd's Case (1866) 36 L. J. Ch. 32; L. R. 2 Ch. 16; 15 L. T. 198; 15 W. R. 2, 117.—TURNER and CAIRNS, L.JJ.; *affirming* L. R. 2 Eq. 564; 12 Jur. (N.S.) 697; 14 L. T. 788.—ROMILLY, M.R., *explained and distinguished.*

Joint Stock Discount Company, In re, Nation's Case (1866) 36 L. J. Ch. 112; L. R. 3 Eq. 77; 15 L. T. 308; 15 W. R. 143.

ROMILLY, M.R.—I fully admit, and in fact that was what I intended to decide in *Shepherd's Case*, that if a company find they are in a situation in which they cannot go on, and they think that it will be necessary to wind up, and are of opinion, after a proper investigation of the state of their affairs, that such is the case, and it is but fair to all persons connected with the company that the matter should remain in its then state, then they may make a resolution to make no transfers after that date, but always subject to this—that those transfers which they ought to have completed previously to such resolution cannot in any degree be bound or altered; but they are entitled to say, that those which they were not bound to complete before that time should not be completed afterwards, as was the case in *Shepherd's Case*. . . I am of opinion, therefore, that it was when the resolution was passed (and that is what I meant to decide in *Shepherd's Case*) that the line was drawn, and that the resolution affected all those transfers, and those only, which they had not been previously bound to complete according to the ordinary course of business without any improper delay.—p. 113.

Nation's Case; Joint Stock Discount Co., In re, Hill's Case (1867) L. R. 4 Ch. 769, n.—ROMILLY, M.R.; and *Shepherd's Case, followed.*

Joint Stock Discount Co., In re, Fyfe's Case (1869) 38 L. J. Ch. 725; L. R. 4 Ch. 768; 21 L. T. 151; 17 W. R. 978.—GIFFARD, L.J.; *reversing* 17 W. R. 870.—ROMILLY, M.R.

Contract Corporation, In re, Head's Case; White and Holmes' Case (1866) 36 L. J. Ch. 121; L. R. 3 Eq. 84; 15 L. T. 201; 15 W. R. 142.—ROMILLY, M.R., *approved.*

London, Hamburg and Continental Bank, In re, Ward's Case (1867) 36 L. J. Ch. 462; L. R. 2 Ch. 481; 16 L. T. 254; 15 W. R. 569.—TURNER

and CAIRNS, L.J.; *reversing* (1866) L. R. 2 Eq. 226; 12 Jur. (N.S.) 493.—ROMILLY, M.R.

CAIRNS, L.J.—I prefer the view of the section [sect. 35 of the Companies Act, 1862,] acted on by his lordship [the M.R.] in the cases of *White* and *Head*, the decisions in which appear to me to be hardly reconcilable with that in the case now under appeal.—p. 468

Accidental Death Insurance Co., In re, Lankester's Case (1870) L. R. 6 Ch. 905. n.

—JAMES, L.J., *followed*.

Accidental Death Insurance Co., In re, Chappell's Case (1871) L. R. 6 Ch. 902; 23 L. T. 438; 20 W. R. 9.—JAMES, L.J.; MELLISH, L.J. *dis-senting*; *affirming* ROMILLY, M.R.

Chappell's Case, followed.

Accidental Death Insurance Co., In re, Allin's Case (1873) 43 L. J. Ch. 116; L. R. 16 Eq. 449; 21 W. R. 900.—SELBORNE, L.C.

Chappell's Case and Allin's Case, distinguished.

East India Cotton Agency, In re, Sand's Case (1875) 32 L. T. 299.—BACON, V.-C.;

and **United Service Co., In re** (1868) L. R. 7 Eq. 76.—ROMILLY, M.R., *explained*.

Taurine Co., In re (1883) 25 Ch. D. 118; 53 L. J. Ch. 271; 49 L. T. 514; 32 W. R. 129.—C.A.

COTTON, L.J.—We need not go through the books to show how constantly honest transfers registered before the commencement of the winding-up have been treated as effectual, although made when it must have been known that the company could not go on. In *Chappell's Case* and *Allin's Case* the company was entirely at an end by transfer of its business and property to another company. There it was held that there was no company; that the company, as far as the existence of the shares was concerned, might be considered at an end, and that after the company had ceased to have property or shares it could not be said to be a company in which the shareholders could transfer, so as to enable themselves to say they were no longer shareholders. *Tenant v. City of Glasgow Bank* (*supra*, col. 508) was of a different description. The question there was whether one who was on the register was not too late in commencing proceedings to get relieved from his shares on the ground of misrepresentation. Lord Cairns did not decide the point, but intimated an opinion that when a bank had become insolvent and stopped payment it was too late for a shareholder to exercise his option, and to avoid the contract to take shares. . . . There [*Sand's Case*] the question was whether the liquidator, who had only put on the list the English shareholders, could, in order to satisfy the claims for contribution, put on the list Indian shareholders. There was no voidable transaction at all which could be alleged to be confirmed by his delay. . . . That case [*United Service Co., In re*], so far as it goes, appears to me to be in favour of the view I have expressed, for in making an order for continuing the winding-up subject to supervision and a subsequent compulsory order, the view of the Court evidently was, that notwithstanding the compulsory order the winding-up would still commence at the time when the voluntary resolution was passed. I do not, however, rely on that case, for the facts are not fully stated, and the reasons do not appear. . . . The case [*Thomas v. Patent Linoleum Co.*, *nost.* 6041] decides nothing, because

there was undoubtedly a continuing process of distress during the time of the compulsory winding-up, a process which had not been made effectual before the presentation of the petition. Therefore the case does not show that the commencement of the winding-up was held by the Court to relate back to the voluntary resolution.—pp. 131—136.

Bennett, Ex parte, Cameron's Coalbrook, &c. Co., In re (1854) 24 L. J. Ch. 130; 5 De G. M. & G. 248.—KNIGHT BRUCE and

TURNER, L.J., *distinguished*.

Jessop, Ex parte, London and County Assurance Society, In re (1856) 27 L. J. Ch. 757; 2 De G. & J. 632.

TURNER, L.J.—There the acceptance by the directors was a breach of their duty. There was no such case here.—p. 761.

KNIGHT BRUCE, L.J. to the same effect.

Bennett, Ex parte, distinguished.

Brotherhood's Case (1862) 31 Beav. 365.—ROMILLY, M.R.; *affirmed*, 31 L. J. Ch. 861; 4 De G. F. & J. 566 (*supra*, col. 523).

Jessop, Ex parte, and De Pass, Ex parte, Mexican and South American Co., In re

(1850) 28 L. J. Ch. 769; 4 De G. & J. 544; 5 Jur. (N.S.) 1191; 7 W. R. 681.—

KNIGHT BRUCE and TURNER, L.J., *commented on*.

Mexican and South American Co., In re, Hyam, Ex parte (1859) 29 L. J. Ch. 243; 1 De G. F. & J. 75; 6 Jur. (N.S.) 181; 1 L. T. 115; 8 W. R. 52.—L.C. and L.J.

CAMPBELL, L.C.—I confess I should have hesitated before I concurred in these decisions, because I think there might have been a considerable difference drawn between the analogy of an assignee of a lease assigning the lease to a man of straw and a shareholder who has become a partner with others, and who has incurred a joint liability at a time when the company had ceased to be of any value, and his sole object being to throw the liability entirely on his co-partners; but I again say, I most respectfully bow to the decisions of this Court.—p. 244.

De Pass, Ex parte, preferred.

Hyam, Ex parte, not followed.

Mexican and South American Mining Co., In re, Costello, Ex parte (1860) 30 L. J. Ch. 113; 2 De G. F. & J. 302; 6 Jur. (N.S.) 1270; 3 L. T. 421; 9 W. R. 6.

KNIGHT BRUCE, L.J.—I am not persuaded that the case of *De Pass* was erroneously decided, and I am not persuaded that, were that case before us now for the first time, my opinion would not be the same. Neither, certainly, am I persuaded that the case of *Hyam* was erroneously decided. I think that it was correctly decided.—p. 116.

TURNER, L.J.—The question appears to me to lie between the case of *De Pass* and the case of *Hyam*, and, until corrected by a higher authority, I retain the opinion which was expressed in the former instance—that the mere circumstance of difficulty existing in a company, where the shares are transferable by delivery, does not prevent the holder of those shares from making a *bona fide* and effectual sale of them. I do not see how, when the contract between the parties is that each man may transfer his shares, any one partner can have a right to complain of another for making that transfer at a time when

the company may happen to be involved in difficulties. That was the principle upon which the case of *De Pass* was decided, and by that principle I am content to abide.—p. 117.

St. George's Steam Packet Co., In re, Litchfield's Case (1850) 19 L. J. Ch. 124; 3 De G. & Sm. 141; 14 Jur. 541.—**KNIGHT BRUCE, V.-C.**, *followed*.

Electric Telegraph Co. of Ireland, In re, Reid's Case (1857) 24 Beav. 318; 3 Jur. (N.S.) 1015; 5 W. R. 864.—**ROMILLY, M.R.**

Reid's Case, followed.

Joint Stock Discount Co., In re, Mann's Case (1867) L. R. 3 Ch. 459, n.; 15 W. R. 1124.—**ROLT, L.J.**, *discussed*.

China Steamship and Labuan Coal Co., In re, Capper's Case (1868) L. R. 3 Ch. 463; 16 W. R. 1002.—**WOOD AND SELWYN, L.J.**

Mann's Case, explained.

Blackly Ordnance Co., In re, Lumsden's Case (1868) L. R. 4 Ch. 31; 19 L. T. 437; 17 W. R. 65.—**WOOD AND SELWYN, L.J.**

SELWYN, L.J.—In *Capper's Case* I certainly did not mean to decide, nor to treat *Mann's Case* as deciding, that a transfer to an infant is, *ab initio*, a nullity, but my judgment was founded expressly upon the principle laid down in *Reid's Case* and *Litchfield's Case*, and I referred to the judgment of Rolt, L.J. in *Mann's Case*, as going further than the previous cases in treating the transfer as a nullity; but in that case also while the transferee was still an infant, events occurred which made it clearly for his benefit to repudiate the transfer.—p. 34.

Wheal Emily Mining Co., In re, Cox's Case (1863) 33 L. J. Ch. 145; 4 De G. J. & S. 53; 3 N. R. 97; 9 Jur. (N.S.) 1184; 9 L. T. 493; 12 R. 92.—**KNIGHT BRUCE AND TURNER, L.J.**, *distinguished*.

Great Wheel Busy Mining Co., In re, King's Case (1871) 40 L. J. Ch. 361; L. R. 6 Ch. 196; 24 L. T. 599; 19 W. R. 549.—**JAMES AND MELLISH, L.J.**

MELLISH, L.J.—I am of opinion that this case can be distinguished from *Cox's Case* in two most material particulars, both as respects what is the mere question of law, and also on the facts. In *Cox's Case*, Cox was one of the original promoters of the company, and he had agreed with the company, or perhaps, more strictly, with the other persons who were joining with him in forming the company, that he would take a certain number of shares; and then, in collusion with the officers of the company, he procured 200 of these shares to be registered in the names of persons who were, as the lords justices found, mere sham names; that is to say, names of persons who had no real interest in the shares; and he did that, as they also found, for the improper purpose of deceiving other persons who might become shareholders in the company. Now, under those circumstances, what in substance the L.J.J. did . . . amounted to granting specific performance of that contract, which Cox had entered into with the company.—p. 364.

European Bank, In re, Master's Case, 25 L. T. 582.—**MALINS, V.-C.**; *reversed*, (1872) 41 L. J. Ch. 601; L. R. 7 Ch. 292; 26 L. T. 269; 20 W. R. 499.—**JAMES AND MELLISH, L.J.**

Contract Corporation, In re, Gooch's Case, L. R. 14 Eq. 454.—**ROMILLY, M.R.**; *reversed*, **O.C.**

(1872) 42 L. J. Ch. 381; L. R. 8 Ch. 266; 28 L. T. 148; 21 W. R. 181.—**C.A. SELBORNE, L.C., JAMES AND MELLISH, L.J.**

National Provincial Marine Insurance Co.,

In re, Gilbert's Case (1870) 39 L. J. Ch. 837; L. R. 5 Ch. 559; 23 L. T. 341; 18 W. R. 988.—**GIFFARD, L.J.**, *dicta followed*.
South London Fish Market Co., In re (1888) 39 Ch. D. 324; 60 L. T. 68; 37 W. R. 3; 1 Meg. 92.—**KAY, J.**; *affirmed*, **C.A. COTTON, FRY AND LOPES, L.J.**

KAY, J.—It was held in . . . *Gilbert's Case*, that a transfer of his qualification shares by a director was an improper proceeding. Lord Romilly said: "Whether a director can do that"—that is, transfer his qualification shares—"is a question which has never yet been determined, and I apprehend that he cannot. His situation is that of a trustee for the shareholders, and therefore he is not at liberty to do things which he does not think for the benefit of all the shareholders of the company—still less may he do so to gain pecuniary advantage to himself." That case went on appeal before Giffard, L.J., and he said: "I quite agree that because a man is a director he is not necessarily a trustee of the shares he holds for the general body of shareholders; and in a vast variety of circumstances he is just as free to deal with his shares—except perhaps his qualification, which he cannot deal with without giving up his directorship—as any other person." So that I have the authority of two eminent judges that a director cannot deal with his qualification shares as freely as he may with other shares. Looking at the doctrine of this Court, that a voluntary transfer to escape liability in some cases is a fraud, I cannot doubt that a director voluntarily transferring his qualification shares in order to escape liability is committing a fraud.—p. 331.

National and Provincial Marine Insurance

Co., In re, Parker, Ex parte (1867) L. R. 2 Ch. 685; 15 W. R. 1217.—**ROLT, L.J.**; and *Gilbert's Case, discussed*.

Cawley & Co., In re, Hallett, Ex parte (1889) 42 Ch. D. 209; 68 L. J. Ch. 638; 61 L. T. 601; 37 W. R. 692; 1 Meg. 175.—**C.A. ESHER, M.R., COTTON AND FRY, L.J.**

COTTON, L.J.—*Parker, Ex parte*, has no bearing at all upon the question as to what directors may do, because there the person seeking to transfer was not a director, but an ordinary shareholder, who induced the directors at a board meeting to postpone the consideration of a call, and then, before the call was made, executed a transfer of his shares to a pauper to evade liability. Rolt, L.J. said he could not do that, for he had represented to the directors, or led them to believe, that if they would postpone making a call he would not exercise his right to make a transfer. That case was founded on misrepresentation. The other case cited, *Gilbert's Case* was more in point, but the circumstances were entirely different. At a meeting of the directors of whom Gilbert was one, it was agreed that a call should be made, but no formal resolution was passed, and the actual making of a call was postponed until a later day when a formal resolution for the purpose was passed; but before that later day Gilbert had executed a transfer and got it registered, which he could not have done unless the call had been postponed, and it was held that as the call was postponed

for a purpose which was not honest the registration of the transfer could not prevail against the company's creditors. But here there was nothing against Mr. Hallett which could make that case. —p. 233.

Cawley & Co., in re, discussed.

Ottos Kopje Diamond Mines, in re (1892) 62 L. J. Ch. 166; [1893] 1 Ch. 613; 2 R. 257, 68 L. T. 138; 41 W. R. 258.—C.A. See *supra*, col. 522.

10. STOCK EXCHANGE.

And see "PRINCIPAL AND AGENT."

Payne v. Hayes, Buller's N. P. 145, *overruled*.
Wickes v. Gordon (1819) 2 B. & Ald. 335; 1 Chit. 60.

ABBOTT, C.J.—This application is founded upon a supposed variance between the declaration and the proof, and the attention of the Court has been directed to a case in Buller's Nisi Prius, which beyond all doubt is precisely in point. It seems to me, however, that that case cannot be supported in point of principle. What weight the learned person who edited that work attached to the law there laid down may be collected from the observation which immediately follows the case itself. Adverting to this and other cases, decided about the same time, he says, "These cases seem rather to be founded upon the times, to get rid of South Sea contracts, than to be relied upon as precedents in other cases." Buller, J. thought, therefore, that that case was not to form a rule of decision in future times; and in that opinion I most fully concur. p. 337.

Harrison v. Pryse (1740) Barnard. Ch. 324; S. C. nom. **Harrison v. Harrison**, 2 Atk. 121, *considered*.

Davis v. Bank of England (1824) 2 Bing. 393; 3 L. J. (O.S.) C. P. 4; 9 Moore 747; 27 R. R. 667; *reversed*, nom. **Bank of England v. Davis** (1826) 5 B. & C. 185; 7 D. & R. 828; 4 L. J. (O.S.) K. B. 145.—EX. CH.

BEST, C.J.—I can find no case in which the question whether the stock is transferred by the act of the bank has been raised. There is one in Barnardiston's reports, where a man of the name of Edward Harrison got South Sea Stock, which belonged to another Edward Harrison, put to his account in the books of the company, and then transferred this stock to his broker to sell, and which stock the broker sold. . . . In this case it seems to be assumed that the stock had passed out of the name of the owner by this transfer under a fraudulent assumption of his name, although he never assented to such transfer; but whether it had so passed or not was not considered, and I therefore cannot think this case any authority against our opinion if it were correctly reported. I think, however, that this case is not correctly reported by Barnardiston; the same case is to be found in 2 Atkyns, in the name of **Harrison v. Harrison**. In this report it appears that the stock was transferred by a trustee; and, if so, the question whether a transfer unauthorised by the stockholder would alter the property of the stock could not arise, the trustee having a legal authority to transfer, although he might be guilty of a breach of trust by exercising that authority. This circumstance also accounts for the doubtful way in which Lord Hardwicke

speaks of the liability of the company to replace the stock. The question there was whether the South Sea company were bound to prevent a breach of trust, and not whether a stockholder's name can be taken from the books without his own authority; and the company that has permitted this act not be responsible for the consequence of it.—p. 406.

Birmingham v. Sheridan (1864) 33 L. J. Ch. 571; 33 Beav. 660; 10 Jur. (N.S.) 415; 10 L. T. 255; 12 W. R. 658.—M.R., *explained*.
Evans v. Wood (1867) 37 L. J. Ch. 159; 5 E. 9; 17 L. T. 190, 16 W. R. 67.—ROMILLY, M.R.

Birmingham v. Sheridan; Evans v. Wood; London, Hamburg and Continental Exchange Bank, in re, Emmerson's Case (1866) 36 L. J. Ch. 177; L. R. 1 Ch. 433; 12 Jur. (N.S.) 592; 14 L. T. 746; 14 W. R. 785, 905.—TURNER and KNIGHT BRUCE, L.J., *reversing* (1866) 35 L. J. Ch. 692; L. R. 2 Eq. 231.—ROMILLY, M.R.; and **Overend, Gurney & Co., in re, Musgrave's Case** (1868) 37 L. J. Ch. 161; L. R. 5 Eq. 193; 16 W. R. 247.—MALINS, V.-C., *distinguished*.

Paine v. Hutchinson (1868) 37 L. J. Ch. 485; L. R. 3 Ch. 388; 18 L. T. 280; 16 W. R. 553.—WOOD and SELWYN, L.J. *And see* col. 549.

Tooke, Ex parte (1849) 18 L. J. Q. B. 343; 13 Jur. 939; 6 Railw. Cas. 1; S. C. nom. **Reg. v. Londonderry and Coleraine Ry.**, 13 Q. B. 998.—Q.B., *distinguished*.

Hawkins v. Maltby (1868) 37 L. J. Ch. 58; L. R. 3 Ch. 188, 17 L. T. 51, 39; 16 W. R. 209.—CHELMSFORD, L.C.; *affirming on a different ground* L. R. 4 Eq. 572; 15 W. R. 1075.—WOOD, V.-C.

Birmingham v. Sheridan, no longer law.
Evans v. Wood, Paine v. Hutchinson and Hawkins v. Maltby, referred to.
Casey v. Bentley (*post*, col. 552).

Paine v. Hutchinson, distinguished.
Sheppard v. Murphy (1868) 16 W. R. 948; Ir. R. 2 Eq. 544.—C.A. BREWSTER, L.C. and CHRISTIAN, L.J.; *reversing* Ir. R. 1 Eq. 490.—CHATTERTON, V.-C. *And see post*, col. 549.

Sheppard v. Murphy, distinguished.
Torrington (Lord) v. Lowe (1868) 38 L. J. C. P. 121; L. R. 4 C. P. 26; 19 L. T. 316; 17 W. R. 78.—C.F.

BOVILL, C.J.—That case [*Sheppard v. Murphy*] was in substance this: Sheppard had sold certain shares to Kennedy on the Stock Exchange, and Kennedy had sold an equal number of such shares to Murphy on a different day and at a different price, and in that respect the circumstances were similar to the present. The name of Murphy was passed to Sheppard as that of the transferee, and Sheppard executed a deed of transfer of the shares to Murphy and was paid the price; but Murphy did not sign the deed, and in a suit by Sheppard for indemnity against calls in respect of such shares, Murphy was held liable, although he had not executed the deed. The ground on which he was held to be liable was this: that he had caused his own name to be handed in as the transferee, paid the price, and requested the transfer of the shares to be made out to him. If Murphy had executed the deed of transfer, there would have been no doubt

as to his liability, and as he had agreed to accept the shares, and was bound to execute the deed, the Court of Chancery, acting on the well-known principle of equity, held him to be just as liable as he would have been if he had executed the deed.—p. 123

Sheppard v. Murphy, approved.

Hodgkinson v. Kelly (1868) 37 L. J. Ch. 837; L. R. 6 Eq. 496; 16 W. R. 1078.—*ROMILLY, M.R.*

Hodgkinson v. Kelly, approved. Smith, Knight & Co., in re, *Weston's Case* (1868) 38 L. J. Ch. 49; L. R. 4 Ch. 20; 17 W. R. 62.—*WOOD and SELWYN, L.J.*; reversing 37 L. J. Ch. 559; 16 W. R. 887.—*ROMILLY, M.R.*; *principle applied*, Fenwick v. Buck (1874) 24 L. T. 274; 19 W. R. 597.—*ROMILLY, M.R.*; *discussed*, Casey v. Bentley (*post*, col. 552).

Sheppard v. Murphy, approved.

Grissell v. Bristowe (1868) 38 L. J. C. P. 10; L. R. 4 C. P. 36; 19 L. T. 390; 17 W. R. 128.—*EX. CH.*; reversing (1868) 37 L. J. C. P. 89; L. R. 3 C. P. 112; 17 L. T. 564; 16 W. R. 428.—*C.P.*

COCKBURN, C.J. (for the Court).—We entirely concur in the reasoning and conclusion of Christian, L.J. in the case referred to [*Sheppard v. Murphy*], and to which it seems to us impossible to add anything with advantage.—p. 19.

Grissell v. Bristowe, approved.

Coles v. Bristowe (1868) 38 L. J. Ch. 81; L. R. 4 Ch. 3; 19 L. T. 403; 17 W. R. 105.—*C.A.* CAIRNS, L.C. and WOOD, SELWYN and GIFFARD, L.J.; reversing (1868) 37 L. J. Ch. 737; L. R. 6 Eq. 149; 18 L. T. 459; 16 W. R. 19.—*MALINS, V.-C.* And see *post*, col. 551.

Grissell v. Bristowe and Coles v. Bristowe, distinguished.

Maxted v. Paine (first action) (1869) 38 L. J. Ex. 41; L. R. 4 Ex. 81.—*EX.* And see *post*, col. 550.

Coles v. Bristowe and Paine v. Hutchinson (*supra*, col. 548), *distinguished.*

Cruse v. Paine (1869) 38 L. J. Ch. 225; L. R. 4 Ch. 441; 17 W. R. 1033.—*HATHERLEY, L.C.*

Grissell v. Bristowe and Coles v. Bristowe, followed.

Davis v. Haycock (1869) 38 L. J. Ex. 155; L. R. 4 Ex. 373; 20 L. T. 954.—*EX.* CHANNELL and CLEASBY, BB. *dissenting.*

Grissell v. Bristowe, followed.

Cruse v. Paine and *Maxted v. Paine* (first action), *distinguished.*

Maxted v. Paine (second action) (1871) 40 L. J. Ex. 67; L. R. 6 Ex. 132; 24 L. T. 149; 19 W. R. 527.—*EX. CH.* LUSH, J. *dissenting.*

Davis v. Haycock, explained.

Sheppard v. Murphy (*supra*, col. 548), *discussed.*

Rowing v. Shepherd (1871) 40 L. J. Q. B. 129; L. R. 6 Q. B. 309; 24 L. T. 721; 19 W. R. 852.—*EX. CH.*

Grissell v. Bristowe; Coles v. Bristowe, and

Cruse v. Paine, discussed.

Maxted v. Paine (first action), *approved.*

Rennie v. Morris (1872) 41 L. J. Ch. 321;

L. R. 13 Eq. 208; 25 L. T. 862; 20 W. R. 227.—*M.R.*, *overruled.*

Maxted v. Paine (second action), *observed on.* *Merry v. Nickalls* (1872) 41 L. J. Ch. 767; L. R. 7 Ch. 733; 27 L. T. 12; 20 W. R. 929.—*L.J.*; reversing 26 L. T. 496.—*BACON, V.-C.*; *affirmed*, *L.J.*, *post.*

JAMES, L.J.—The principle of those authorities of *Grissell v. Bristowe* and *Coles v. Bristowe* was explained in a judgment which I consider is binding on us. It is a judgment of this Court, of Hatherley, L.C., in the appeal of *Cruse v. Paine* from the V.-C., in which he distinguished the case by reason of there being a guarantee of registration, but he laid down what the principle of the other case was.—p. 770.

MELLISH, L.J.—The case comes within that decision of the Court of Ex. [*Maxted v. Paine* (first action)]; and the question we have to consider is, whether we ought to follow that case or treat it as overruled? Blackburn, J. in his very elaborate judgment in the second action of *Maxted v. Paine*, stated principles which certainly cannot be reconciled with the decision in the first action of *Maxted v. Paine*; indeed, he as much as said that he did not agree with it. Lord Romilly has also acted upon a principle, in the case before him about an infant [*Rennie v. Morris*], which cannot be reconciled with the principle upon which the Court of Ex. acted.—p. 772.

Cruse v. Paine (*supra*), referred to, Blundell, In re, Blundell v. Blundell (1888) 57 L. J. 730; 40 Ch. D. 370; 58 L. T. 933; 36 W. R. 779.—*STIRLING, J.*; Casey v. Bentley (*post*, col. 552); *applied*, Perkins, In re, Poyser v. Boyfus (1898) 67 L. J. Ch. 454; [1898] 2 Ch. 182; 78 L. T. 666; 46 W. R. 595; 5 Manson 198.—*C.A.* LINDLEY, M.R., RIGBY and COLLINS, L.J.

Merry v. Nickalls (*supra*), *affirmed.*

Maxted v. Paine (first action), *approved.*

Maxted v. Paine (second action), *discussed.*

Rennie v. Morris, *disapproved.*

Nickalls v. Merry (1875) 45 L. J. Ch. 575; L. R. 7 H. L. 530; 32 L. T. 623; 23 W. R. 663.—*H.L. (E.)*. CAIRNS, L.C.—*Maxted v. Paine* (first action) is an authority directly in favour of the view which I have submitted to your Lordships, and I am not aware of any authority opposed to it, except *Rennie v. Morris*, before the late M.R., with which decision I am bound to say I am unable to agree.—p. 580.

LORD HELMSFORD.—The two cases of *Maxted v. Paine* exemplify the distinction established by the authorities as to the performance or non-performance of the jobbers' contract. In the first action the defendant, the jobber, passed the name of a person as purchaser of the shares without his sanction or authority. The seller therefore could not compel him to accept a transfer of the shares. It was accordingly held that the jobber was not exonerated from liability upon his contract. In the second action the jobber was held to be released by having given the name of a nominee of the real buyer of the shares, a person of no means, but capable of contracting, and who in consideration of a small sum of money had consented to allow his name to be used as the proposed transferee of the shares. . . . Lord Romilly, in *Rennie v. Morris*, proceeded on an erroneous interpretation of the usage of the Stock Exchange with respect to the

transactions of jobbers in the purchase of shares for a re-sale. He thought that a jobber had performed his contract when he had given a name to the seller's broker which was accepted, without regard to whether the person whose name was given (in that case, as in the present, an infant) was of ability to contract or not. But the language of the usage as proved affords no countenance to such a construction. The jobber is not required to give a name of a person merely, but to give the name of a person as the purchaser, meaning, of course, a person capable of becoming the purchaser, whose contract will be binding and enforceable against him. Bacon, V.-C. in deciding the present case, said: "I do not think I should be right in departing in the slightest degree from the judgment of the M.R. in *Rennie v. Morris*. The cases are identical." But the L.J.J. were of opinion, and I have no doubt correctly, that the case was not distinguishable on principle from *Marted v. Paine* (first action). There a person's name was given without authority. In the present case the infant was legally incompetent to give any authority. Therefore they considered that the decision in *Rennie v. Morris* could not be reconciled with the principle upon which that case of *Marted v. Paine* was decided.—p. 581.

LORD HATHERLEY to the same effect.

Coles v. Bristows (*supra*, col. 549), *followed*.
Loring v. Davis (1886) 32 Ch. D. 625; 55 L. J. Ch. 725; 54 L. T. 899; 34 W. R. 701.

CHITTY, J.—*Coles v. Bristows* involved directly the question of the jobber's liability, but the jobber could not be made liable unless some other person had come under a liability towards the plaintiff. The C. A. held that the jobber had been relieved of the liability which fell upon him by reason of his original contract to purchase, and that the liability which otherwise would have remained upon him was imposed in the circumstances of the case on the transferees, none of whom had executed the transfer. The C. A. could not have held, and did not hold, that the jobber was relieved, unless some other person had become liable. Though the exact decision was that the jobber was not liable, the decision involves the proposition that the transferees were. Lord Cairns says: "In these circumstances, the good faith of the transaction being in no way impugned, but being rather recognised by the plaintiff, we are of opinion that the proper conclusion to draw is, that the whole 200 shares and the transfers of them were duly accepted and paid for by the transferees, and that these transferees were in equity as much bound as if they had executed the deeds." Now the only ground on which the transferees were liable was by accepting the transfers, because they were not original parties to the contract with the plaintiffs. . . . I say, adopting Lord Cairns' view, that Davis has become equitable owner of the shares, and therefore it follows that as equitable owner of the shares he is bound to indemnify the person who legally holds the shares for him as the only and absolute *cestui que trust*.—p. 638. *And see post*.

Castellan v. Hobson (1870) 39 L. J. Ch. 490; L. R. 10 Eq. 47; 22 L. T. 575; 18 W. R. 731.—JAMES, V.-C., *distinguished*.

Ramage v. Womack (1899) 69 L. J. Q. B. 40; [1900] 1 Q. B. 116; 81 L. T. 526.—WRIGHT, J.

Castellan v. Hobson and Loring v. Davis (*supra*, col. 551), *discussed and applied*.
Hardoon v. Bellios (1900) 70 L. J. P. C. 9; [1901] A. C. 118; 83 L. T. 573; 49 W. R. 209.—P. C. LORDS HORROUSE, ROBERTSON, LINDLEY, SIR F. JEUNE and SIR F. NORTH.

Brown v. Black, L. R. 15 Eq. 364; 28 L. T. 256.—BACON, V.-C.; *varied*, (1873) 42 L. J. Ch. 397, 814; L. R. 8 Ch. 939; 29 L. T. 362; 21 W. R. 457, 892.—JAMES and MELLISH, L.J.J.

Maynard v. Eaton, 29 L. T. 637.—MALINS, V.-C.; *reversed*, (1874) 43 L. J. Ch. 641; L. R. 9 Ch. 414; 30 L. T. 241; 22 W. R. 252, 457.—C.A. CAIRNS, L.C., JAMES and MELLISH, L.J.J.

Wilkinson v. Lloyd (1845) 14 L. J. Q. B. 165; 7 Q. B. 27; 9 Jur. 328.—Q.B., *distinguished*.

Stray v. Russell (1859) 28 L. J. Q. B. 279.—Q.B.: *affirmed*, (1860) 29 L. J. Q. B. 115; 1 EL. & EL. 888; 6 Jur. (N.S.) 168; 1 L. T. 443; 8 W. R. 240.—EX. CH.: *Casey v. Bentley* (*post*).

Stray v. Russell, *followed*.

London Founders' Association v. Clarke (1888) 57 L. J. Q. B. 291; 20 Q. B. D. 576; 59 L. T. 93; 36 W. R. 489.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

Stray v. Russell, *Castellan v. Hobson*, and *London Founders' Association v. Clarke*, *discussed*.

Casey v. Bentley [1902] 1 Jr. R. 376.—C.A. ASHBOURNE, L.C., WALKER and HOLMES, L.J.J.: FITZGIBBON, L.J., *dissenting*.

11. ACTIONS BY AND AGAINST.

Security for Costs.

Cailland's Patent Tanning Co. v. Caillaud (1859) 28 L. J. Ch. 357; 26 Beav. 427; 5 Jur. (N.S.) 259; 7 W. R. 172.—ROMILLY, M.R., *commented on*.

Isle of Wight and Southampton Steamboat Co. v. Rawlings (1869) 9 Jur. (N.S.) 887; 11 W. R. 978.

ROMILLY, M.R.—I do not understand the case cited, as it is reported. It appears by the report that I did not call on the counsel for the plaintiffs, but that, upon the statements of the affidavits, which were uncontradicted, I declined to make the order. There must have been some counter evidence which influenced me.—p. 888.

Washoe Mining Co. v. Ferguson (1866) L. R. 2 Eq. 371; 14 L. T. 590; 14 W. R. 820.—WOOD, V.-C., *followed*.

City of Moscow Gas Co. v. International Financial Society (1872) 41 L. J. Ch. 350; L. R. 7 Ch. 225; 26 L. T. 377; 20 W. R. 394.—C.A. JAMES and MELLISH, L.J.J.

Service.

Wilson v. Caledonian Ry. (1850) 20 L. J. Ex. 6; 5 Ex. 822; 1 L. M. & P. 731; 15 Jur. 17; 6 Railw. Cas. 772.—EX., *dissenting from*.

Palmer v. Caledonian Ry. (1892) 61 L. J. Q. B. 552; [1892] 1 Q. B. 823; 66 L. T. 771; 40 W. R. 562.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.; *reversing* (1892) 1 Q. B. 607; 40 W. R. 865.—COLLINS and CAVE, JJ.

12. WINDING-UP.

Companies that may be wound up.

Commercial Bank of India, In re (1868) L. R. 6 Ex. 517; 16 W. R. 1104.—ROMILLY, M.R., *approved*.

Matheson Bros., Ltd., In re (1884) 27 Ch. D. 225; 51 L. T. 111; 32 W. R. 846.

KAY, J.—There a joint-stock company formed in India, registered under Indian law, and having its principal place of business in India, with an agent and a branch office in England, was ordered to be wound up under the Act of 1862, and Lord Romilly said: "I think I have jurisdiction to make the order; if the company is not wound up here, these persons will not be able to get their money." Now that case was decided in 1868, and no authority against it has been cited. Certain *obiter dicta* in a case in which the present point did not arise, and an observation in Lindley, L.J.'s book on Partnership have been referred to, but nothing amounting to this, that *Commercial Bank of India, In re*, was wrongly decided. That decision is one which I should be disposed to follow, even if, as is not the case, my own opinion had been the other way.—p. 280.

East Botallack Consolidated Mining Co., In re (1864) 34 Beav. 82; 11 L. T. 408; 13 W. R. 197.—ROMILLY, M.R., *disapproved*.

Silver Valley Mines, In re (1881) 18 Ch. D. 472; 45 L. T. 104; 30 W. R. 36.—C.A.

JESSE, M.R.—There [*East Botallack, &c. Co., In re*], the company was formed to purchase and work a mine in Cornwall only. But . . . I think it right to say that, in my opinion, it was not well decided, because a company formed to purchase a mine in Cornwall is not a company "engaged in working" a mine there.—p. 475.

BRETT and COTTON, L.JJ. to the same effect.

Silver Valley Mines, In re, distinguished.

New Terras Tin Mining Co., In re [1894] 2 Ch. 344; 63 L. J. Ch. 397; 8 R. 233; 70 L. T. 625; 42 W. R. 504; 1 Manson 149.

V. WILLIAMS, J.—The point in that case was as to the meaning of "engaged in working mines" as used in sect. 81 of the Act of 1862. Sir J. Romilly, M.R. had held in *East Botallack, &c. Co., In re*, that a company was within the section if it was formed to work a mine in Cornwall, although it never possessed or worked a mine there. That decision was disapproved of in *Silver Valley Mines, In re*; but now sect. 81 has been repealed, and the new enactment (sect. 1, sub-sect. 4, of the Companies Act, 1890) substitutes for "engaged in working mines" the words "formed for working mines," and thus makes Lord Romilly's decision law. The jurisdiction can only be ousted by showing that the company is working a mine elsewhere than in the Stannaries jurisdiction.—p. 347.

Exmouth Docks Co., In re (1873) 43 L. J. Ch. 110; L. R. 17 Eq. 181; 29 L. T. 573; 22 W. R. 104.—MALINS, V.-C., *followed*.

Herne Bay Waterworks Co., In re (1878) 48 L. J. Ch. 69; 10 Ch. D. 42; 39 L. T. 324; 27 W. R. 36.—MALINS, V.-C.

Herne Bay Waterworks Co., In re, not followed.

Brentford and Isleworth Tramways Co., In re

(1884) 53 L. J. Ch. 624; 26 Ch. D. 527; 50 L. T. 580; 32 W. R. 893.—BACON, V.-C.; and **Barton-upon-Humber and District Water Co., In re** (*post*, col. 560), *followed*.
Portsmouth Tramways Co., In re (1892) 61 L. J. Ch. 462; [1892] 2 Ch. 362; 66 L. T. 671; 40 W. R. 553.—STIRLING, J.

Portsmouth Tramways Co., In re, disapproved.

Marshall v. South Staffordshire Tramways Co. (1895) 64 L. J. Ch. 481; [1895] 2 Ch. 86; 13 R. 275; 72 L. T. 542, 43 W. R. 469; 2 Manson 292. See "TRAMWAYS."

Pinto Silver Mining Co., In re (1878) 47 L. J. Ch. 591; 8 Ch. D. 273; 38 L. T. 336; 26 W. R. 622.—C.A. JAMES, COTTON and THESIGER, L.JJ., *explained and followed*.

London and Caledonian Marine Insurance Co., In re (1879) 11 Ch. D. 140; 40 L. T. 666; 27 W. R. 713.—C.A.

JAMES, L.J.—I have considered this case, and it seems to me that really in all respects it is governed by the decision of this Court in *Pinto Silver Mining Co., In re*. . . . What was decided in the case to which I have referred was, that we could not put upon these words, "as soon as the affairs of the company are fully wound up," the construction contended for, namely, to make that a condition precedent and construe it to mean that everything had been done which was to be done.—p. 143.

BAGGALLAY and BRAMWELL, L.JJ. concurred.

London and Caledonian Marine Insurance Co., In re, dicta considered.

Knowles v. Scott (1891) 60 L. J. Ch. 284; [1891] 1 Ch. 717; 64 L. T. 135; 39 W. R. 523.—ROMER, J. (*post*, col. 612).

Pinto Silver Mining Co., In re, and London and Caledonian Marine Insurance Co., In re, followed.

Coxon v. Gorst (1891) 60 L. J. Ch. 502; [1891] 2 Ch. 73; 64 L. T. 444; 39 W. R. 600.—CHITTY, J.

Crookhaven Mining Co., In re (1866) 36 L. J. Ch. 226; L. R. 3 Eq. 69; 12 Jur. (N.S.) 872; 15 L. T. 169; 15 W. R. 28.—ROMILLY, M.R., *followed*.

Pinto Silver Mining Co., In re; London and Caledonian Marine Insurance Co., In re, and Coxon v. Gorst, considered.

Whiteley Exerciser, Ltd. v. Gannaga (1898) 67 L. J. Ch. 560; [1898] 2 Ch. 405; 79 L. T. 20; 5 Manson 249.

NORTH, J.—It is said that that decision [*Crookhaven Mining Co., In re*] has been got rid of, in some way, by subsequent cases, three of which have been cited to me. But it does not seem to me that that decision is touched by the cases which were referred to. On the contrary in one of those cases—*London and Caledonian, &c. Co., In re*—it is clearly recognised that there may be rights existing against the liquidator in respect of what he has done in the course of his employment, matters for which the company itself could not be proceeded against, because it had been dissolved.—p. 561.

Withdrawal of Petition.

North Brazilian Sugar Factories, In re (1886) 56 L. T. 229.—CHITTY, J., *explained*.

Peckham Tramways Co., In re (1888) 57 L. J. Ch. 462.

CHITTY, J.—I gave everybody who appeared separately his costs, whether he appeared as creditor or contributory, and whether he appeared to oppose or support the petition; but my reason for so doing was that in that case the petitioner refused to give any reason for the withdrawal of the petition, so that I could not go into the question as to the rights of the parties.—p. 463.

North Brazilian Sugar Factories, In re, followed.

Paper Bottle Co., In re (1888) 40 Ch. D. 52; 38 L. J. Ch. 82; 60 L. T. 354; 37 W. R. 214.

MORTH, J.—I think that the judgment of Chitty, J. in *North Brazilian Sugar Factories, In re*, has made this matter clear, and I shall follow that case, unless it shall be found upon inquiry that there is (as the registrar has suggested) a recent decision of the C. A. to the contrary . . . Chitty, J. said: ". . . the petitioner has abandoned his petition at the hearing. . . . The rule to allow one set of costs to creditors and one to shareholders appearing, only applies when a winding-up order has been obtained, and when the costs would have to come out of the assets of the company. In fact, the rule is founded on the protection of the company's assets. . . ." I see no reason in this case for departing from that rule merely because the petition has been presented by the company itself.—p. 53.

Peckham Tramways Co., In re, followed.

Criterion Gold Mining Co., In re (1889) 58 L. J. Ch. 277; 41 Ch. D. 146; 60 L. T. 218; 37 W. R. 348; 1 Meg. 166.—KAY, J.

Times Life Assurance and Guarantee Co., In re (1869) L. R. 9 Eq. 382.—MALINS, V.-C., *followed*.

Home Assurance Association, In re (1871) 41 L. J. Ch. 110; L. R. 12 Eq. 59; 24 L. T. 613; 19 W. R. 817.—WICKENS, V.-C.

Marlborough Club Co., In re (1865) 35 L. J. Ch. 146; L. R. 1 Eq. 216; 12 Jur. (N.S.) 44; 14 L. T. 697; 14 W. R. 171.—KINDERSLEY, V.-C.: **Home Assurance Association, In re**, and **Hereford and South Wales Waggon and Engineering Co., In re** (1874) L. R. 17 Eq. 423; 29 L. T. 881; 22 W. R. 314.—BACON, V.-C., *applied*.

Patent Cocoa Fibre Co., In re (1876) 45 L. J. Ch. 207; 1 Ch. D. 617; 24 W. R. 483.—JESSEL, M.R.

Patent Cocoa Fibre Co., In re, distinguished. **Jablochhoff Electric Light and Power Company, In re** (1888) 49 L. T. 556; 32 W. R. 168.—PEARSON, J.

Jablochhoff & Co. Co., In re, distinguished. **Nacupai Gold Mining Co., In re** (1884) 28 Ch. D. 65; 54 L. J. Ch. 109; 33 W. R. 117; 51 L. T. 900.

CHITTY, J.—There it appears that the shareholders who had intended to support the petition consented to its withdrawal or dismissal, but in

this case they do not consent except on the terms of their costs being paid.—p. 65.

Priority of Petition.

Norton Iron Co., In re (1877) 47 L. J. Ch. 9; 26 W. R. 92.—JESSEL, M.R., *followed*. **United Ports and General Insurance Co., In re** (1869) 39 L. J. Ch. 146.—JAMES, V.-C., *discussed and not followed*.

London and Australian Agency Corporation, In re (1878) 29 L. T. 417; 22 W. R. 45.—JESSEL, M.R.; and **Trades Bank Co., In re** W. N. (1877), p. 268.—JESSEL, M.R., *explained*.

Building Societies' Trust, In re (1890) 44 Ch. D. 140; 59 L. J. Ch. 638; 62 L. T. 360; 38 W. R. 458; 2 Meg. 81.

CHITTY, J.—Adopting the rule laid down by the late M.R. in *Norton Iron Co., In re*, I say that the second petitioner, Pooley, being aware of the presentation of the first petition, would have been right in going on with his petition had he been in a position to show that the first petition was not a proper petition, i.e., presented not in good faith or collusively. . . . As the M.R. points out in *Norton Iron Co., In re*, if a creditor presents a second petition merely on suspicion that the first is not *bona fide*, he does so at his own risk as to costs. . . . It was pressed upon me in argument that James, L.J., when V.-C., considered in *United Ports, &c. Co., In re*, that the date of advertisement regulated the order of priority. On looking through that case I cannot find that he said anything of the kind. . . . There certainly are some expressions of the V.-C. which look as though he thought that the advertisement tested the priority of proceedings, but if that was his rule, it was not adopted by the late M.R. in 1877, when he decided *Norton Iron Co., In re*. I find, too, in the report before James, V.-C., some statements and expressions from which I infer that the V.-C. considered both the first and second petitions improper; both appear to have been friendly petitions. If I had to choose between the two authorities, I think the right rule and the fair rule is that laid down by the M.R. in *Norton Iron Co., In re*. In *London and Australian Agency Corporation, In re*, I find there was one order on the three petitions, but the carriage of the order was given to a petitioner whose petition had been presented before though advertised after one of the other two. In that case all three petitions appear to have been properly presented, and Jessel, M.R., gave the carriage of the order to the petitioner who first presented his petition; he seems to have looked on priority of presentation as the right element in a case where there were no special circumstances, yet afterwards in *Trades Bank Co., In re*, on December 8, 1877, less than a month after *Norton Iron Co., In re*, he is reported to have adopted a different rule. In *Trades Bank Co., In re*, as appears from the Weekly Notes, the M.R. had in reality only one petition before him, Frodsham's. . . . In that case he allowed the rule as to priority of advertisement to prevail, the reporter adding—"I say reporter advisedly," because the M.R. never intended to overrule what he had just laid down in *Norton Iron Co., In re*: "Thus assimilating his practice to the other branches of the Court." This is not accurate. . . . My clerk has just handed me two

old daily cause lists of December 8 and 15, 1877, from which I see that in *Trades Bank Co. In re, Frodsham's Petition*, was in the M.R.'s paper on December 8, and that on the 15th a winding-up petition in the same company, transferred from Hall, V.-C., was in his list. So that on the 8th he had, as a fact, only one petition, Frodsham's, before him.—pp. 143—146.

Creditor's Petition.

Rhydydefed Colliery Co., Ex parte (1858) 3 De G. & J. 80.—KNIGHT BRUCE and TURNER, L.J.J., **Catholic Publishing and Bookselling Co., In re** (1864) 33 L. J. Ch. 325; 2 De G. J. & S. 116; 10 L. T. 79; 12 W. R. 339.—KNIGHT BRUCE and TURNER, L.J.J., **Brighton Club and Norfolk Hotel Co., In re** (1865) 35 Beav. 204; 11 Jur. (N.S.) 436; 12 L. T. 884; 13 W. R. 735.—ROMILLY, M.R., and **London Wharving and Warehousing Co., In re** (1865) 35 Beav. 87.—ROMILLY, M.R., *discussed*.

London and Paris Banking Corporation, In re (1874) 1 L. R. 19 Eq. 444; 23 W. R. 643.—JESSEL, M.R.

London and Paris Banking Corporation, In re, followed.

Cadiz Waterworks Co. v. Barnett (1871) 41 L. J. Ch. 529; 1 L. R. 19 Eq. 182; 31 L. T. 640; 23 W. R. 208.—MALINS, V.-C.

Cadiz Waterworks Co. v. Barnett, followed.

Niger Merchants' Co. v. Capper (1877) 18 Ch. D. 557, n.; 25 W. R. 365.—JESSEL, M.R.

Niger Merchants' Co. v. Capper, followed.

Cercle Restaurant Castiglione Co. v. Lavery (1881) 50 L. J. Ch. 837; 18 Ch. D. 555; 30 W. R. 288.—JESSEL, M.R.

Pen-y-Van Colliery Co., In re (1877) 46 L. J. Ch. 390; 6 Ch. D. 477.—JESSEL, M.R., *followed*.

Bank of South Australia, In re, Union Bank, Ex parte (1894) 64 L. J. Ch. 44; [1894] 3 Ch. 722; 13 R. 343; 2 Manson 148.—V. WILLIAMS, J.

Bank of South Australia, In re, doubted.

Provincial Banking Co., Ex parte, East of England Banking Co., In re (1868) 38 L. J. Ch. 121; 1 L. R. 4 Ch. 14; 19 L. T. 299; 17 W. R. 18.—CAIRNS, L.C., WOOD and SELWYN, L.J.J.; *varying* 1 L. R. 6 Eq. 363.—MALINS, V.-C., *distinguished*.

Bank of South Australia, In re, Union Bank, Ex parte (No. 2) [1895] 1 Ch. 578; 64 L. J. Ch. 144, 397; 12 R. 166; 72 L. T. 273; 43 W. R. 359; 2 Manson 129.—C.A.

LORD HALSBURY.—I do not intend to comment upon the earlier decision of my brother V. Williams in this case. It is not before us, and at present I confess I have some difficulty in understanding it. If I do understand it, I am not prepared to say I should follow it.—p. 590.

LINDLEY, L.J.—It is said that the payment of interest is shown to be *ultra vires* by *East of England Banking Co., In re*. There there was a resolution of the directors shortly before the winding up of that company, which was never communicated to the depositors—a resolution to

increase the rate of interest because other banks had done it; that resolution did not bind the company, and the creditors knew nothing about it. The liquidator, without consulting anybody, said that the higher rate of interest should be paid, and the Court held that he had no power to do that. That is very different from the present case, where the liquidators are doing nothing but that which they have been directed to do by the shareholders, who came together to decide what was to be done.—p. 593. A. L. SMITH, L.J. concurred.

Combined Weighing and Advertising

Machines, In re (1889) 59 L. J. Ch. 26; 43 Ch. D. 99; 61 L. T. 582; 38 W. R. 67, 1 Meg. 398.—C.A. COTTON, BOWEN and FRY, L.J.J., *considered*.

Pritchett and Young v. English and Colonial Syndicate (1899) 68 L. J. Q. B. 801; [1899] 2 Q. B. 428; 81 L. T. 206; 47 W. R. 577.—C.A.

LINDLEY, M.R.—The decisions of this Court that garnishee orders and balance orders are not final judgments, and therefore are not alone foundations for bankruptcy notices, are not inconsistent with our decision, for they turn upon the true construction of the Bankruptcy Act and the technical meaning of the words "final judgment." It is pointed out in *Combined Weighing, &c. Co., In re*, that a garnishee order absolute is not a final judgment.—p. 804.

ROMER, L.J.—That decision [*Combined Weighing, &c. Co., In re*] is binding on us. But seeing that in garnishee proceedings the order absolute contains an order that the garnishee do pay direct to the garnisher, the judgment creditor, I am surprised that the Court in the last-mentioned case did not see its way to hold that the judgment creditor there was entitled to petition to wind up the company.—*ib.*

Bowes v. Hope Mutual Life Assurance, &c.

Society (1865) 35 L. J. Ch. 574; 11 R. L. Cas. 389; 12 L. T. 680.—H.L. (E.). WESTBURY, L.C., LORDS CRANWORTH and KINGSDOWN; *dictum* of LORD CRANWORTH *observed on*. *And see* col. 561.

Brighton Hotel Co., In re (1888) 37 L. J. Ch. 915; 1 L. R. 6 Eq. 339; 18 L. T. 741.—MALINS, V.-C., *agreed with*.

Western of Canada Oil Lands and Works Co., In re (1873) 43 L. J. Ch. 184; 1 L. R. 17 Eq. 1.—SELBORNE, L.C. (for ROMILLY, M.R.). *And see post*.

Western of Canada, &c. Co., In re,

explained. **St. Thomas' Dock Co., In re** (1876) 45 L. J. Ch. 304; 2 Ch. D. 116; 34 L. T. 228; 24 W. R. 544.—JESSEL, M.R.

St. Thomas' Dock Co., In re, followed.

Great Western (Forest of Dean) Coal Consumers' Co., In re (1882) 51 L. J. Ch. 743; 21 Ch. D. 769; 46 L. T. 875; 30 W. R. 885.—FRY, J.

Bowes v. Hope Mutual Life Assurance, &c.

Society (*supra*), *distinguished*. **United Stock Exchange, In re** (1884) 51 L. T. 687.

PEARSON, J. distinguished the above case on the grounds that, in the present case, the petitioning judgment creditor was not standing *simpliciter* on his judgment, but, on the contrary, he (the learned judge) had had an opportunity of considering whether or not the judgment was

fairly obtained, an opportunity which the Court said they had not before them in *Bowes's Case*.—p. 688.

Uruguay Central and Hygueritas Ry. of Monte Video, In re (1879) 48 L. J. Ch. 540; 11 Ch. D. 372; 27 W. R. 571.—JESSEL, M.R., *approved*.

Chapel House Colliery Co., In re (1883) 24 Ch. D. 259; 52 L. J. Ch. 934; 49 L. T. 575, 31 W. R. 933.—C.A.

BAGGALLAY, L.J.—The petitioner relies on the common expression that a creditor whose debt is undisputed and who cannot obtain payment is entitled *ex debito justitiæ* to a winding-up order. This is founded on the dictum of Lord Cranworth in *Bowes v. Hope Mutual Life Assurance, &c. Society* (*supra*) where his lordship says: "It is not a discretionary matter with the Court when a debt is established and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but ordinarily speaking it is the duty of the Court to direct the winding-up;" and Lord Selborne in *Western of Canada, &c. Co., In re* (*supra*), expresses his agreement with that doctrine. This proposition is expressed in very general terms, but it has subsequently been almost universally considered that these remarks only apply as between the petitioning creditor and the company, and that where the interest of the body of creditors comes in, the Court will have regard to sect. 91 of the Companies Act, 1862. In the case of the *Brighton Hotel Co. (supra)*, Malins, V.-C. held that the general expressions of Lord Cranworth must be qualified in cases to which that section applied, and in *Western of Canada, &c. Co., In re*, it was distinctly held that the section is applicable not only in proceedings under a winding-up order, but whenever a winding-up petition is before the Court. Here the opinion of the bondholders has been taken, and the petitioner stands alone in desiring a winding-up. . . . In the case of *St. Thomas' Dock Co.* the company desired a postponement, and it was ordered on undertakings being given. In *Western of Canada, &c. Co., In re*, there was a *prima facie* case for winding-up, but there was a prospect of money coming in from Canada, which might make it unnecessary. The petition was ordered to stand over to see whether the money would come in, and when the petition came on again, no money having arrived, a winding-up order was made. The decision of Kay, J., in the present case, seems to have been given in deference to that in *Great Western, &c. Coal Consumers' Co. (supra)*, where Fry, J. ordered the petition to stand over. . . . I agree with the view that these cases must be dealt with according to their special circumstances. Another case has been referred to, which enunciates a doctrine to which I fully assent, and which has now for the first time to be considered by the C. A., viz.: *Uruguay, &c. Ry. of Monte Video, In re*. The headnote of that case gives the rule, to which I assent, and I need not go into the judgment: "As a general rule an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ*; but that rule is subject to exceptions: e.g., where all the other creditors oppose the petition, and it appears that the

petitioning creditor will not be in a better position by obtaining a winding-up order." I do not say that there may not be other cases in which the Court would dismiss the petition, but where the circumstances there mentioned by the M.R. concur, I think that it ought to be dismissed.—p. 265.

COTTON and BOWEN, L.J.J. to the same effect. *And see post*, col. 561.

Uruguay Central and Hygueritas Ry. of Monte Video, In re, distinguished.

Olathe Silver Mining Co., In re (1884) 27 Ch. D. 278; 33 W. R. 12.

FEARSON, J.—It is said that the petitioner is entitled to recover the amount of his debentures only through the trustees of the deed, and that, therefore, he is not a creditor of the company, and cannot be entitled to a winding-up order, and for this purpose *Uruguay, &c. Ry. of Monte Video, In re*, has been cited. But when that case is looked at it appears that the covenant in the debentures to pay the money secured thereby was not entered into by the company with the bearer at all, but it was a covenant by the company with the trustees of the covering deed that the company would pay the bearer of the debenture, and Jessel, M.R. laid stress on this provision as showing that there was no direct debt from the company to the holder of a debenture, and that it was manifestly intended that the money should be recovered in the manner expressed in the trust deed, and in no other. In the present case the form of the debenture is entirely different. There is no covenant in it with the trustees of the deed, but there is an agreement by the company with the bearer of the debenture that they will pay him.—p. 282.

And see post, col. 561.

Chapel House Colliery Co., In re (supra), principle applied.

Free Fishermen of Faversham, In re (1887) 57 L. J. Ch. 187; 36 Ch. D. 329; 57 L. T. 577.—C.A. COTTON, BOWEN and FRY, L.J.J.

BOWEN, L.J.—The principle to be applied is that laid down in *Chapel House Colliery Co., In re*, namely, if putting in motion the statutory machinery for winding up cannot possibly accomplish the purpose for which such machinery was invented by the legislature, the Court will not make the order for winding up.—p. 192.

Free Fishermen of Faversham, In re, commented on. South London Fish Market Co., In re (1888) 39 Ch. D. 324; 60 L. T. 68; 37 W. R. 3; 1 Meg. 92.—KAY, J.; *affirmed*, C.A. (*and see post*, col. 561); *not applied*, Barton-upon-Humber and District Water Co., In re (1889) 68 L. J. Ch. 613; 42 Ch. D. 535; 61 L. T. 803; 38 W. R. 8; 1 Meg. 412.—NORTH, J. *And see supra*, col. 554.

Chapel House Colliery Co., In re, distinguished.

Krasnapolsky Restaurant and Winter Gardens Co., In re [1892] 3 Ch. 174; 61 L. J. Ch. 593; 67 L. T. 51; 40 W. R. 639.

V. WILLIAMS, J.—As I understand the decisions, apart from the Act of 1890, it was settled law that, *prima facie*, a creditor whose debt was unpaid and who satisfied certain conditions precedent, was entitled to an order on his petition. That is stated to be the rule, and I do not understand that the rule as to the creditor's *prima facie* right to such an order

has been altered by anything laid down in *Chapel House Colliery Co., In re*. It is a rule which, in its origin, had very high authority. It was laid down originally by Lord Cranworth [*Bouca v. Hope Life Assurance Society* (*supra*, col. 558)], and was assented to by Lord Selborne [*Western of Canada, &c. Co.* (*supra*, col. 558)]. But *Chapel House Colliery Co., In re*, does show that there are exceptions to the rule, and I agree that one of those exceptions is that, when those who oppose the making of a winding-up order can show that no possible benefit can accrue to creditors from making the order, it ought not to be made; *à fortiori* that is so when persons opposing the petition show, not only that the petitioning creditor will obtain no benefit from a winding-up order, but that a large proportion of the creditors are opposed to its being made.—p. 177.

Bolton Benefit Loan Society, In re, Coop v. Booth (1879) 49 L. J. Ch. 39; 12 Ch. D. 679; 28 W. R. 164.—JESSEL, M.R.; and **South London Fish Market Co., In re** (*supra*), *followed*.

Bowling and Welby's Contract, *In re* (1895) 64 L. J. Ch. 427; [1895] 1 Ch. 663; 12 R. 218; 72 L. T. 411; 43 W. R. 417; 2 Manson 257.—G.A. LORD HATSBURY, LINDLEY and A. L. SMITH, L.J.J. See judgment of Lindley, L.J.

Chapel House Colliery Co., In re, referred to.

Olathe Silver Mining Co., In re (*supra*, col. 560), *not applied*.

London Health Electrical Institute, *In re* (1897) 76 L. T. 98; 45 W. R. 566.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.J.J.; *affirming* 3 Manson 338.—V. WILLIAMS, J.

Chapel House Colliery Co., In re (*supra*), and **Uruguay Central and Hygueritas Ry. of Monte Video** (*supra*, col. 559), *principle applied*.

Ilfracombe Permanent Building Society, *In re* (1900) 70 L. J. Ch. 66; [1901] 1 Ch. 102. 84 L. T. 146.—WRIGHT, J.

Chapel House Colliery Co., In re, applied.

Greenwood & Co., *In re* (1900) 69 L. J. Q. B. 751; [1900] 2 Q. B. 306; 82 L. T. 843, 48 W. R. 607; 7 Manson 456.—RIDLEY and BIGHAM, JJ.

Australian Joint Stock Bank, In re (1897) 32 L. J. N. C. 264; W. N. (1897) 48.—V. WILLIAMS, J., *distinguished*.

Melbourne Brewery and Distillery, Ltd., *In re* (1900) 70 L. J. Ch. 198; [1901] 1 Ch. 453; 84 L. T. 228; 49 W. R. 250; 8 Manson 403.

WRIGHT, J.—There was a petition by a creditor whose debt was not yet payable, and a winding-up order seems to have been made upon it, but then he was a creditor—he was a creditor in the fullest sense, but payment of his debt was deferred under a scheme. . . . He was none the less a creditor, if the debt was due and had become payable, because payment had been suspended for a time; but here in the view that I take the petitioner is not a creditor at all—certainly not in respect of future interest, and with regard to the principal it seems to me that any right he once had has been waived.—p. 202.

Shareholder's Petition.

European Life Assurance Society, In re, Crowe, Ex parte (1870) 40 L. J. Ch. 87; L. R. 10 Eq. 408; 22 L. T. 785; 18 W. R. 918.—V.-C., *approved and followed*.

Steam Stoker Co., *In re* (1875) 44 L. J. Ch. 386; L. R. 19 Eq. 416; 32 L. T. 143; 23 W. R. 545.

BACON, V.-C.—Upon this point the authority of James, L.J. [*In European Life Assurance Society, In re*] is undisputed and is most directly in point. Mr. Jackson says I am not bound by the L.J.'s decision when he was V.-C. Nothing can be more clear than that I am not so bound, but I am justified in following that decision if my judgment goes along with it, and in my opinion a more wholesome rule has never been laid down, or one more useful in checking the abuses which might otherwise spring up under colour of these Acts. If it were otherwise, the moment a shareholder, or it may be 100 shareholders, were called upon by the company to pay up on their shares, it might be competent for each of them to file a petition for the purpose of staying off a payment which he was called upon presently to make. It would be an instrument of effectual ruin to companies if shareholders who owed the company money by not having paid their calls were allowed to come into Court with winding-up petitions. In my opinion the decision of the L.J. when V.-C. was a right one in principle, and if he had not so ruled I should have decided this case mainly on a similar view of the statements in the petition.—p. 387.

Just and Equitable.

Natal, &c. Co., In re (1863) 1 H. & M. 639.—WOOD, V.-C.; and **Sea and River Marine Insurance Co., In re** (1866) 35 L. J. Ch. 820; L. R. 2 Eq. 545; 12 Jur. (N.S.) 779.—KINDERSLEY, V.-C., *not followed*.

Sanderson's Patents Association, *In re* (1871) L. R. 12 Eq. 188; 40 L. J. Ch. 519; 19 W. R. 966.

MALINS, V.-C.—If *Natal, &c. Co., In re*, which was followed in *Sea and River Marine Insurance Co., In re*, was a decision that the Court will never wind up a company which has only seven shareholders, I entirely dissent from that view. But I think the learned V.-C. did not intend so to decide.—p. 189.

Renss (Princess) v. Bos (1871) 40 L. J. Ch. 655; L. R. 5 H. L. 176; 24 W. R. 641.—H.L. (E.). HATHERLEY, L.C., LORDS COLONSAY and CAIRNS; *affirming* S. C. *nom. General Co. for the Promotion of Land Credit, In re* (1870) L. R. 5 Ch. 363; 18 W. R. 505.—GIFFARD, L.J.; *discussed*, Nassau Phosphate Co., *In re* (1876) 45 L. J. Ch. 584; 2 Ch. D. 610; 24 W. R. 692.—HALL, V.-C.; *distinguished*, Capital Fire Insurance Association, *In re* (1882) 52 L. J. Ch. 20; 21 Ch. D. 209; 47 L. T. 123; 30 W. R. 941.—CHITTY, J. See judgment at length.

Imperial Bank of China, India and Japan, In re (1866) 35 L. J. Ch. 445; L. R. 1 Ch. 339; 12 Jur. (N.S.) 442; 14 L. T. 211; 14 W. R. 594.—KNIGHT BRIDGES and TURNER, L.J.J.; and **Imperial Bank of China, India and Japan v. Bank of Hindustan, China, and Japan** (1868) L. R. 6 Eq. 91; 16

W. R. 1107.—GIFFARD, V.-C., *discussed and distinguished*.
 Irrigation Co. of France, In re, Fox, Ex parte (1871) 40 L. J. Ch. 433; L. R. 6 Ch. 176; 21 L. T. 336.—JAMES and MELLISH, L.JJ.

Fox, Ex parte, commented on and applied.
 Tunis Ryrs., In re (1874) 30 L. T. 512; 22 W. R. 639.—MALINS, V.-C.

Fox, Ex parte, distinguished.
 Amalgamated Syndicates, In re (1897) 66 L. J. Ch. 783; [1897] 2 Ch. 600; 77 L. T. 431; 46 W. R. 75; 4 Manson 308.

V. WILLIAMS, J.—I do not think that *Fox, Ex parte*, goes the length of saying that where the Court has to consider whether it should take upon itself the adjustment of the rights of the shareholders of a company, the substratum of which is gone, it should not take into consideration the fact that the directors intend entering upon businesses which in the opinion of the Court are outside the memorandum of association. Mr. Buckley, in his work on the Companies Acts (7th ed., p. 245) says: "So where a company is proceeding to do something which is *ultra vires*, a shareholder has a right in an action, on behalf of himself and all other shareholders, to restrain the company, though every shareholder but himself be acquiescent; but has no right to come for a winding-up order under the 'just and equitable' clause;" and he cites *Fox, Ex parte*, as an authority in support of that proposition. It is plain, however, that that passage is a mere illustration of a previous passage on the same page, where he says, "There is no doubt that the 'just and equitable' clause gives the Court power to wind up a company in cases not coming under any of the first four heads, but there must be strong ground for exercising the power, at any rate at the instance of a shareholder." Without going into details, I repeat what I said during the argument, that the stringency of the *quodam generis* rule has of late been considerably relaxed.—p. 787.

Baring v. Dix (1786) 1 Cox 213; 1 R. R. 23.—KENTON, M.R.: **Le Factage Parisien** (1864) 34 L. J. Ch. 140; 11 Jur. (N.S.) 121; 11 L. T. 500; 13 W. R. 214.—ROMILLY, M.R.; *order discharged by* WESTBURY, L.C.: **Anglo-Greek Steam Co., In re** (1866) L. R. 2 Eq. 1; 35 Deav. 399; 12 Jur. (N.S.) 323; 14 L. T. 120; 14 W. R. 624.—ROMILLY, M.R.; and **West Surrey Tanning Co., In re** (1866) L. R. 2 Eq. 737; 14 W. R. 1009.—WOOD, V.-C., *considered*. *And see post*, col. 564.

Suburban Hotel Co., In re (1867) 36 L. J. Ch. 710; L. R. 2 Ch. 737; 17 L. T. 22; 15 W. R. 1095.—GATENS, L.J.

Suburban Hotel Co., In re, and Haven Gold Mining Co., In re (1882) 51 L. J. Ch. 242; 20 Ch. D. 151; 46 L. T. 322; 30 W. R. 389.—C.A. JESSEL, M.R., BRETT and LINDLEY, L.JJ., *applied*.

Langham Skating Rink Co., In re (1877) 46 L. J. Ch. 345; 5 Ch. D. 669; 36 L. T. 605.—C.A. JESSEL, M.R., JAMES, L.J. and BAGGALLAY, J.A., *not applied*.

German Date Coffee Co., In re (1882) 51 L. J. Ch. 564; 20 Ch. D. 169; 46 L. T. 327; 30 W. R. 717.—KAY, J.; *affirmed*, C.A. JESSEL, M.R., BAGGALLAY and LINDLEY, L.JJ.

Haven Gold Mining Co., In re, considered and applied.
 Coolgardie Consolidated Gold Mines, In re (1897) 76 L. T. 269.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.JJ.

German Date Coffee Co., In re (*supra*), *applied*.

Stephens v. Mysore Reefs (Kangundy) Mining Co. (1902) 71 L. J. Ch. 295; [1902] 1 Ch. 745; 86 L. T. 221; 50 W. R. 509; 9 Manson 199.—SWINFEN EADY, J.

Diamond Fuel Co., In re (1879) 49 L. J. Ch. 301; 13 Ch. D. 400; 41 L. T. 573; 28 W. R. 309.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ., *explained*.

Crystal Reef Gold Mining Co., In re (1892) 61 L. J. Ch. 208; [1892] 1 Ch. 408; 66 L. T. 111; 40 W. R. 235.—NORTH, J. *See judgment*.

West Surrey Tanning Co., In re (*supra*, col. 563), *followed*.
 Varieties, Ltd., In re (1893) 62 L. J. Ch. 526; [1893] 2 Ch. 235; 3 R. 324; 68 L. T. 214; 41 W. R. 296.—V. WILLIAMS, J. *And see post*, col. 565.

London and County Coal Co., In re (1866) L. R. 3 Eq. 355.—WOOD, V.-C.: **West Surrey Tanning Co., In re, and Diamond Fuel Co., In re, explained.
 Brinsmead & Sons, In re (1896) 66 L. J. Ch. 85; [1897] 1 Ch. 45.—V. WILLIAMS, J.; *affirmed*, (1897) 66 L. J. Ch. 290; [1897] 1 Ch. 406; 76 L. T. 100; 4 Manson 70.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.JJ.**

Compulsory or Voluntary.

Bank of Gibraltar and Malta, In re (1865) 35 L. J. Ch. 49; L. R. 1 Ch. 69; 11 Jur. (N.S.) 916; 13 L. T. 386; 14 W. R. 69.—KNIGHT BRUCE and TURNER, L.JJ.; *reversing* 34 L. J. Ch. 617.—ROMILLY, M.R.; and **London Mercantile Discount Co., In re** (1865) 35 L. J. Ch. 229; L. R. 1 Eq. 277; 13 L. T. 665; 14 W. R. 219.—WOOD, V.-C., *followed*.

Beaujolais Wine Co., In re, Wragge, Ex parte (1867) 37 L. J. Ch. 220; L. R. 3 Ch. 15; 17 L. T. 399; 16 W. R. 177.—ROLT, L.J.

Bank of Gibraltar and Malta, In re, and Beaujolais Wine Co., In re, discussed.
 County Marine Insurance Co., In re, *Rance's Case* (1870) 40 L. J. Ch. 277; L. R. 6 Ch. 104 (*supra*, col. 427).

Bank of Gibraltar and Malta, In re, and Fire Annihilator Co., In re (1863) 32 Deav. 561.—ROMILLY, M.R., *discussed*.

Littlehampton, Havre and Harfleur Steamship Co., In re, Ellis, Ex parte (1865) 34 L. J. Ch. 237; 2 De G. J. & S. 521; 11 Jur. (N.S.) 211; 12 L. T. 8; 13 W. R. 420.—KNIGHT BRUCE, L.J.; TURNER, L.J., *dissenting*; and **West Surrey Tanning Co., In re** (*supra*, col. 563), *distinguished*.

Gold Co., In re (1879) 48 L. J. Ch. 281; 11 Ch. D. 701; 40 L. T. 5; 27 W. R. 341.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.JJ.

Fire Annihilator Co., In re, and Gold Co., In re, followed.

Haycraft Gold Reduction and Mining Co.,

In re (1900) 69 L. J. Ch. 497; [1900] 2 Ch. 230; 83 L. T. 166; 7 Manson 243.—COZENS-HARDY, J. See *supra*, col. 413.

Gold Co., In re, followed. Hadleigh Castle Gold Mining Co., In re (1900) 69 L. J. Ch. 631; [1900] 2 Ch. 419; 83 L. T. 400.—COZENS-HARDY, J. (*supra*, col. 476); Arnot v. United African Land Co. (1901) 70 L. J. Ch. 306; [1901] 1 Ch. 518.—C.A. (*supra*, col. 477).

Haycraft Gold Reduction Co., In re, and Guyta Percha Corporation, In re (1900) 69 L. J. Ch. 769; [1900] 2 Ch. 665; 83 L. T. 401; 8 Manson 67.—COZENS-HARDY, J., *approved*.

Gold Co., In re, considered and explained. National Co. for Distribution of Electricity, In re (1902) 71 L. J. Ch. 702, [1902] 2 Ch. 34; 87 L. T. 6; 9 Manson 314.—C.A. V. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

Gold Co., In re, and Varieties, Ltd., In re (*supra*, col. 564), *followed*.

West Hartlepool Ironworks Co., In re (1875) 44 L. J. Ch. 668; L. R. 10 Ch. 618; 33 L. T. 149; 23 W. R. 938.—JAMES and MELLISH, L.JJ.; **New York Exchange, In re** (1888) 58 L. J. Ch. 111; 89 Ch. D. 415; 60 L. T. 46; 1 Meg. 78.—C.A. COTTON, FRY and LOPES, L.JJ.; and **Russell, Corder & Co., In re** (1891) 60 L. J. Ch. 805; [1891] 3 Ch. 171; 65 L. T. 740; 39 W. R. 635.—NORTH, J., *explained*.

Medical Battery Co., In re (1893) 63 L. J. Ch. 189; [1894] 1 Ch. 444; 8 R. 46; 69 L. T. 799; 42 W. R. 191; 1 Manson 104.—V. WILLIAMS, J., *approved*.

Bishop & Sons, Ltd., In re (1900) 69 L. J. Ch. 513; [1900] 2 Ch. 254; 82 L. T. 756; 7 Manson 342.

PARWELL, J.—The authority relied upon by the company was *Gold Co., In re*, where the petition was that of a shareholder. Now, if sect. 145 [Companies Act, 1862] creates an absolute bar to a creditor unless he can prove that he is prejudiced, it must certainly create by necessary implication an absolute bar to a shareholder whether he is prejudiced or not. But the C. A. in *Gold Co., In re*, while expressing the view that if it had been open to them they would have been disposed to decide that sect. 145 was such a statutory bar, felt themselves prevented from so deciding by the judgments of their predecessors, and V. Williams, J., made an order in *Varieties, Ltd., In re*, on this footing. . . . But since the case was argued my attention has been called to three cases which were not cited. . . . The first is *West Hartlepool Ironworks Co., In re*. There does not appear, from the report of that case, to have been any evidence that the petitioner would be prejudiced; but sect. 145 was cited, as appears from the report of the case in the Weekly Reporter and the Law Times Reports—and I cannot suppose that it was not present to the mind of the Court—and it would have been a very short mode of disposing of the case if sect. 145 had the effect contended for by the company. Mellish, L.J., treats the case as depending entirely on the wishes of the creditors, and his judgment is quite inconsistent with the idea that sect. 145 overrides sects. 91 and 149. In *New York Exchange,*

In re, the point decided was that the petitioning creditor was affected by sect. 145, although he had presented his petition before the resolution was passed. There was nothing in this case contrary to the view that I have expressed: indeed Fry, L.J., refers to sect. 91 as being applicable to the case before the Court; but it did not assist the petitioner, because the other creditors who appeared opposed the compulsory order. The last case is *Russell, Corder & Co., In re*. The point really decided in that case was that the Companies Act. 1890 had not altered the law under sect. 145 of the Act of 1862; and the petitioner stood alone, being opposed by all the other creditors who appeared. This, therefore, is not a decision contrary to the view that I have expressed, and North, J., expresses no opinion on it, although he suggests the point by asking the question, in the course of the argument, whether, if all the creditors desired a compulsory order, they would be entitled to it, unless they came within the words of sect. 145. . . . Taking the view I do, it is unnecessary that the petitioner should allege prejudice to the petitioning creditors. But, if it were necessary, I am prepared to follow V. Williams, J., in *Medical Battery Co., In re*, and to hold that the creditors under the circumstances in this case are prejudiced by the voluntary winding up.—p. 515.

London Quays and Warehouses Co., In re (1868) 37 L. J. Ch. 397; L. R. 3 Ch. 394; 18 L. T. 195; 16 W. R. 530.—L.JJ., *observed on*.

Owen's Patent Wheel Co., In re (1873) 22 W. R. 151.—HALL, V.-C.

Owen's Patent Wheel Co., In re, followed. Simon's Reef Consolidated Gold Mining Co. (1882) 31 W. R. 238.—FRY, J.

London Quays and Warehouses Co., In re, and Rochdale Property and General Finance Co., In re (1879) 48 L. J. Ch. 768; 12 Ch. D. 775; 41 L. T. 16.—BACON, V.-C., *discussed and adopted*.

Watson & Sons, In re (1891) 60 L. J. Ch. 473; [1891] 2 Ch. 55; 65 L. T. 170; 39 W. R. 633.

CHITTY, J.—In *London Quays, &c. Co.* the L.JJ., Cairns and Selwyn, imposed on the voluntary liquidator the same restrictions as an official liquidator would be subject to in a compulsory winding up, except so far as the Court should think fit to dispense with those restrictions. That is an authority for the exercise of the jurisdiction imposing restrictions. Now, turning to the 183rd section of the Act of 1862, I find in sub-sect. 7, "The liquidators may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator." Turning to the 95th section, which confers powers on the official liquidator, I find that there are restrictions placed upon the exercise of certain powers, the 95th section being completed by the 96th, which provides that, "The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court," and in the *Rochdale Property, &c. Co.* the Court made an order giving the official liquidator power to do all acts without the previous sanction of the Court, thus giving to a compulsory winding up the effect of winding up under supervision. That is the converse case to *London Quays, &c. Co., In re*. These cases are of use as showing

that the Court has jurisdiction, and has exercised the jurisdiction, which, for practical purposes, turns the winding up by the Court very nearly into a winding up voluntarily under supervision; and, *vice versa*, turns a winding up under supervision almost into a winding up by the Court.—p. 475.

Order to Wind up—Effect of.

General Rolling Stock Co., In re, Chapman's Case (1866) L. R. 1 Eq. 346; 32 Beav. 207.—ROMILEY, M.R., *followed*.

English Joint Stock Bank, In re, Harding, Ex parte (1867) L. R. 3 Eq. 341; 15 L. T. 529.—WOOD, V.-C., *distinguished*.

Oriental Bank, In re, Macdowall's Case (1886) 32 Ch. D. 366; 53 L. J. Ch. 680; 55 L. T. 667; 34 W. R. 529.

CHITTY, J.—It is said, in order to come to the conclusion at which I have arrived, I must be overruling Lord Hatherley's judgment in *Harding, Ex parte*. I consider that not to be so. The case that Lord Hatherley was considering when V.-C. was the case in which, as I understand the report, the business of the company as such was continued. No doubt if that were the case, the liquidator having continued the business, there might be grounds for saying, and the V.-C. found there were grounds in that case for saying, that either the notice had been waived or there was a new contract on the same terms. I think that . . . *Chapman's Case* and *Harding, Ex parte*, can stand together. I am satisfied that Lord Hatherley did not intend, if even he had the authority so to do, to overrule *Chapman's Case*, and in the report I find, so far from thinking he was overruling it, Lord Hatherley said he thought there were sufficient facts in the case before him to take it out of the M.R.'s decision in *Chapman's Case*. This is an acknowledgment of the authority of the case itself.—p. 372.

Winding-up Act, 1890.

Great Kruger Gold Mining Co., In re, Barnard, Ex parte (1892) 62 L. J. Ch. 22; [1892] 3 Ch. 307; 2 R. 11; 67 L. T. 770; 40 W. R. 625; 5 Times L. R. 690.—C.A., LINDLEY, LOPES and A. L. SMITH, L.J., *explained*.

Trust and Investment Corporation of South Africa, In re, Bertram Luipaard's Vlei Gold Mining Co., In re [1892] 3 Ch. 332; 62 L. J. Ch. 22; 2 R. 76; 67 L. T. 777; 40 W. R. 689.—C.A.

LINDLEY, L.J.—The difficulty which has arisen is attributable to some words reported to have been used by me, and which, if I did use them, were uttered unintentionally in *Barnard, Ex parte*. In a report of that case, which was referred to before us, and in a shorthand note read before V. Williams, J., I am reported to have said twice over that in order to justify an order for public examination under the Companies (Winding-up) Act, 1890, sect. 8, sub-sect. 3, the least that is required is that there should be a written report upon the responsibility of the official receiver that in his opinion some fraud has been committed by the person to be examined. If I did say that, I expressed myself incautiously, because that was not the meaning of any of us. I will proceed to state exactly what I understand to be the view taken by the Court on that occasion, and the view taken by the Court on this occasion. First of all, we stated in *Barnard, Ex parte*, intentionally and deliberately, that "such report"

in sub-sect. 3 means the report referred to in sub-sect. 2. That produces no inconvenience, and I am satisfied that it is the true construction, and I abide by it. Secondly, we have to decide now what we had not to decide in *Barnard, Ex parte*, namely, whether these applications can be made *ex parte*. [His lordship then decided that they could, and the other, L.J.J. concurred, and continued:] Now, what are the materials upon which the Court ought to act? In *Barnard, Ex parte*, we had no materials, for there was no report that Barnard had taken any part in the promotion or formation of the company or been a director or officer, and we held that a verbal statement by the official receiver to the judge that Barnard had been a promoter could not be acted upon. . . . It is not necessary for the official receiver to draw an indictment against that person to be examined, and I feel certain that we said so during the argument in *Barnard, Ex parte*.—pp. 341–343.

LOPES, L.J.—The judgment in *Barnard, Ex parte*, seems to have been somewhat misunderstood. I am perfectly clear what my view was, and I certainly thought it was the view of my learned brethren, namely, that there must be a report that in the opinion of the official receiver a fraud has been committed by somebody, but that the particular person or persons who were parties to it need not be named in order to apply this sub-section.—p. 343.

A. L. SMITH, L.J.—In my judgment the headline of *Barnard, Ex parte*, in the report to which we have been referred [40 W. R. 625] must be altered. I am not sure that I had not a hand in making the headline wrong by what I said in the last part of my judgment; but I certainly did not intend to say what this headline says, although I think the reporter might well have thought I meant it. The headline runs: "The Court has no jurisdiction to direct a person to attend and be publicly examined under sect. 8 of the Companies (Winding-up) Act, 1890, unless it has before it a report in writing of the official receiver stating that, in his opinion, a fraud has been committed." That is right enough; but it goes on "by such person," that is the point which we have to decide to-day. I remember perfectly, as Lindley, L.J. has stated, a discussion going on about an indictment; and I remember that we negatived the necessity of an indictment or anything like it being contained in the reports.—p. 344.

Trust, &c. Corporation of South Africa, In re; Bertram Luipaard's Vlei Gold Mining Co., In re, explained.

Laxon & Co., In re (1892) 62 L. J. Ch. 206; [1893] 1 Ch. 210; 3 R. 99; 67 L. T. 654; 41 W. R. 62.—V. WILLIAMS, J.

Laxon & Co., In re, followed.

Birkdale Steam Laundry and Carpet Beating Co., In re (1893) 63 L. J. Q. B. 20; [1893] 2 Q. B. 386; 5 R. 557; 42 W. R. 144.—GAYE and WRIGHT, JJ.

Trust, &c. Corporation of South Africa, In re, explained.

Laxon & Co., In re, and Birkdale Steam Laundry and Carpet Beating Co., In re, discussed and disapproved.

General Phosphate Corporation, In re, Transvaal Gold Mining Co., In re, Delhi Steamship Co., In re (1894) 64 L. J. Ch. 195; [1895] 1 Ch. 3;

12 R. 39; 71 L. T. 619; 43 W. R. 34; 1 Manson 522.—C.A. LINDLEY and A. L. SMITH, L.JJ.
 LINDLEY, L.J.—In my opinion we must refuse this application, in fact, we cannot do otherwise if we are to be consistent with our previous decisions. It appears to me now, as it did on the two former occasions, that we construed the Act rightly, and that there is no power to put in force this process of public examination upon a report by the official receiver which does not show upon its face that some fraud has been committed, though not necessarily, as we have carefully explained, by a particular person. There is always a great danger in going beyond or varying the language of an Act; but, adhering, as I do to the view that "such report" in sect. 8, sub-sect. 3, means a "further report" and not the preliminary report, it follows that, although the official receiver need not make a further report, yet, if the Court is to order a public examination under this section, it must have before it a report such as is referred to in sub-sect. 2. . . . The exact language in which he is to state it is another matter; and in *Trust, &c. Corporation of South Africa, In re*, this Court held that the report was sufficient if it showed fraud—that is, when the fraud was manifest on the face of the report the Court did not think it necessary to send it back to the official receiver in order to compel him to say in black and white that, in his opinion, fraud had been committed. That decision has been since interpreted in a way which is too lax. We did not intend in any way to depart from the requirement of the Act. But our observations have been understood as meaning that it would be sufficient if in his report the official receiver "suggested" fraud. The word "suggest" is very ambiguous. What we meant was, that circumstances must be stated in the report which show that the official receiver is of opinion that some fraud has been committed. If the report shows that, I think it is unnecessary that we should act (so to speak) as drill sergeants, and insist that there should be in the report a paragraph stating in so many words that which is apparent on the face of it. But I think it is time for us to protest against the notion that we went the length of saying that a "suggestion" of fraud would be sufficient.—p. 195. A. L. SMITH, L.J. concurred.

Barnes, Ex parte (1896) 65 L. J. Ch. 394; [1896] A. C. 146; 74 L. T. 153; 44 W. R. 433; 3 Manson 63.—H. L. (2). HALLIBURY, L.C., LORDS WATSON, HERSHELL, MACNAGHTEN, MORRIS, SHAND and DAVEY, considered and explained.
 Civil, Naval and Military Outfitters, In re (1898) 68 L. J. Ch. 164; [1899] 1 Ch. 215; 80 L. T. 241; 47 W. R. 233; 6 Manson 100.—C.A. LINDLEY, M.R.—*Barnes, Ex parte*, has removed one point in controversy, which was, what is the "report" referred to in sub-sect. 2 of the section [sect. 8]. . . . *Barnes, Ex parte*, has made it plain that such report is what is called the further report, and not what is called the preliminary report. . . . The result of *Barnes, Ex parte*, appears to me to be tolerably plain. There must be a report stating the manner in which the company was formed, and whether, in the opinion of the official receiver, fraud has been committed by any person proposed to be examined. That is not found in the Act; it is added by the H. L. in *Barnes, Ex parte*. And the

H. L. were led to add it by construing sub-sect. 3 in connection with sub-sects. 2 and 7.—p. 166.

CHITTY, L.J.—As to the decision in *Barnes, Ex parte*, I have nothing to add to what the M.R. has said, except to say that in that case there was no charge of fraud made in the report, nor was there any statement of fact from which fraud could be inferred against the persons who were named as persons to be examined.—p. 170.

V. WILLIAMS, L.J.—Speaking for myself, I should hesitate very much to say that a mere narrative as to "the manner" (to use the very words of the section) of the formation of the company, coupled with a statement that in the opinion of the official receiver fraud had been committed by A. B., would be sufficient to justify an order for the examination of A. B. I do not say that the judgment of the H. L. in *Barnes, Ex parte*, is at all conclusive as to this point. But it does suggest that the statement of that opinion by the official receiver must be in such a shape that it can be said that there is a charge made against the person sought to be examined, of such a kind that he can either exculpate himself or be incriminated. . . . The spirit of the decision of the H. L. is that you are not to make an order for the examination of any one unless he falls within those categories; and unless the judge is satisfied on the report that the report does make such a charge against the person sought to be examined that he can know what it is that he must exculpate himself from, or, if he fail, be convicted of.—*ib.*

New Travellers' Chambers, In re (1895) 64 L. J. Ch. 317; [1895] 1 Ch. 395; 13 R. 295; 72 L. T. 89; 43 W. R. 282; 2 Manson 110.—ROMER, J., followed.
 National Stores, In re (1899) 69 L. J. Ch. 16; [1899] 2 Ch. 773; [1900] 1 Ch. 27; 81 L. T. 529. WRIGHT, J.

[The C. A. (LINDLEY, M.R., SIR F. JEUNE and ROMER, L.J.) dismissed an appeal on the ground of delay in making the application.]

Reynolds (Chas.) & Co., In re (1895) 30 L. J. N. C. 116; W. N. (1895) 81.—V. WILLIAMS, J., referred to.
 Radford v. Bright, Ltd., In re (No. 1) (1900) 70 L. J. Ch. 73; [1901] 1 Ch. 272; 84 L. T. 150; 49 W. R. 270; 9 Manson 98.—WRIGHT, J.

Assets.

Direct London and Exeter Ry., In re, Hollinsworth's Case (1849) 3 De G. & Sm 102.—KNIGHT BRUCE, V.-C.; and **Tring, Reading and Basingstoke Ry., In re, Cox's Case** (1850) 19 L. J. Ch. 167; 3 De G. & Sm. 180; 14 Jur. 387.—KNIGHT BRUCE, V.-C., followed.
 United English and Scottish Assurance Co., In re, Hawkins, *Ex parte* (1863) L. R. 3 Ch. 757; 19 L. T. 232; 16 W. R. 1136.—WOOD and SELWYN, L.JJ.

Surplus Assets.

Hodges' Distillery Co., In re, Maude, Ex parte (1870) 40 L. J. Ch. 21; L. R. 6 Ch. 51; 23 L. T. 749; 19 W. R. 113.—JAMES and MELLISH, L.JJ., distinguished.
 Eclipse Gold Mining Co., In re (1874) 43 L. J. Ch. 637; L. R. 17 Eq. 490.
 MALINS, V.-C.—This case differs from *Maude's*

Case. In that case there was no issue of new capital, but the shareholders had a right to anticipate their calls. Some had and some had not done so; but Mr. Maude, as I understand, had anticipated his calls, and it was urged before me, and I thought there was great force in the argument, that, inasmuch as he had paid up his call, he was entitled to a greater amount of profit, if profit had been made, and so, having had a greater amount of profit, he could only share with the others according to what he had paid when the division of profits took place. This is a case in which the company being, as I have already pointed out, in great distress, with no possible chance of success except with the addition of fresh capital—fresh capital is provided by these new shareholders. Therefore, my opinion is that, in the winding up, the capital ought to be divided amongst the old shareholders and the new shareholders in proportion to the amount which they have respectively advanced.—p. 639.

Maude, Ex parte (*supra*), principle applied. Gibson & Co., In re, James, Ex parte (1880) 5 L. R. 139.—CHATTERTON, V.-C.

Maude, Ex parte, discussed. Birch v. Cropper (1889) 59 L. J. Ch. 122; 14 App. Cas. 525.—H.L. (E.) (*post*, col. 572), followed, Weymouth, &c. Steam Packet Co., In re (1890) 59 L. J. Ch. 714 (*post*, col. 572); rule applied, Sheppard's Corn Malting Co., In re (1893) 7 R. 337.—C.A. (*post*, col. 572); considered, Anglo-Continental Corporation of W. Australia, In re (1898) 67 L. J. Ch. 179; [1898] 1 Ch. 327 (*post*, col. 572); discussed, Driffield Gas Light Co., In re (1898) 67 L. J. Ch. 247; [1898] 1 Ch. 451 (*post*, col. 573).

Somes v. Currie (1855) 1 K. & J. 605; 1 Jur. (N.S.) 974.—WOOD, V.-C., considered. And see *post*, col. 573.

Sheppard v. Seinde, Punjaub and Delhi Ry. (1887) 56 L. J. Ch. 866; 57 L. T. 585; 36 W. R. 1; 3 Times L. R. 382, 721.—C.A.; affirming 56 L. T. 180.—KEKEWICH, J.; affirmed, on construction of special Act, 60 L. T. 641.—H. L. (E.). HALSEBURY, L.C. LORDS WATSON, BRAMWELL, FITZGERALD and MACNAGHTEN.

COTTON, L.J.—As to *Somes v. Currie* . . . I would rather not rely upon it in the present case, as the decision turned so much on the view of the V.-C. as to the facts of the case; but it certainly is a decision which in no way assists the plaintiff's contention.—p. 868.

BOWEN, L.J. to the same effect. FRY, L.J. concurred.

And see *post*, col. 573.

Sheppard v. Seinde, &c. Ry., not applied. London and Brighton Stock Exchange, In re (1887) 4 Times L. R. 2.—STIRLING, J.; principle applied, Bridgewater Navigation Co., In re (1888) 57 L. J. Ch. 809; 39 Ch. D. 1; 58 L. T. 476, 866; 36 W. R. 769.—C.A. COTTON, FRY and LOPES, L.J.J.; reversed, *post*.

Bridgewater Navigation Co., In re, explained.

Andrews v. Gas Meter Co. (1897) 66 L. J. Ch. 246; [1897] 1 Ch. 361.—C.A. (*supra*, col. 389).

Bridgewater Navigation Co., In re (*supra*), reversed.

Sheppard v. Seinde, &c. Ry., commented on. Oakbank Oil Co. v. Crum (1882) 8 App.

Cas. 65; 48 L. T. 537.—H.L. (SC). SELBORNE, L.C. LORDS BLACKBURN, WATSON, BRAMWELL and FITZGERALD (and see *post*, col. 573); and London and Brighton Stock Exchange, In re, referred to. Anglesse Colliery Co., In re (1860) 35 L. J. Ch. 809; 15 L. T. 127; 14 W. R. 1004. KNIGHT BRUCE and TURNER, L.J.J., discussed.

Birch v. Cropper, Bridgewater Navigation Co., In re (1889) 59 L. J. Ch. 122; 14 App. Cas. 525; 61 L. T. 621; 38 W. R. 401.—H.L. (E.).

LORD HERSCHELL.—Some stress was laid in the Court below upon the decision in *Sheppard v. Seinde, &c. Ry.*; but I do not think that that case can be relied on as an authority except where the circumstances are precisely similar. All the noble and learned lords who took part in the consideration of that case in this House rested their opinions upon the very special facts of the case, and intimated that they were not laying down any general principle.—p. 125. [His lordship also discussed *Anglesse Colliery Co., In re*, and *Maude, Ex parte* (*supra*, col. 570).] LORD FITZGERALD concurred, and referred to *Oakbank Oil Co. v. Crum*.

LORD MACNAGHTEN.—The question involved in this appeal appears to be novel. No direct authority on the point was cited. Nor am I aware of any, except a decision of Stirling, J., in *London and Brighton Stock Exchange, In re*, . . . *Sheppard v. Seinde, &c. Ry.*, which was treated as an authority in the Courts below, has since been reviewed in this House: and in affirming the decision of the C. A., every one of the noble and learned lords who addressed the House relied simply and solely on the special circumstances of the case.—p. 131.

Birch v. Cropper, distinguished. Weymouth and Channel Islands Steam Packet Co., In re (1890) 59 L. J. Ch. 714; 63 L. T. 445; 39 W. R. 5; 2 Meg. 283.—NORTH, J.; affirmed. (1890) 60 L. J. Ch. 33; [1891] 1 Ch. 66; 63 L. T. 686; 2 Meg. 866; 39 W. R. 49.—C.A. LINDLEY, BOWEN and FRY, L.J.J.; considered. Bridgewater Navigation Co., In re (1891) 60 L. J. Ch. 415; [1891] 2 Ch. 317; 64 L. T. 576.—C.A. (*supra*, col. 527).

Weymouth, &c. Steam Packet Co., In re, referred to. Wakefield Rolling Stock Co., In re (1892) 61 L. J. Ch. 670; [1892] 3 Ch. 165; 67 L. T. 83; 40 W. R. 700.—V. WILLIAMS, J.; disapproved, Welton v. Saffery (1897) 66 L. J. Ch. 562; [1897] A. C. 299; 76 L. T. 505; 45 W. R. 508; 4 Manson 269.—H.L. (E.) (*supra*, col. 515).

Welton v. Saffery, applied.

Welsh Whisky Distillery Co., In re (1900) 16 Times L. R. 246.—COZENS-HARDY, J.

Birch v. Cropper, rule applied.

Sheppard's Corn Malting Co., In re, Lowenfeld's Case (1893) 7 R. 397; 70 L. T. 3; 1 Manson 325.—C.A. LINDLEY, A. L. SMITH and DAVEY, L.J.J.

Lowenfeld's Case, applied.

Welsh Whisky Distillery Co., In re (1900) 16 Times L. R. 246.—COZENS-HARDY, J.

Birch v. Cropper (*supra*), considered.

Anglo-Continental Corporation of Western Australia, In re (1898) 67 L. J. Ch. 179; [1898]

1 Ch. 327; 78 L. T. 157; 46 W. R. 419; 5 Manson 184.

WRIGHT, J. — In *Moude, Ex parte* (*supra*, col. 570), there was in the company's articles of association no express provision for regulating the distribution of surplus assets. The shares had been unequally called up. After payment of the debts and expenses there remained a balance, as in the present case, insufficient for the return of all the paid-up capital. It was held that the real question was not how profits should be distributed, but how a loss should be borne, and that the uncalled capital was as much liable to be called up for the purpose of meeting this loss as it would have been for the payment of debts; and the result was that after the capital account had been equalised by calling up, or treating as called up, unpaid capital, the whole resulting balance was returned in proportion to the amount paid up on each share—that is to say, to its nominal amount, and every shareholder lost the same percentage of what he had subscribed and paid. In *Birch v. Cropper* there was again no provision for regulating the distribution of the surplus assets. The shares had been unequally called up. There was a large real surplus—that is, more than enough for the return of all the paid-up capital. North, J. and the C. A. held that the paid-up capital must be returned, and the balance distributed in proportion to the amounts which had been paid up on the several classes of shares, but the H. L. held that after the capital paid had been returned the balance must, in the absence of any different provision in the memorandum or articles of association, be distributed in proportion to the nominal amount of the shares. Thus all equities were satisfied by the return of all capital paid, and there remained no reason for treating the surplus assets as held for the shareholders in proportions differing from the amounts of their shares. In the present case there is an express provision regulating the distribution of assets after payment of debts and expenses . . . There is no real surplus. . . . Under these circumstances . . . there is no room for the application of *Birch v. Cropper*.—p. 181.

And see post, col. 574.

Scinde, Delhi and Punjab Corporation, In re (1867) L. R. 6 Ch. 53, n.; Oakbank Oil Co., In re (*supra*, col. 572), and *Birch v. Cropper*, discussed.

Somes v. Currie (*supra*, col. 571), and Sheppard v. Scinde, &c. Ry. (*supra*, col. 571), distinguished.

Driffeld Gas Light Co., In re (1898) 67 L. J. Ch. 247; [1898] 1 Ch. 451; 78 L. T. 162; 46 W. R. 411; 5 Manson 253.

WRIGHT, J. — The ground of the decision [*Somes v. Currie*] seems to have been that on the particular facts of the case, and especially the fact that dividends had during three years been distributed according to the amounts paid up, the V.-C. held that there had in effect been a contract between the shareholders that "the profits and advantages" should be so distributed. It is pointed out by the C. A. in *Sheppard v. Scinde, &c. Ry.* that *Somes v. Currie* cannot be considered as suggesting any general rule, and a disapproval of it, if so considered, is plainly implied . . . There [*Sheppard v. Scinde, &c. Ry.*] it was held, both in the C. A. and in the H. L., that the surplus was divisible according to the

amounts paid up on the different classes of shares; but that decision, again, was expressly based on its own peculiar circumstances.—p. 250.

Somes v. Currie, followed.

Beeston Pneumatic Tyre Co., In re (1898) 14 Times L. R. 338; 33 L. J. N. C. 188; W. N. (1898) 34.—WRIGHT, J.

Somes v. Currie and Beeston Pneumatic Tyre Co., In re, distinguished.

North West Argentine Ry., In re (1900) 70 L. J. Ch. 9; [1900] 2 Ch. 882; 49 W. R. 134.

WRIGHT, J.—In *Somes v. Currie* and *Beeston Pneumatic Tyre Co., In re*, there were facts from which an inference was drawn that all the parties concerned had agreed upon a principle of distribution. In the present case there is no room for such an inference.—p. 11.

Birch v. Cropper (*supra*), distinguished.

Mutoscope and Biograph Syndicate, In re (1899) 68 L. J. Ch. 417; [1899] 1 Ch. 896; 81 L. T. 22; 47 W. R. 520; 6 Manson 298.

WRIGHT, J.—The fully-paid shareholders say that they are entitled to the full proportion which their paid-up capital represents, and that the others are only entitled to the proportion represented by 10s. per share. On the other hand, the partly-paid shareholders say that, according to cases like *Birch v. Cropper*, the division should be in accordance with the number of shares, irrespective of the amount paid up. If there were no provision in the articles as to the method of distribution to be adopted, it would be tolerably clear that after the capital amount had been properly dealt with the balance would be distributable share and share alike. But there are two articles which must now be considered . . . The distribution must be in accordance with the agreement shown by the articles—that is to say, the balance after repaying the paid-up capital must be divided in proportion to the paid-up capital.—p. 418.

Anglo-Continental Corporation of Western Australia, In re (*supra*, col. 572), and Mutoscope and Biograph Syndicate, In re, applied.

Welsh Whisky Distillery Co., In re (1900) 16 Times L. R. 246.—COZENS-HARDY, J.

Griffith v. Paget (1877) 46 L. J. Ch. 498; 6 Ch. D. 511; 37 L. T. 141; 25 W. R. 821.—JESSEL, M.R., applied.

Bishop v. Smyrna and Cassaba Ry. (No. 1) (1895) 64 L. J. 617; [1895] 2 Ch. 265; 13 R. 561; 72 L. T. 773; 43 W. R. 647; 2 Manson 429.—KECKEWICH, J.

Bishop v. Smyrna and Cassaba Ry., commented on.

Odezza Waterworks Co., In re (1901) 32 L. J. N. C. 608; [1901] 2 Ch. 190, n.—BYRNE, J.

Bishop v. Smyrna and Cassaba Ry. (*supra*), not followed.

Odezza Waterworks Co., In re (*supra*), preferred.

Crichton's Oil Co., In re (1902) 71 L. J. Ch. 531; [1902] 2 Ch. 86; 86 L. T. 787; 9 Manson 402.—O.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.J.; affirming 49 W. R. 556; 8 Manson 319.—WRIGHT, J. See judgments.

Transfer of Proceedings.

Landore Siemens Steel Co., In re (1879) 10

Ch. D. 489; 40 L. T. 35; 27 W. R. 304.

—MALINS, V.-C., *not followed*.

Madras Irrigation and Canal Co., In re (1881) 16 Ch. D. 702; 29 W. R. 520.

JESSEL, M.R.—The case cited is an instance of a mistake on the part of counsel, transmitted to the judge, and adopted by the reports. Of course, the order for transfer, under the rule referred to [Ord. L. r. 2A], can only be made when the action is pending "in any other division"—not in another Court of the same division.—p. 702.

London and Suburban Bank, In re (1892)

61 L. J. Ch. 316; [1892] 1 Ch. 604; 66 L. T. 716; 40 W. R. 326.—NORTH, J., *approved*.

Real Estates Co., In re (1892) [1893] 1 Ch. 398; 62 L. J. Ch. 213; 3 R. 192; 68 L. T. 24; 41 W. R. 157.

V. WILLIAMS, J.—Although the question is not raised on this summons, it has been suggested that the inconvenience of having the two liquidations pending in different Courts might be got over by transferring the proceedings which are pending in the City of London Court, for the winding-up of the building society, to this Court. But, in my opinion, there is no power to make such a transfer. That seems to be the effect of the decision of North, J. in *London and Suburban Bank, In re*. . . . The County Court is also the Court having jurisdiction to wind up building societies registered under the Building Societies Act, 1874.—p. 402.

[See now Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 8.]

Stay of Proceedings.

Williams v. Bristol Marine Insurance Co. (1870) 39 L. J. Ch. 504.—MALINS, V.-C., *not followed*.

Western and Brazilian Telegraph Co. v. Bibby (1880) 42 L. T. 821.

JESSEL, M.R.—It is quite clear that Malins, V.-C. did make such an order, but it is against the usual practice. Such leave [*i.e.*, to file a bill against a company in liquidation] is never given on an *ex parte* application.—p. 822.

United Kingdom Electric Telegraph Co., In re, Allan's Executors' Claim, 24 W. R. 546.—BACON, V.-C.; *varied*. (1876) 45 L. J. Ch. 366; 34 L. T. 707; 24 W. R. 593.—C.A. JAMES and MELLISH, L.JJ., BAGGALLAY, J.A.

Executions.

Harrison v. Timmins (1888) 8 L. J. Ex. 94; 4 M. & W. 510; 7 D. P. C. 28.—EX., *explained*.

Vigers v. Pike (1842) 8 Cl. & F. 562.—H.L. (IR.). LORDS OOTENHAM, BROUGHAM and DEVON; *affirming* S. C. *nom.* Pike v. Vigers, 2 Dr. & Wal. 1.

Vigers v. Pike, discussed.

Erlanger v. New Sombrero Phosphate Co. (1878) 48 L. J. Ch. 73; 3 App. Cas. 1218.—H.L. (E.) (*supra*, col. 394).

Taylor v. Hughes (1844) 2 Jo. & Lat. 24; 6 Ir. Eq. R. 480; 7 Ir. Eq. R. 529.—SUGDEN, L.C., *followed*.

Horn r. Kilkenny and Great Southern and

Western Ry. (1855) 24 L. J. Ch. 241; 1 K. & J. 399; 3 W. R. 226.

WOOD, V.-C.—The case now before me is, that the solicitors have entered up judgment by default against their own clients, and that they are now taking proceedings against the plaintiffs by *seire facias* to make them liable to the whole amount of the unpaid calls. If they were allowed to proceed they would interfere with one of the main objects of the suit; and if these proceedings have been taken by collusion, as stated in the bill, that will bring this case within *Taylor v. Hughes*, in which it was laid down that this Court will not allow a creditor by any hostile or extraneous proceedings to determine those equities which are already the subject of litigation.—p. 243.

Taylor v. Hughes, applied.

Bargate v. Shortridge (1855) 24 L. J. Ch. 457; 5 H. L. Cas. 297; 3 Eq. R. 605; 3 W. R. 423.—H.L. (E.). CRANWORTH, L.C. and LORD ST. LEONARDS.

Bargate v. Shortridge, applied.

Fountaine v. Carmarthen and Cardigan Ry. (1868) 37 L. J. Ch. 429; L. R. 3 Eq. 316; 16 W. K. 476.—WOOD, V.-C. *And see supra*, col. 454.

Taylor v. Hughes and Horn v. Kilkenny, &c. Ry. (*supra*), *approved and applied*.

Escott v. Gray (1878) 47 L. J. C. P. 606; 39 L. T. 121.—GROVE and LINDLEY, JJ.

Thompson v. Universal Salvage Co. (1849) 18 L. J. Ex. 157; 3 Ex. 810; 13 Jur. 104; 6 D. & L. 465; 6 Railw. Cas. 10.—EX., *questioned*, **King v. Parental Endowment Assurance Co.** (1855) 25 L. J. Ex. 18.—PARKE, B. (for the Court); **Hill v. London and County Insurance Co.** (1856) 26 L. J. Ex. 89; 1 H. & N. 398; 2 Jur. (N.S.) 1074; 5 W. R. 7.—EX.

Hill v. London and County Insurance Co., approved.

Thompson v. Universal Salvage Co., overruled in part.

Morisse v. Royal British Bank (1856) 26 L. J. C. P. 62; 1 C. B. (N.S.) 67; 3 Jur. (N.S.) 137; 5 W. R. 188.—C.P.

COCKBURN, C.J.—That Court [Court of Ex. in *Hill v. London and County Insurance Co.*] has held that there is no discretion [under the Winding-up Act, 7 & 8 Vict. c. 113], and that a creditor who has performed the required conditions is entitled as of right to execution against a shareholder, and Martin, B. states there that such is the opinion of the Courts of equity.—p. 64.

Oriental Inland Steam Co., In re, Scinde

Ry., Ex parte (1874) 43 L. J. Ch. 699; L. R. 9 Ch. 557; 31 L. T. 5; 22 W. R. 810.—JAMES and MELLISH, L.JJ., *dicta considered*. *And see* "INTERNATIONAL LAW."

Knowles v. Scott (1891) 60 L. J. Ch. 284; [1891] 1 Ch. 717; 64 L. T. 135; 39 W. R. 528.—ROMER, J. (*post*, col. 612).

Oriental Inland Steam Co., In re, principle applied.

Central Sugar Factories of Brazil, In re, Flack's Case (1893) 63 L. J. Ch. 410; [1894] 1 Ch. 369;

8 R. 205; 70 L. T. 645; 42 W. R. 345; 1 Manson 145.

NORTH, J.—I think that I ought to grant an injunction, and I do so upon the authority of *Oriental Island Steam Co., In re*, where the matter was put in this way. It was said that the assets of the company were held upon a trust, as it were, for the persons entitled to them. The Court treated the position of the claimant in that case upon the footing that one *cestui que trust* had got possession of trust property after the property had been subjected to the trust. That being so, the *cestui que trust* was obliged to bring it in for distribution with the other property of the trust. That is the principle applied there; and it seems to me to apply here in the same way.—p. 411.

Keynsham Co., In re (1863) 33 Beav. 123; 9 Jur. (N.S.) 855; 8 L. T. 687; 11 W. R. 360.—ROMILLY, M.R.: *Life Association of England, In re* (1864) 34 L. J. Ch. 64; 10 Jur. (N.S.) 762; 10 L. T. 833; 12 W. R. 1069.—ROMILLY, M.R.; and **Peninsular, & Banking Co., In re** (1866) 35 Beav. 280.—ROMILLY, M.R., *followed*.

Levick, Ex parte (*post*, col. 578), *discussed*.
Poole Firebrick and Blue Clay Co., *In re* (1878) L. R. 17 Eq. 268; 43 L. J. Ch. 447; 22 W. R. 247.

JESSEL, M.R.—There are, however, three decisions of Lord Romilly, all of which are in point as regards principle, and in the last of these the facts are very nearly those of the present case. It is true there is a decision of Stuart, V.-C. which seems to be at variance with the cases to which I have referred, but in it the circumstances were quite different, and I do not think it is really in opposition to the principle which has been laid down. . . . There [*Keynsham Co., In re*] the creditor had begun his action before the commencement of the winding-up; the liquidators applied to the Court to stay the action, and the M.R. granted an injunction, and said that he thought the practice was analogous to the staying of actions after a decree for administration, and that the creditor ought to have his costs down to the time when he had notice of the winding-up, such costs to be added to his debt. . . . There [*Life Association of England, In re*], also, the creditor commenced his action before the commencement of the winding-up, and, upon an application for an injunction, the M.R. says this: "There is clearly an analogy between this and a suit for administration. If the executor does not admit assets, the costs of the creditor can only be added to his debt; but if assets are admitted, and the debt not disputed, the creditor's costs would at once be paid. In this case I can only grant the application on condition, first, that Mr. Whitty (the creditor) be allowed to see the proceedings on the winding-up, and, secondly, to prove for his debt, which must include the costs of the action at law, as well as the costs of this motion. If the action had been commenced after notice of the resolution to wind up, I should certainly not have allowed the costs." In that case, the attention of his lordship does not appear to have been called to the difference between a liquidation by the Court and a purely voluntary liquidation, under which a creditor has no means of coming in and establishing his claim; so that perhaps it may be considered that the last part of the judgment

O.C.

cannot be fairly used as an authority. . . . There [*Peninsular, &c. Banking Co., In re*], in January, 1866, after the winding up commenced, an action was brought by a creditor on bills of exchange, and on February 15th the creditor would have been entitled to sign judgment. On February 15th a motion was made to stay proceedings. The M.R. said: "I will stay execution only, and the creditor can come in under the winding-up. He can add his costs to his debt; I cannot make him pay costs." The creditor was represented by eminent counsel, and the attention of the M.R. must have been called to the distinction between a compulsory and a voluntary winding-up, and it could hardly have been disputed that the creditor had notice of the winding-up; at all events, the decision was that the costs were to be added to the debt. Then the decision in *Levick, Ex parte*, is said to be contrary to these. There the action was brought by the liquidators after the commencement of the winding-up, and, I presume, in the name of the company. The action was unsuccessful, and the defendants became entitled to recover their costs from the plaintiffs; but they were not creditors except in that sense. Stuart, V.-C. held that the act did not apply, inasmuch as they were not creditors at the commencement of the winding-up; if they had been creditors at that time, I presume he would have followed the decisions of the M.R. I think in the present case I must follow those decisions which appear to me to have established the practice.—p. 270.

Dimson's Estate Fire-clay Co., In re (*post*), *applied*.

Poole Firebrick, &c. Co., In re, *distinguished*.
National Building and Land Co., *In re*, Clitheroe, *Ex parte* (1885) 15 L. R. Ir. 47.—CHATTERTON, V.-C. *And see post*, col. 617.

Waterloo Life, Education, Casualty and Self-Relief Assurance Co., In re (1862) 32 L. J. Ch. 371; 31 Beav. 589; 9 Jur. (N.S.) 291; 7 L. T. 459; 11 W. R. 159.—ROMILLY, M.R., *approved*.

London Cotton Manufacturing Co., *In re* (1866) 35 L. J. Ch. 425; 12 Jur. (N.S.) 313; 14 L. T. 135; 14 W. R. 575.—WOOD, V.-C. *And see post*, col. 579.

Great Ship Co., In re, Parry, Ex parte (1863) 33 L. J. Ch. 245; 4 De G. & S. 63; 3 N. R. 181; 10 Jur. (N.S.) 3; 9 L. T. 432; 12 W. R. 139.—KNIGHT BRUCE and TURNER, L.Js. (*and see post*, col. 580); and **London Cotton Manufacturing Co., In re**, *discussed*.

Bastow & Co., In re (1867) 36 L. J. Ch. 899; L. R. 4 Eq. 681.—MALINS, V.-C. *And see post*.

Great Ship Co., In re, distinguished.
Bank of Hindustan, China and Japan, *In re*, Levick, *Ex parte* (1867) L. R. 5 Eq. 69; 17 L. T. 237; 16 W. R. 102.—STUART, V.-C.

Bastow & Co., In re (*supra*), *not applied*.
London and Devon Biscuit Co., In re (1871) 40 L. J. Ch. 574; L. R. 12 Eq. 190; 24 L. T. 650; 19 W. R. 943.—MALINS, V.-C., *explained and applied*.

Dimson's Estate Fire-clay Co., In re (1874) L. R. 19 Eq. 204; 23 W. R. 435.—MALINS, V.-C. *And see supra*.

Great Ship Co., In re (*supra*), *followed*.

Plas-yn-Mhowys Coal Co., In re (1867) L. R. 4 Eq. 689.—**MALINS, V.-C.** (*and see post*); and, **London Hill Pottery Co., In re** (1866) L. R. 1 Eq. 649; 15 W. R. 97.—**BOMILLY, M.R.**, *not followed*.

Milwood Colliery Co., In re (1876) 24 W. R. 898.—**JESSEL, M.R.**; *affirmed*, C.A. **JAMES** and **MELLISH, L.J.** and **BAGGALLAY, J.A.**

Great Ship Co., In re, *distinguished*.

Perkins Beach Lead Mining Co., In re (1877) 7 Ch. D. 371; 37 L. T. 604; 26 W. R. 164.

BACON, V.-C.—The affidavit filed in support of the motion alleges circumstances, which, if true, and they are unanswered, show that this execution was fraudulently obtained. *Great Ship Co., In re*, was the case of a bona fide creditor. The distinction, therefore, between the two cases is obvious.—p. 372.

Perkins, & Co., disapproved.

Artistic Colour Printing Co., In re (1880) 49 L. J. Ch. 526; 14 Ch. D. 502; 42 L. T. 803; 28 W. R. 943.

JESSEL, M.R.—*Perkins Beach Lead Mining Co., In re*, is no authority on this point [whether a sale by a sheriff is a "proceeding" within sect. 85 of the Companies Act, 1862, and liable to be restrained by the Court], because it appears from the report that the Judicature Act, which has an important bearing upon the question, was not referred to in any way either by the judge or the counsel.—p. 527.

Artistic Colour Printing Co., In re, *questioned*.

Liverpool Household Stores Association, In re (1888) 1 Meg. 83.—C.A. **COTTON, FRY** and **LOPES, L.J.**

London Cotton Co., In re (*supra*, col. 578), and **Plas-yn-Mhowys Coal Co., In re** (*supra*), *followed*.

Ry. Steel and Plant Co., Ex parte, Taylor, In re, Williams, In re (1878) 47 L. J. Ch. 321; 8 Ch. D. 183; 38 L. T. 475; 26 W. R. 418.—**HALL, V.-C.**

Williams, In re, *followed*.

Richards & Co., In re, Crawshaw, Ex parte (1879) 48 L. J. Ch. 555; 11 Ch. D. 676; 40 L. T. 315; 27 W. R. 530.—**FRY, J.** (*see post*, col. 602).

Williams, In re, *distinguished*.

Rudow v. Great Britain Mutual Life Assurance Society (1881) 17 Ch. D. 600; 50 L. J. Ch. 504; 44 L. T. 688; 29 W. R. 585.—C.A. **JESSEL, M.R.**, **COTTON** and **LUSH, L.J.**; *affirming on other grounds* **BACON, V.-C.**

[In argument it was said: In *Williams, In re*, judgment was signed after the winding-up petition, yet the creditor was restrained.]

JESSEL, M.R.—The cases are before the Judicature Act, when a winding-up petition was no defence in the action. It now is a defence, and if a company does not take it, but allows the plaintiff to go on and alter his position, the company cannot afterwards raise it.

[*Williams, In re* was since the Judicature Act.]

JESSEL, M.R.—In that case there was no adverse litigation after the presentation of the petition. Nothing took place in the action after the presentation of the petition except the mere formal signing of judgment.—p. 608.

London Cotton Co., In re (col. 578), *distinguished*.

Williams, In re, *doubted*.

Vron Colliery Co., In re (1882) 20 Ch. D. 442; 51 L. J. Ch. 389; 30 W. R. 388.—C.A. (*post*, col. 604).

JESSEL, M.R.—In that case [*London Cotton Co., In re*] there was an execution before the presentation of the petition and an unlawful resistance to the sheriff's taking possession.—p. 445.

Great Ship Co., In re (*supra*, col. 578), *followed*, **Roundwood Colliery Co., In re, Los c. Roundwood Colliery Co.** (1897) 66 L. J. Ch. 186; [1897] 1 Ch. 373; 75 L. T. 508; 45 W. R. 217.—C.A. **LINDLEY, A. L. SMITH** and **RIGBY, L.J.** (*supra*, col. 446); *principle applied*, **Crosbar v. Lyndhurst Ship Co.** (1897) 66 L. J. Ch. 576; [1897] 2 Ch. 151; 76 L. T. 553; 45 W. R. 570.—**STIRLING, J.**

Distress.

Russell v. East Anglian Rys. (1850) 20 L. J. Ch. 287; 8 Mac. & G. 104; 15 Jur. 935; 6 Railw. Cas. 501.—**TRURO, L.C.** *approved*.

Dry Docks Corporation of London, In re (1888) 58 L. J. Ch. 33; 39 Ch. D. 306; 59 L. T. 763; 37 W. R. 18; 1 Meg. 86.—C.A. **COTTON, FRY** and **LOPES, L.J.**; *reversing* **KAY, J.**, who had applied *Weston's Case* (1808) 38 L. J. Ch. 49; L. R. 4 Ch. 20.—**L.J.** (*supra*, col. 549).

Exhall Coal Mining Co., In re, Field's Case (1864) 38 L. J. Ch. 595; 4 De G. J. & S. 377; 11 L. T. 526; 13 W. R. 219.—**L.J.** (*and see post*, col. 583); and **Lundy Granite Co., In re, Heaven, Ex parte** (1871) 40 L. J. Ch. 588; L. R. 6 Ch. 462; 24 L. T. 922; 19 W. R. 609.—**L.J.**, *commented on* **Traders' North Staffordshire Carrying Co., In re, North Staffordshire Ry., Ex parte** (1874) 44 L. J. Ch. 172; L. R. 19 Eq. 60; 31 L. T. 716; 23 W. R. 205.

JESSEL, M.R.—In the *Exhall Coal Mining Co.'s Case*, the actual tenant was a trustee for the company, and the company was a stranger. The landlord there put in a distress after the winding-up petition was filed. The question was whether sect. 163 avoided the distress, and the distress was held to be valid. . . . **Knight Bruce, L.J.** said there was nothing in the Act rendering it incumbent upon the Court to say when a distress has been put in force before the making of the winding-up order that the company was then being wound up within the meaning of sect. 163. This was a mistake. The words are not "after the winding-up order," but "after the commencement of the winding-up." **Turner, L.J.** did not take this view, but concurred, for the reason that sect. 163 of the Act must be construed as only avoiding attachments, sequestrations, distresses, or executions, when leave to put them in force has not been given under sect. 87. As they differed in their reasons, I may take my own view. . . . There [*Lundy Granite Co., In re*] the company was not the tenant; they were equitable owners of the lease. The landlord distrained after the order to wind up. The M.R. held the distress was not valid, but was reversed on appeal. The L.J.J. drew this distinction—that sect. 163 had no reference to a case where the right of the landlord was not that of a

creditor of the company, but a right to take goods to whomsoever they belong. I do not find the exact words there, but that is the meaning. In the case before them the landlord was not a creditor, and to have taken away his right and given nothing in return, would have produced not equality, but inequality. It amounts to this—that where a landlord is a stranger and not a creditor at all, and where he seizes strangers' goods on his land, sect. 163 does not apply. This can be gathered from their words. James L.J. says, "We must consider what is the position of a stranger under the Act." I think this must mean as far as regards the goods of the company. Mellish, L.J. says, "The landlord is by the law of the country entitled to take as a security for his rent the goods upon his land, whomsoever they belong to. Then was it intended to deprive the landlord of that right if the goods happened to belong to a company under liquidation? It would be very extraordinary if the legislature had deprived the landlord of that right without clear and express words, and without giving him any compensation." This proposition commands my most cordial assent. Both the L.J.J. took a very sensible view of the Act. It would have been monstrous to say the landlord could lose his right without being able to sue the company. But here there is an attempted preference by one creditor, attempted after the winding-up.—p. 173.

Traders North Staffordshire Carrying Co.,
In re, *discussed*.

Lundy, Bayley and Dixon, In re (*post*, col. 582).

Brown Granite Co., In re (*supra*), *discussed*, North Yorkshire Iron Co., In re (1878) 47 L. J. Ch. 333; 7 Ch. D. 661; 38 L. T. 143; 26 W. R. 367. HALL, V.-C.; *followed*, Regent United Service Stores, In re (1878) 47 L. J. Ch. 677; 8 Ch. D. 616; 38 L. T. 493; 26 W. R. 579.—C.A. JESSEL, M.R., JAMES and THESIGER, L.J.J.; *principle applied*, Silkstone and Dodworth Coal and Iron Co., In re (1881) 50 L. J. Ch. 444; 17 Ch. D. 188; 44 L. T. 405; 29 W. R. 484.—FRY, J.; *discussed*, Oak Pits Colliery Co., In re (*post*, col. 582); *referred to*, Lancashire Cotton Spinning Co., In re (1887) 56 L. J. Ch. 761; 35 Ch. D. 656.—C.A. (*post*, col. 583).

North Yorkshire Iron Co., In re (*supra*), *approved and followed*.

South Kensington Co-operative Stores, In re, Seymour, Ex parte (1881) 50 L. J. Ch. 446; 17 Ch. D. 161; 44 L. T. 471; 29 W. R. 662.

FRY, J.—I will say at once that I intend [in determining from what date the rent is to be calculated, and whether the rent to be proved for and that to be distrained for are to be divided by the quarter-days when it became due or by reference to the commencement of the winding-up] to proceed substantially on the same rule as that followed by Hall, V.-C., in *North Yorkshire Iron Co., In re*, because it appears to me that the rule there adopted is a reasonable and sound one.—p. 147.

South Kensington Co-operative Stores, In re,
discussed and approved.

Elwidge v. Meldon (1888) 24 L. R. Ir. 98.—Q.B.D.; Leeks, In re [1902] 2 Ir. R. 344.—C.A. FITZGIBBON, WALKER and HOLMES, L.J.J.

United Club and Hotel Co., In re (1889) 60 L. T. 665; 1 Meg. 186.—KAY, J.; and

Silkstone and Dodworth, & Co., In re (*supra*), *dicta discussed and not applied*.

Leeks, In re, applied.

(Glass v. Patterson [1902] 2 Ir. R. 960.—K.B.D. KENNY, J. *dissenting*).

David Lloyd & Co., In re, Lloyd v. David Lloyd & Co. (1877) 6 Ch. D. 389; 37 L. T. 83; 25 W. R. 872.—C.A. JESSEL, M.R., JAMES and COTTON, L.J.J.; *applied*, Longendale Cotton Spinning Co., In re (1878) 48 L. J. Ch. 54; 8 Ch. D. 150; 38 L. T. 776; 26 W. R. 491.—JESSEL, M.R.; *discussed*, Brown, Bayley and Dixon, In re, Roberts and Wright, Ex parte (1881) 50 L. J. Ch. 738; 18 Ch. D. 649; 45 L. T. 347; 30 W. R. 5.—FRY, J.; Andrew (or Jones) v. Swansea Cambrian Building Society (1880) 50 L. J. Q. B. 428; 44 L. T. 106; 29 W. R. 382; 45 J. P. 507.—BENMAN and LINDLEY, J.J.; *distinguished*, Cambrian Mining Co., In re vs. Fell, Ex parte (1881) 50 L. J. Ch. 886; 45 L. T. 208; 25 W. R. 881.—BACON, V.-C.

Brown, Bayley and Dixon, In re (*supra*), *discussed*, Oaks Pits Colliery Co., In re, Eynon's Claim (1882) 51 L. J. Ch. 768; 31 Ch. D. 322; 47 L. T. 7; 30 W. R. 759.—C.A. BAGGALLAY, LINDLEY and HOLKER, L.J.J. See judgment of Court delivered by LINDLEY, L.J. laying down general principles (*and see post*, col. 583) *referred to*, Higinshaw Mills, & Co., In re (1896) 65 L. J. Ch. 771; [1896] 2 Ch. 544.—C.A. (*post*, col. 584).

West Hartlepool Iron Co., In re, Improvement Commissioners, Ex parte (1876) 34 L. T. 568.—BACON, V.-C.; and **Oak Pits Colliery Co.,** In re (*supra*), *discussed*.

Watson, Kipling & Co., In re (1883) 52 L. J. Ch. 473; 28 Ch. D. 500; 49 L. T. 115; 31 W. R. 674.—KAY, J.

West Hartlepool Iron Co., In re, and **Watson, Kipling & Co.,** In re, *distinguished*.

Oak Pits Colliery Co., In re, *explained*.

International Marine Hydropathic Co., In re (1884) 28 Ch. D. 470; 33 W. R. 587.—C.A.

BAGGALLAY, L.J.—The distinction in *West Hartlepool Iron Co., In re*, is this, that there the rate was made before the commencement of the winding-up, and that at the time of the company going into liquidation there was no carrying on of the works. . . . It appears to me that the case was decided upon the ground of beneficial occupation. . . . In *Watson, Kipling & Co., In re* . . . the rates were not made for several months, and some of them for more than a twelvemonth after the commencement of the winding-up, and the conclusion at which the learned judge arrived, rightly or wrongly, was this, that there was no beneficial occupation at the time when the rate was made, and that was the ground of the decision. It appears to me that it was rightly decided.—p. 472. BOWEN, L.J. concurred.

FRY, L.J.—The rule has been laid down in the C.A., in *Oak Pits Colliery Co., In re*, and that rule I take to be this: If the debt or liability is incurred by the liquidator or by the company after the winding-up, in the course of carrying on the business of the company, it must be paid in full.—p. 473.

West Hartlepool Iron Co., In re, *test doubted*.

National Arms and Ammunition Co., In re (1885) 54 L. J. Ch. 678; 28 Ch. D. 474; 52 L. T. 287; 33 W. R. 585.—C.A. BAGGALLAY, BOWEN and FRY, L.J.J. *And see post*, col. 583.

Exhall Coal Mining Co., In re (*supra*, col. 580), *disapproved, but followed*.
Lancashire Cotton Spinning Co., In re, Carnell, Ex parte (1887) 56 L. J. Ch. 761. 35 Ch. D. 636; 57 L. T. 511; 36 W. R. 305.—C.A.
COTTON, LINDLEY AND BOWEN, L.JJ.

COTTON, L.J.—Undoubtedly Turner, L.J. in *Exhall Coal Mining Co., In re*, said that those two sections [sects. 87 and 163 of the Act of 1862] must be read together, notwithstanding the precise words of sect. 163, and that the Court has power to authorise a distress, which must come within the word "proceeding" in sect. 87. . . To my mind it is doubtful whether, having regard to the express words of sect. 163, which says, "that any distress shall be void," it is right to say that sect. 87 included distress in the proceedings which the Court might allow. There are other proceedings in the nature of actions and modes of enforcing claims against the company which undoubtedly would satisfy sect. 87, without including in the word "proceeding" a distress, which is in terms dealt with under sect. 163. But it would be very wrong for us to depart from the decisions which have followed the judgment of Turner, L.J. in *Exhall Coal Mining Co., In re*, which was decided as long ago as 1864. Following that, and taking that as the rule on which we must act, what is the rule which has been laid down not inconsistent with the cases? It is this: that it lies upon the landlord who applies to put in a distress to show that there are circumstances which justify the Court in depriving the company, and the creditors of the company, of the benefit of the express provision of sect. 163. . . It is unfortunate, perhaps, that a good many of the cases on these two sections, and on applications like this, have not dealt with the matter as directly as they might have done. In one authority which has been referred to—*Lundy Granite Co., In re* (*supra*, col. 580)—the question really did not arise; and it is only some general observations of James, L.J., which, with all respect, were not applicable to the case before him—which are relied on as laying down what the doctrine is.—p. 763.
And see post, col. 584.

National Arms, &c. Co., In re (*supra*, col. 582), *test applied*.

West Hartlepool Iron Co., In re, and Watson, Kipling & Co., In re (*supra*), *tests not adopted*.

Oak Pits Colliery Co., In re (*supra*, col. 582), *discussed*.

Blazer Fire Lighter, In re (1894) [1895] 1 Ch. 402; 64 L. J. Ch. 161; 13 R. 62; 71 L. T. 605; 48 W. R. 364.

V. WILLIAMS, J.—There have been differences of opinion in the cases decided, and no amount of legal ingenuity could maintain that all the judgments which have been delivered could stand together. I give up that task myself as being too difficult. I adopt the view taken by Bowen, L.J. in *National Arms, &c. Co.* No case later in date than that has been cited before me. I do not say that that case is a decision of the C. A. in favour of the view I am about to take; but Bacon, V.-C. had in *West Hartlepool Iron Co., In re*, suggested that the test whether the rates were payable in full was whether there had been a beneficial enjoyment by the liquidator; and Bowen, L.J. in *National Arms, &c. Co., In re*, said, "I wish to add that I am not satisfied that the test given

by Bacon, V.-C. in *West Hartlepool Iron Co., In re*, is the true one. I am disposed to think that the true test is whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating, and I wish to leave this question open in case it should ever call for decision." I intend to adopt that view. . . Under the circumstances the test applied by Bowen, L.J. is much the plainest and simplest. Here it is said that the liquidator occupied in a beneficial way, and it cannot be disputed that he did. Having said that, I wish to make one observation as to the effect of the decision of the Court, as distinguished from the observations of the judges, in *National Arms, &c. Co., In re*. After the decision in that case, it is impossible to say that *Watson, Kipling & Co., In re*, can stand as an authority, so far as it distinguishes the case of rent from that of rates. In *National Arms, &c. Co., In re*, all the L.J.J. decided the question before them on the basis that rents and rates were to be dealt with on the same principle. . . This case is really unangable unless reliance is placed on the test applied by Bacon, V.-C. in *West Hartlepool Iron Co., In re*, that mere possessory occupation is not sufficient to render the liquidator liable. Having regard to subsequent cases, that test no longer stands. In *Oak Pits Colliery Co., In re*, Lindley, L.J. says: "No authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessees." He does not, however, go the length of affirming the test of Bacon, V.-C. If the liquidator deliberately chooses to occupy premises, and thinks that loss will be avoided by waiting before selling them, the rates ought to be paid in full.—p. 405.

Lancashire Cotton Spinning Co., In re (*supra*, col. 583), *principles applied*.

Shackell & Co. v. Charlton & Sons (1895) 64 L. J. Ch. 353; [1895] 1 Ch. 378; 13 R. 301; 72 L. T. 188; 43 W. R. 394; 2 Manson 233.—KEKEWICH, J.

Lancashire Cotton Spinning Co., In re, *discussed and followed*.

Higginshaw Mills and Cotton Spinning Co., In re, Manchester and County Bank v. Higginshaw, &c. Co. (1896) 65 L. J. Ch. 771; [1896] 2 Ch. 544; 75 L. T. 5; 45 W. R. 56.—C.A.

LINDLEY, L.J.—There may be circumstances which, notwithstanding the absolute prohibition contained in sect. 163 of the Companies Act, 1862, will justify the Court in giving leave to distrain. The principles which should be applied in dealing with an application by a mortgagee are fully and accurately explained in *Lancashire Cotton Spinning Co., In re*, the Court having previously explained in *Oak Pits Colliery Co., In re* (*supra*, col. 582), the principles applicable in the case of a landlord. The distinction is against the mortgagee. It is easier for a landlord to make out a case for leave to distrain than for a mortgagee, and the reason is obvious. It would be very unjust that a landlord's property should be made use of by a company or its creditors for the carrying on of the business, and that he should be paid nothing for it. It is not the same in the case of a mortgagee. He has the benefit

of his security, and if the property of the company is so managed by the liquidator that it becomes of increased value, and sells for a better price than it would have otherwise, that is as much for the benefit of the mortgagee as of the other creditors. That appears to be the ratio decided in *Lancashire Cotton Spinning Co., In re*, in which case it was held that the mortgagees ought not to be allowed to distrain. For the Court to give leave for that it was said, there must be some conduct on the part of the company, or its liquidator, which would make it unjust not to give it. That is quite consistent with what was said by Fry, J. in *Brown, Bayley and Dixon, In re* (*supra*, cap. 582). I think that this case is in principle entirely governed by *Lancashire Cotton Spinning Co., In re*.—p. 772.

LOPES, L.J. to the same effect

Carriage Co-operative Supply Association.

In re, Clemence, Ex parte (1888) 52 L. J. Ch. 472; 23 Ch. D. 154; 48 L. T. 308; 31 W. R. 397.—FRY, J., *discussed*.

New City Constitutional Club, *In re*, Purssell, *Ex parte* (1887) 84 Ch. D. 646; 56 L. J. Ch. 332; 56 L. T. 792; 35 W. R. 421.—C.A.

COTTON, L.J.—Kay, J. [in the Court below] was right in holding that as against the debenture-holders the landlord had a right to distrain on the furniture and chattels, and therefore that he had a right to the proceeds of the sale of the property. But the learned judge went further: he held that as between the company and the landlord the landlord had a right to distrain; but said that he would have come to a different conclusion if it had not been for . . . *Clemence, Ex parte*. We need not enter into the question whether Fry, L.J. was right in that decision. It must not be taken that we approve of that decision, but we leave it to be dealt with when the occasion shall arise.—p. 661.

LINDLEY and LOPES, L.J.J. concurred, but expressed no opinion as to *Clemence, Ex parte*.

Clemence, *Ex parte*, not followed.

Purssell, *Ex parte*, followed.

Harpur's Cycle Fittings Co., *In re* (1900) 69 L. J. Ch. 841; [1900] 2 Ch. 731; 83 L. T. 407.—WRIGHT, J.

Future Rent.

Haytor Granite Co., *In re*, Bell, *Ex parte*

(1865) 35 L. J. Ch. 29, 154; L. R. 1 Ch. 77; 12 Jur. (N.S.) 1; 13 L. T. 266, 515; 14 W. R. 72, 186.—KNIGHT BRUCE and TURNER, L.J.J.; *reversing* L. R. 1 Eq. 11; 11 Jur. (N.S.) 899.—ROMILEY, M.R. London and Colonial Co., *In re*, Horsey's Claim (1868) 37 L. J. Ch. 893; L. R. 5 Eq. 561; 18 L. T. 103; 16 W. R. 577.—WOOD, V.-C., GIFFARD, V.-C.; and Telegraph Construction and Maintenance Co., *In re*, Enderby's Trustees, *Ex parte* (1870) 39 L. J. Ch. 723; L. R. 10 Eq. 384; 22 L. T. 649; 18 W. R. 729.—JAMES, V.-C., *discussed*.

Gartness Iron Co., *In re*, Elphinstone (Lord), *Ex parte* (1870) 39 L. J. Ch. 884; L. R. 10 Eq. 412; 23 L. T. 359; 18 W. R. 1103.—BACON, V.-C.

Haytor Granite Co., *In re*, and Telegraph Construction, &c. Co., *In re*, explained.

Oppenheimer v. British and Foreign Exchange and Investment Bank (1877) 46 L. J. Ch. 882; 6 Ch. D. 744; 37 L. T. 629; 26 W. R. 391.—HALL V.-C.

Haytor Granite Co., *In re*; Horsey's Claim, and Gartness Iron Co., *In re*, considered.

Gooch v. London Banking Association (1886) 32 Ch. D. 41.—PEARSON, J., *comprised* in C.A.

Horsey's Claim; Hardy v. Fothergill (1888)

58 L. J. Q. B. 44; 13 App. Cas. 351; 58 L. T. 273; 37 W. R. 177; 53 J. P. 36.—H.L.(C.). HALSBURY, L.C., LORDS SELBORNE, FITZGERALD, HERSCHELL and MACNAGHTEN (*and see* "BANKRUPTCY"); and Elphinstone (Lord) v. Monkland Iron and Coal Co. (1886) 11 App. Cas. 332.—H.L.(SC). HERSCHELL, L.C., LORDS WATSON, BLACKBURN, FITZGERALD and HALSBURY, *discussed*.

Midland Coal, Coke and Iron Co., *In re*, Craig's Claim (1894) 64 L. J. Ch. 279; [1895] 1 Ch. 267; 12 R. 62; 71 L. T. 705; 43 W. R. 244; 2 Manson 75.—C.A.

LINDLEY, L.J. (for self, LORD HALSBURY and A. L. SMITH, L.J.).—Notwithstanding the very comprehensive language of this section [Companies Act, 1862, s. 158], Giffard, L.J. when V.-C. decided in *Horsey's Claim* that, as it was impossible to put a just estimate on the claim of a landlord to future rent and possible breaches of covenant, he was not entitled to prove against a limited company being wound up and to receive a dividend on his proof; and this view prevailed until a comparatively recent date.

But after the decision of the H. L. in *Hardy v. Fothergill*, which must be considered in connection with sect. 10 of the Judicature Act, 1875, it is difficult, if not impossible, to say that Mr. Craig could not have had his claim valued and have proved for its value against the old company. Mr. Craig, however, does not really want to do this. What he wants is to enter a claim with a view to have assets of the old company set apart for his indemnity before they are divided amongst the shareholders; or, if he is not in time for that, he asks that the old company may not be formally dissolved so long as he is exposed to liability under his covenants. He bases his claim in this respect on certain decisions in which a lessor of a limited company being wound up or applying for leave to reduce its capital has been held entitled to enter a claim for the amount of rent and royalties which may become due to him in future, and to an injunction to restrain the company from distributing its assets and dissolving without making proper provision for his payment. The cases in which orders to this effect have been made are: *Telegraph Construction Co., In re*; *Oppenheimer v. British, &c. Investment Bank*; *Gooch v. London Banking Association*, and *Elphinstone (Lord) v. Monkland Iron and Coal Co.* The last of these cases was in the H. L., and the House made an order in favour of the lessor of a limited company, which was being wound up voluntarily, and declared that the lessee company was bound to fulfil its future obligations under its lease, and that the liquidators were bound to make due provision for fulfilling such obligations, and to set aside assets of the company in their hands for that purpose. It is true that this was a Scotch case, and a case between lessor and lessee, but we see no reason to suppose that there is any difference between English and Scotch law in this respect. The effect, however, of the decision in *Hardy v. Fothergill* on the right of a lessor to have the assets of a limited company which is

being wound up impounded has not yet been judicially determined. The English decisions in favour of his right to enter a claim and have assets impounded to meet it have all proceeded upon the view that the lessor could not prove for any ascertainable sum and be paid a dividend upon it and on some future occasion those decisions will have to be reconsidered. In the present case it is not necessary to solve this new problem, and we say no more about it.—p. 282.

Hardy v. Fothergill (*supra*), distinguished.
Haytor Granite Co. In re, and Horsey's Claim (*supra*), applied.

New Oriental Corporation, In re, Hong Kong Land and Investment Co., Ex parte [1895] 1 Ch. 759; 64 L. J. Ch. 489; 18 R. 459; 72 L. T. 419; 43 W. R. 528; 2 Manson 301.

V. WILLIAMS, J.—In *Hardy v. Fothergill* the lease had expired, and the assignee actually obtained his discharge before the lessee claimed to be indemnified. In bankruptcy there would be no difficulty in dealing with the proof, but in winding up the term is still vested in the company. *Hardy v. Fothergill* is not a decision that, without more, all future rent can be proved for at once in a winding-up.—p. 756.

In *Craig's Claim* (*supra*) Lindley, L.J. intimates that *Hardy v. Fothergill* has altered the law as to proofs in winding up. . . . *Hardy v. Fothergill* seems to apply only where there is a disclaimer. But in winding up the liquidator cannot disclaim, and the rule can only be applied in winding up where there is a surrender or a repudiation of the lease which is accepted by the lessors.—th.

As the liquidator will not accept your [*i.e.*, the lessors'] terms, and cannot be forced to do so, the matter must be dealt with on the footing of there being a subsisting lease. To such a case *Hardy v. Fothergill* has no application. I can therefore only allow a proof for the branches which have occurred up to the present time. . . . The principle of *Haytor Granite Co., In re*, and *Horsey's Claim* applies to the present case; and if the company is in beneficial occupation, I go further, and say that the lessors can enter a claim for the full rent.—p. 757.

New Oriental Bank Corporation, In re, distinguished.

Panther Lead Co., In re (1896) 65 L. J. Ch. 499; [1896] 1 Ch. 978; 44 W. R. 573; 3 Manson 165.

ROMER, J.—Now, if in this case, as in that of the *New Oriental Bank Corporation*, . . . the lessors had refused to let the lease be given up and prove for the loss thereby sustained by them. I should have felt great difficulty in doing more than was done by the learned judge in that case, for a lessor cannot be compelled to come in and prove. But here the lessors offer to arrange with the liquidator to take a surrender of the lease, or to determine it, on terms of their being able to prove for the loss thereby sustained by them. This is clearly an arrangement which ought to be made by the liquidator. . . . I desire to add that, in my opinion, since the decision in *Hardy v. Fothergill*, the old cases as to proof by a lessor to a company in liquidation have to be reconsidered, as was pointed out by Lindley, L.J. in *Craig's Claim*; and certainly it will be the duty of the Court to assist a lessor in proving in respect of the obligations of a company as lessee

under its . . . all cases like the present, where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined.—p. 502.

Classes of Contributories.

Maria Anna and Steinbank Coal and Coke Co., In re, Maxwell's Case, Hill's Case (1875) 44 L. J. Ch. 423; L. R. 20 Eq. 585; 32 L. T. 747; 23 W. R. 646—MALINS, V.-C.; and **Professional Life Assurance Co., In re** (1867) L. R. 3 Ch. 167; 17 L. T. 631; 16 W. R. 295.—BOLT, L.J.; *affirming* 36 L. J. Ch. 442; L. R. 3 Eq. 668.—ROMILLY, M.R., *discussed*.

Maria Anna and Steinbank Coal, &c. Co., In re, McKewan's Case, 36 L. T. 609; 25 W. R. 577.—MALINS, V.-C.; *varied*, (1877) 46 L. J. Ch. 819; 6 Ch. D. 447; 37 L. T. 201; 25 W. R. 857—G.A. JESSE, M.R., JAMES and BAGGALLAY, L.J.

Maxwell's Case and McKewan's Case, distinguished.

Lion Mutual Marine Insurance Association v. Tucker (1888) 53 L. J. Q. R. 185; 12 Q. B. D. 176; 40 L. T. 764; 32 W. R. 546—G.A. COLERIDGE, C.J., WHET, M.R., and BOWEN, L.J., *approved and applied*.

Bangor and North Wales Mutual Marine Protection Association, In re, Baird's Case (1899) 68 L. J. Ch. 521; [1899] 2 Ch. 593; 80 L. T. 870; 47 W. R. 685; 7 Manson 160.

WRIGHT, J.—The two decisions of Malins, V.-C. which were cited by the liquidator, turned upon a different Act [Companies Act, 1856], and related to companies limited by shares. Whether they are authorities on the construction of the Act of 1862, even as to companies limited by shares, it is not necessary to consider. *Lion, &c. Association v. Tucker* shows that he [the member] is liable to be sued for these losses, but it is not there suggested that he can be made a contributory in the winding-up in respect of them.—p. 524.

Maxwell's Case and McKewan's Case, distinguished.

Walker and Hacking, Ltd., In re (1887) 57 L. T. 763—STIRLING, J.

East India Cotton Agency, In re, Furdoojee's Case (1876) 3 Ch. D. 264; 35 L. T. 53.—BACON, V.-C., *not followed*.

Mercantile Mutual Marine Insurance Association, In re, Jenkins' Case (1883) 53 L. J. Ch. 593; 25 Ch. D. 415; 50 L. T. 160; 32 W. R. 360.

CHITTY, J.—Now, apart from any authority on the matter, I should have said that there would be practically but little difficulty in any case where there is a winding-up, going on in putting an estimate on the liability of any contributory. . . . But it was said that Bacon, V.-C. has decided in *Furdoojee's Case* that future calls could not be fairly estimated. That case, however, was one which related to an Indian insolvency, and has been treated by some of the text-writers of great learning and authority as turning on that fact, and I am very much disposed to take that view of the case, and to think that that was all that was intended to be decided by Bacon, V.-C. who had not before him a section similar to that which I have to

deal with—namely, sect. 31 of the Bankruptcy Act, 1869. But there are some observations, no doubt, of the V-C which seem to show that, in his opinion, in that case, a fair estimate could not have been put on the amount of the liability. Speaking with the greatest respect for the V-C, if that was his opinion, it appears to me it would not be reconcilable with the decisions of the C. A., who have dealt with cases of far greater difficulty than the one which he had before him. It is sufficient to mention one case—that is, *Neal, Ex parte, Butey, In re* [(1880) 14 Ch. D. 579], where the C. A. put an estimate on an annuity which was agreed to be paid to a wife separated from her husband in the event of her being chaste, or cohabitation not being resumed, or the marriage not dissolved. These were contingencies which practical men, after all, could deal with, although what exact deduction ought to be made in respect of them might perhaps give rise to difficulty. But such difficulty did not appear to the C. A. to be insuperable.—p. 594.

Martin's Patent Anchor Co. v. Morton (1868) 37 L. J. Q. B. 98; L. R. 3 Q. B. 106; 9 B. & S. 183.—Q.B., commented on.

General Estates Co. In re, *Hastie's Case* (1869) 38 L. J. Ch. 48, 233; L. R. 4 Ch. 274; 20 L. T. 93; 17 W. R. 162, 302.—L.J.; affirming L. R. 7 Eq. 8.—ROMILLY, M.R.

GIFFARD, L.J. (for self and SELWYN, L.J.).—The M.R. founded his judgment for the most part on *Martin's Patent Anchor Co. v. Morton*. In the argument before us exceptions were taken both to the argument of the M.R. and of the learned judges of the Court of Q. B. in the *Patent Anchor Co. v. Morton*, and it was, among other arguments, urged that, taking the Bankruptcy Act and the Winding-up Act together, there was a distinct legislative enactment that calls under a winding-up should be proved and provable whether the bankruptcy occurred before or after the winding-up. As a ground for this the latter part of the 77th section of the Winding-up Act was much relied upon. . . . The argument on this section was, that as it applied in terms and words to an insolvency before the Act, it necessarily applied to a bankruptcy proceeding the winding-up; and the observations on the judgment of the M.R. and the judgments of the learned judges of the Court of Q. B. were to the effect that they were erroneous in attempting to escape the result of this conclusion by laying it down that proof might be made, provided it occurred before the assets under the bankruptcy were distributed and the estate wound up. We think there is great force in this argument.—p. 234.

Hastie's Case, followed, *Cary v. Dawson* (1869) 38 L. J. Q. B. 300; L. R. 4 Q. B. 568; 10 B. & S. 663; 21 L. T. 23; 17 W. R. 916.—Q.B.; approved, Bank of Hindustan, China and Japan, In re, *Mitchell and Aspinall's Case* (1870) 39 L. J. Ch. 530; L. R. 5 Ch. 400; 22 L. T. 188; 18 W. R. 502.—GIFFARD, L.J.; reversing 21 L. T. 812.—STUART, V-C.

Elliot, Ex parte, Freen & Co., In re (1866) 15 L. T. 406; 15 W. R. 166.—KINDERSLEY, V-C, referred to.

Cooke's Mining and Smelting Co., In re, *Gilman's Case* (1866) 65 L. J. Ch. 509; 31 Ch. D. 420; 54 L. T. 205; 34 W. R. 362.—BACON, V-C.

Albert Life Assurance Co., In re, Bell's Case (1870) 39 L. J. Ch. 539; L. R. 9 Eq. 706; 22 L. T. 697; 18 W. R. 688.—JAMES, V-C, followed.

Lancaster's Case (Albert Assurance Co. Arbitration) (1871) 40 L. J. Ch. 612, n.; L. R. 14 Eq. 72. n.—LORD CAIRNS, disapproved.

English Assurance Co., In re, Holdich's Case (1872) 42 L. J. Ch. 612; L. R. 14 Eq. 72; 26 L. T. 415; 20 W. R. 567.

ROMILLY, M.R.—It is also a case which . . . has been decided in one way by the present James, L.J. when V-C. in *Bell's Case*, . . . which decision has been carefully examined and elaborately commented upon by Lord Cairns, who has come to an opposite conclusion in *Lancaster's Case*, while acting as parliamentary arbitrator in the *Albert Assurance Co.* (p. 615). . . . In my opinion the proper rule to be followed is that which was indicated by James, L.J. in *Bell's Case*. I shall follow it on the present occasion.—p. 620.

Bell's Case, discussed.

Sovereign Life Assurance Co., In re (1892) 62 L. J. Ch. 36; [1892] 3 Ch. 279; 2 R. 95; 67 L. T. 336; 41 W. R. 1.—C.A. LINDLEY, LOPES and A. L. SMITH, L.J.

Continental Banking Corporation, In re, Castello's Case (1869) L. R. 8 Eq. 504.—STUART, V-C.; and **Imperial Mercantile Credit Association, In re, Curtis's Case** (1868) 37 L. J. Ch. 629; L. R. 6 Eq. 455.—GIFFARD, V-C, approved. And see post.

Asiatic Banking Co., In re, Nasserwanjee, Ex parte, Symons's Case (1870) 39 L. J. Ch. 461; L. R. 5 Ch. 298; 22 L. T. 217; 18 W. R. 366.

GIFFARD, L.J.—I hold that the V-C, both as regards the facts, both of *Castello's Case* and of the present case, was perfectly accurate when he said that the winding-up fixes the status of the contributory. I have no doubt that his remarks were made with reference to *Curtis's Case* and cases of that class. The principle is quite simple: that a man who executes a transfer remains liable unless and until there is on the list a transferee who is legally liable to the company, and you take, for the purpose of ascertaining whether this is the case, the date of the winding-up.—p. 462.

Albion Assurance Society, In re, Winstone's Case (1870) 48 L. J. Ch. 607; 12 Ch. D. 259; 40 L. T. 858; 27 W. R. 762.—FRY, J. approved but distinguished.

Albion Life Assurance Society, In re, Daw's Case, Mill's Case (1880) 16 Ch. D. 83; 43 L. T. 523; 29 W. R. 109.—C.A. JESSEL, M.R., JAMES and COTTON, L.J.; affirming 49 L. J. Ch. 593.—MALINS, V-C.

Daw's Case and Mill's Case, explained.

Curtis's Case (supra), distinguished.

Albion Life Assurance Society, In re, Brown's Case (1881) 18 Ch. D. 639; 50 L. J. Ch. 714; 45 L. T. 269; 30 W. R. 30.

FRY, J.—These sections to which I have referred are all consistent with the definition clause, and show that the whole scheme of the articles is this, that the holder of a policy is to be a member of the company, but that when he ceases to be the holder he is also to cease to be a member. Moreover, I find that James, L.J., when

the articles were before him in *Albion Life Assurance Society, In re*, explained the articles consistently with this construction, saying that the clause making participating policy-holders members was, "only to give them control over the funds which would be applicable for their policies, and that those provisions did not seem to him sufficient to imply that the mutual liabilities were different from those in ordinary offices." It is clear that these remarks apply to persons who are interested, and not to persons who were once interested but are so no longer. . . . Then the liquidator says that Mr. Brown cannot be relieved until some other person is registered in his place, and *Curtis's Case* was cited to me. But that case did not depend upon the construction of such a special contract as there is in this case, and is no authority here. The question here is simply this—What is the contract between the parties? If the contract is on this footing, that the simply ceasing to hold the policy relieves the policy-holder from his liability, I must give effect to the contract. In *Curtis's Case* there was a provision of a different kind.—p. 644.

Winstone's Case (*supra*), discussed.

Asbury v. Watson (1884) 54 L. J. Ch. 12; 28 Ch. D. 56.—KAY, J.; affirmed, C.A. (*supra*, col. 388).

Waterloo Life Assurance Co., In re, Saunders' Case (1864) 2 De G. J. & S. 101; 10 Jur. (N.S.) 246; 10 L. T. 39; 12 W. R. 502.—TURNER and KNIGHT BRUCE, L.Js., distinguished.

Imperial Mercantile Credit Association, In re, Chapman and Barker's Case (1867) L. R. 3 Eq. 361; 15 L. T. 528.—WOOD, V.-C.

Saunders' Case, followed.

Chapman and Barker's Case, distinguished.

West Hartlepool Iron Co., In re, Gray's Case (1876) 1 Ch. D. 664; 45 L. J. Ch. 342; 34 L. T. 164; 24 W. R. 568.
BACON, V.-C.—The case before Lord Hatherley (*Chapman and Barker's Case*) is a totally different case from this. Lord Hatherley does not express himself as doubting the propriety of the decision in *Saunders' Case*, and the distinction between that [*Chapman and Barker's Case*] and this is that the name of the person there had been put upon the register with his consent. Therefore the case which the L.J. decided had no application to the case before Lord Hatherley, and it did not interfere in the slightest degree with the decision of Lord Hatherley.—pp. 669–671.

Royal Bank of Australia, In re, Robinson's Executors' Case (1852) 2 De G. M. & G. 517.—ST. LEONARDS, L.C., distinguished.

Meux's Executors' Case (1852) 2 De G. M. & G. 522.—ST. LEONARDS, L.C.; affirming [1851] 20 L. J. Ch. 298; 4 De G. & Sm. 351; 15 Jur. 439.—KNIGHT BRUCE, V.-C.

Meux's Executors' Case, distinguished.

Devala Provident Gold Mining Co., In re, Abbott, Ex parte (1883) 22 Ch. D. 593; 52 L. J. Ch. 434; 48 L. T. 259; 31 W. R. 225.

FEB, J.—In *Meux's Executors' Case* the statement was made by an officer of the company in a transaction between the company and a third party; the statement was part of the transaction.—p. 596.

Monarch Insurance Co., In re, Gorissen's Case, 21 W. R. 323.—MALINS, V.-C.; reversed, (1873) 42 L. J. Ch. 864; L. R. 8 Ch. 507; 28 L. T. 611; 21 W. R. 556.—G.A. SELBORNE, L.C. and MELLISH, L.J.

Wincham Shipbuilding, Boiler and Salt Co., In re, Poole, Jackson and Whyte's Case, 38 L. T. 418; 26 W. R. 588.—BACON, V.-C.; reversed, (1878) 48 L. J. Ch. 48; 9 Ch. D. 322; 38 L. T. 659; 26 W. R. 823.—G.A. JESSEL, M.R., JAMES and BRAMWELL, L.Js.

Royal Bank of Australia, In re, Sutton's Case (1850) 3 De G. & Sm. 262; 14 Jur. 966.—KNIGHT BRUCE, V.-C., approved.
London and Mediterranean Bank, In re, Wright, Ex parte (1868) 37 L. J. Ch. 529.—WOOD and SELWYN, L.Js.

Past Members.

Accidental and Marine Insurance Corporation, In re, Briton Medical and General Life Assurance Co., Ex parte (1870) 39 L. J. Ch. 585; L. R. 5 Ch. 428; 23 L. T. 223; 18 W. R. 717.—GIFFARD, L.J., disapproved.

Blakely Ordinance Co., In re, Brett's Case (1871) L. R. 6 Ch. 800; 40 L. J. Ch. 497; 25 L. T. 47; 12 W. R. 687.

HATHERLEY, L.C.—It was most desirable that this case should be fully argued, regard being had to the decision of Giffard, L.J., in *Accidental and Marine Insurance Corporation, In re*. The point in that case was not exactly the same as that which we have now before us, but the observations made by the L.J. in his judgment, and the reasoning on which he relied, would be such as certainly to render a decision in this case, affirming the decision of the M.R., inconsistent with that of Giffard, L.J. . . . Now I confess that it does appear to me that the late Giffard, L.J., was in some degree led to an erroneous conclusion by supposing that the whole of the arrangements thus made under the Act of 1862 was of so general and arbitrary a character, and did so vary all the usual rights subsisting between the partners of a joint stock company *inter se*, and those between the company and the creditors, as to compel him to give to the Act an interpretation which seemed to follow most closely its literal wording, without any reference to what the past course of law had been in such cases.—p. 802.

JAMES and MELLISH, L.Js. concurred.

Brett's Case, followed.

Oriental Commercial Bank, In re, Morris's Case (1871) 41 L. J. Ch. 11; L. R. 7 Ch. 200; 25 L. T. 443; 20 W. R. 25.—JAMES and MELLISH, L.Js.; carrying 40 L. J. Ch. 520; 24 L. T. 699; 19 W. R. 944.—BACON, V.-C.

Brett's Case, discussed.

Morris's Case, disapproved.
Webb v. Whiffin (1872) 42 L. J. Ch. 161; L. R. 5 H. L. 711.—H.L. HATHERLEY, L.C., LORDS CHELMSFORD, WESTBURY, COLONSAFAY and CAIRNS.

Brett's Case, reheard and affirmed.

Morris's Case, reheard and order varied.
Webb v. Whiffin, considered.
Blakely Ordinance Co., In re, Brett's Case; Oriental Commercial Bank, In re, Morris's Case

(1873) 43 L. J. Ch. 47. L. R. S. Ch. 800; 29 L. T. 256; 22 W. R. 22.

SELBORNE, L.C.—These cases have been reheard before us by reason of the decision of the H. L. in *Webb v. Whiffin*. The points which may be regarded as settled by that decision are, first, that the liability of a past member of a company under sect. 38 of the Companies Act, 1862, is a liability to contribute to the general assets of the company in the event of its being wound up, and not a liability to contribute to a fund appropriated (so far as creditors are concerned) for the payment of any particular debts of the company; and, secondly, that the rights of creditors of the company, at whatever time their debts may have been contracted, are, as against the company and its assets (including all contributions made to its assets by past members), similar and equal, or, in other words, that such creditors are not divisible into classes with different rights against different funds; and, as a necessary consequence, that there is neither occasion nor room for any marshalling of assets between them. In one of the cases before us (*Morris's Case*) a different view of the law has been taken by the L.J.J., and in that respect the order in *Morris's Case* must of course now be altered so as to make it conformable to the judgment of the H. L. But there remain two other questions which it is necessary for us to determine—the one (a question arising both in *Brett's Case* and *Morris's Case*), whether when the assets of a company which is being wound up are insufficient to discharge its debts and liabilities and the costs of the winding-up, without recourse to past members, calls can be made on past members, in respect of debts or liabilities contracted by the company before they ceased to be members, to the same extent as if those debts or liabilities had not been reduced by any dividends paid thereon after the winding-up out of the property of the company, independently of calls, or by means of calls upon present members; the other (which arises in *Brett's Case* only), whether calls can be made upon past members in respect of any debt or liability of the company contracted before they ceased to be members, which has been released or extinguished between the date of the winding-up order and the time of making such calls, and which, therefore, cannot participate in any dividend which may be made out of the proceeds of such calls. Neither of these questions came before the H. L. for decision in *Webb v. Whiffin*, but observations bearing more or less upon them were made by four of the noble and learned lords who then advised the House, and some variety of opinion may be traced in those observations. Certain passages in the speeches of Lord Chelmsford and Lord Cairns have been relied upon before us as favouring the view, that the measure of the liability of a past member under sect. 38, so far as it depends upon the existence of debts of the company contracted before he ceased to be a member, ought to be determined solely by the amount of such debts as they stood at the commencement of the winding-up, without reference to any subsequent event by which that amount may have been reduced or even wholly extinguished. On the other hand, it seems clear that Lord Westbury and Lord Hatherley would have returned a negative answer to the first, and (Lord Hatherley at least) to the second also of the

questions now requiring our decision. In this state of things it cannot be said that any binding or authoritative exposition of the law upon these points is derivable from the case of *Webb v. Whiffin* (p. 49). . . . My conclusion is that both in *Morris's Case* and in *Brett's Case* the liability of past members to contribute in respect of debts contracted before they ceased to be members could not exceed the amount of the "residuum" of those debts, to use Lord Westbury's expression, after writing off from them the full amount of the dividends paid out of the property in hand and the contributions of present members; and that in *Brett's Case* the entire claim as to all this residuum and as to all future dividends thereon having been in substance and effect released and discharged to the company, no call in respect of any such debt or liability could properly be made. In *Brett's Case* I agree in result in the original conclusions of the full C. A., and in *Morris's Case* with the original conclusion of the L.J.J. on both these points, though some of the reasons assigned by the learned judges at the original hearing have been displaced by the decision of the H. L. in *Webb v. Whiffin*.—p. 52. JAMES and MELLISH, L.J.J. agreed.

Norwich Provident Insurance Society, In re, Bath's Case (1879) 43 L. J. Ch. 411; 11 Ch. D. 386; 40 L. T. 453; 27 W. R. 658.—BACON, V.-C., *overruled*.

Norwich Provident Insurance Co., In re. Hesketh's Case (1880) 49 L. J. Ch. 288; 13 Ch. D. 693; 42 L. T. 135; 28 W. R. 401.—C.A. JESSEL, M.R., JAMES and COTTON, L.J.J.

Contract Corporation, In re, Hudson's Case (1871) 40 L. J. Ch. 444; L. R. 12 Eq. 1; 24 L. T. 634; 19 W. R. 691.—ROMILLY, M.R., *observed on*.

Natal Investment Co., In re, Nevill's Case (1870) 40 L. J. Ch. 1; L. R. 6 Ch. 43; 35 L. T. 577; 19 W. R. 36.—JAMES and MELLISH, L.J.J., *followed*.
Roberts v. Crowe (1872) 41 L. J. C. P. 198; L. R. 7 C. P. 629; 27 L. T. 238.

WILLES, J.—The question has not arisen for the first time, inasmuch as in *Nevill's Case* it presented itself to the minds of the L.J.J., one of whom [James, L.J.] decided it, whilst the other [Mellish, L.J.] impliedly did the same. As respects the remarks of the M.R. in *Hudson's Case*, it may be that the L.J.J. put the case of principal and surety, but the substance of the decision is that if one person be secondarily and another primarily liable for a debt in respect of property in the enjoyment of the latter, and the former has to pay, he is to be indemnified by the latter; and though it may not be the actual decision in the case, yet it was a substantial cause of the decision, and cannot be considered as extra-judicial. This being so, even if I doubted the correctness of the decision, I should feel bound to follow it; but as it is, I agree with and adopt it cheerfully.—p. 200. KEATING, J. concurred.

Blakely Ordinance Co., In re, Stocken's Case (1868) 37 L. J. Ch. 5, 280; L. R. 3 Ch. 412; 17 L. T. 554; 16 W. R. 322.—CAIRNS, L.J., *distinguished*.

Accidental Marine Insurance Corporation, In re, Bridger and Neill's Case (1869) 38 L. J. Ch.

201: L. R. 4 Ch. 266; 19 L. T. 624; 17 W. R. 216.—SELWYN and GIFFARD, L.J.J.
 SELWYN, L.J.—We have been much pressed with the authority of the judgment of Lord Cairns in *Stocken's Case*. It appears to me that that case has no application to the present. That was not with reference to a liability such as arises here. It was only a question whether certain unpaid calls at the date of the winding-up order could be enforced as against a person who had ceased to be a member.—p. 206.

Bridger and Neill's Case (*supra*), *followed*.

Blakely Ordinance Co., *In re*. Creyke's Case (1869) 39 L. J. Ch. 124; L. R. 5 Ch. 68; 21 L. T. 572; 18 W. R. 108.

GIFFARD, L.J.—I quite agree that the facts of this case are not identical with those of *Bridger and Neill's Case*, but though there is a distinction in fact, in principle there is none whatever. The difference between that case and the present is that there, although the shares had been forfeited, the parties whose names were sought to be placed upon the register were persons who had transferred their shares, and their transferees could not have been made to pay calls made on those shares, while in the present case the gentleman whose name is sought to be put on the list has simply had his shares forfeited; and there is, I agree, also a somewhat different clause of forfeiture in these articles from that in the other case. *Bridger and Neill's Case* proves that there need not be shares in existence in order that a past member may be made liable in respect of them. It also decides that the "amount in respect of which the member is liable," is the amount (if any) which has not been paid, and it further decides this, as plainly as a case can decide anything, that what you have to look to is the original contract of the shareholder in respect of the shares. Then you have to consider whether the shareholder has ceased to be a member for more than twelve months, then whether any other person is liable in respect of these particular shares, and, if so, you must exhaust him before you can come upon the past member; but if either those shares are transferred, and the person who is a member in respect of them is unable to pay, or if those other shares do not exist at all, then, beyond all question, after all the existing members have been exhausted, the past member is liable.—p. 126.

Stocken's Case (*supra*, col. 594), *distinguished*.

Faure Electric Accumulator Co. v. Phillipart (1888) 58 L. T. 525.—HAWKINS, J.

Special Resolution.

Blakely Ordinance Co., In re, Needham's Case (1867) 36 L. J. Ch. 665; L. R. 4 Eq. 135; 16 L. T. 472.—ROMILLY, M.R.; and **Stocken's Case**, *approved*.

Ladies' Dress Association v. Pulbrook (1900) 69 L. J. Q. B. 705; [1900] 2 Q. B. 376; 49 W. R. 6; 7 Mansour 465.—C.A. A. L. SMITH, v. WILLIAMS and ROMER, L.J.J.: *affirming* (1899) 68 L. J. Q. B. 871; 81 L. T. 300.—RIDLEY, J. ROMER, L.J.—As to the first point, the defendant's liability, in respect of which the claim in the action is made, is not as a contributory or as a past or present member of the company, but as a debtor to the company under the provisions

of art. 140 of the articles of association. As long ago as 1867 it was pointed out by Romilly, M.R., in *Needham's Case*, that the liability of a former shareholder in a company which arises in respect of calls owing upon shares at the time of a forfeiture of the shares is not in any sense a liability which arises as a contributory. As to the second point, all I can say is, that if sect. 15 [Companies Act, 1867] is to have any effect it ought to have effect in this case. *National Debenture and Assets Corporation, In re* (*supra*, col. 385), is distinguishable. If we had to consider that case we might have to say whether the *dicta* there could be justified.—p. 708.

Calls.

London Marine Insurance Association, In re, Andrews' and Alexander's Case (1869) L. R. 8 Eq. 176; 20 L. T. 943; 17 W. R. 784.—JAMES, V.-C., *commented on*.

Arthur Average Association, *In re* (1876) 45 L. J. Ch. 346; 3 Ch. D. 522; 34 L. T. 388; 24 W. R. 514.

JESSEL, M.R.—That ought to conclude the question, and would conclude it were it not that there is *London Marine Insurance Association, In re*. It is said, and I agree, that that case was in many respects similar to this, and debts of outside creditors had been proved against the association, which was being wound up. The V.-C. is reported to have said, "with respect to these"—that is debts due to the outside creditors—"if any such debt was contracted, it is not a debt due from the association as such." If it were not, it could not be proved at all. It would be a ground for expunging the proof. But his honour's attention does not seem to have been directed to the fact that it was proved and not expunged, and there being no attempt to expunge it he was bound by the certificate as if it were a debt of the association as far as he was concerned. He continues, "It is not a debt due from any member of the association, and every member is in the same position in that respect as a member of a club." Then he goes into the question with reference to clubs. In my opinion this association cannot be treated in the same way as an ordinary club for social purposes, the constitution of which is familiar in London. But that does not go to this point. The V.-C. decided that, in his opinion, the outside creditors were not creditors either of the association as such, or of any member of it. All I can say is, the learned judge appears there to have forgotten that he had nothing to decide. The certificate had decided that these debts were debts of the association; and in face of that certificate he had no right, as it appears to me, to say they were not debts of the association. It might have been a very good ground for asking on behalf of some of the contributories to expunge those debts, if the argument were well founded; but the debts standing and having, as in this case, stood for years unexpunged, and having so stood until the opportunity was given to the contributories to go over the list of debts and elect what they would seek to expunge, and what they would not, it appears to me impossible to allow them to say that these debts have not been properly proved; at all events, that is not the object of the application before me. I consider I am bound by what has taken place. I consider these debts to be debts of the association, and that, therefore,

every contributor, whose name is on the list of contributors, is liable to pay them, and they must be included in the call.—p. 348.

Mexican and South American Co., In re, Brown, Ex parte (1867) 36 L. J. Ch. 353; L. R. 9 Ch. 304.—TURNER and CAIRNS, L.J.J.; and **Dickson v. Harrison** (1878) 47 L. J. Ch. 761; 9 Ch. D. 243; 38 L. T. 794; 26 W. R. 730.—C.A. JESSEL, M.R., COTTON and BRETT, L.J.J., *approved*.

Elham Valley Ry., In re, Dickson's Case (1879) 48 L. J. Ch. 766; 12 Ch. D. 298; 41 L. T. 184; 27 W. R. 880.—FRY, J.

Dickson's Case, approved.

Mexican and South American Co., In re, Shewell's Case (1867) 36 L. J. Ch. 353; L. R. 2 Ch. 387; 16 L. T. 194; 15 W. R. 541.—TURNER and CAIRNS, L.J.J., *applied*.

Liverpool Household Stores, In re (1890) 63 L. T. 883.—KIRKWITH, J.

Hollyford Copper Mining Co., In re (1869) L. R. 3 Ch. 93. 21 L. T. 734; 18 W. R. 157.—GIFFARD, L.J., *followed*.

Hercules Insurance Co., In re (1871) Ir. R. 6 Eq. 207.—SULLIVAN, M.R., *not followed*. City of Glasgow Bank, In re (1880) 14 Ch. D. 628; 43 L. T. 279.

[The M.R. in Ireland had, in *Hercules Insurance Co., In re*, where a winding-up order had been made in England, declined to adopt the view of Giffard, L.J. in the above case, considering that under the Companies Act, 1862, s. 123, it was sufficient to produce an office copy of the order to the proper officer of the Court of Chancery in Ireland without making it an order of that Court.]

JESSEL, M.R.—I am bound by the decision of the L.J., although the Irish M.R. was not.—p. 628.

Direct Exeter, Plymouth and Devonport Ry., In re, Besley, Ex parte (1850) 2 Mac. & G. 176.—COTTENHAM, L.C., *discussed*.

Norris v. Cottle (1850) 2 H. L. Cas. 647; 14 Jur. 703.—LORD BROUGHAM.

Norris v. Cottle, distinguished.

Hutton v. Upfall (1850) 2 H. L. Cas. 674; 14 Jur. 843.—LORD BROUGHAM.

Hutton v. Upfall, explained, *Direct Birmingham, Oxford, Reading and Brighton Ry., In re*. Upfall, Ex parte (1851) 20 L. J. Ch. 480; 1 Sim. (N.S.) 395; 15 Jur. 481.—CRANWORTH, V.-C.; *commented on*, **Hutton v. Thompson** (1851) 3 H. L. Cas. 161.—TRURO, L.C.; *overruled*, **Bright v. Hutton** (1852) 3 H. L. Cas. 341; 16 Jur. 695.—H.L. (R.). ST. LEONARDS, L.C., LORDS BROUGHAM, TRURO, CAMPBELL and CRANWORTH, *assisted by the JUDGES*.

Upfall's Case (supra), followed.

Direct Birmingham, Oxford, &c. Ry., In re, Hunter's Case (1851) 20 L. J. Ch. 483; 1 Sim. (N.S.) 435; 15 Jur. 532.—CRANWORTH, V.-C., *distinguished. And see post*.

Wolverhampton, Chester and Birkenhead Junction Ry., In re, Dale's Case (1852) 21 L. J. Ch. 341; 1 De G. M. & G. 510; 16 Jur. 207.—CRANWORTH, L.J.

Upfall's Case, applied.

Metropolitan Junction Ry., In re, Markwell's Case (1852) 5 De G. & Sm. 528; 16 Jur. 989.—PARKER, V.-C.

Bright v. Hutton (supra) and Upfall's Case, discussed.

Midland Union, &c. Ry., In re, Lucy, Ex parte (1853) 22 L. J. Ch. 732; 1 De G. M. & G. 356; 17 Jur. 1143.—KNIGHT BRUCE and TURNER, L.J.J.

Hunter's Case (supra), distinguished.

London and Birmingham, &c. Ry., In re, Gny. Ex parte (1852) 21 L. J. Ch. 284; 1 De G. M. & G. 347; 16 Jur. 185.—KNIGHT BRUCE and CRANWORTH, L.J.J.

CRANWORTH, L.J.—It is proper to add, that our decision does not conflict with *Hunter's Case*. Here all the parties made liable to the call are interested in the affairs which are to be wound up, and in respect of which the costs are incurred, in exact proportion to the amount of the call; whereas in *Hunter's Case* it was impossible to say whether he had any interest in the matters in respect of which the call for costs was made, or what was the relative liability of himself and the other contributors.—p. 289.

Gay's Case, observed on.

Sea, Fire and Life Assurance Co., In re, Greenwood's Case (1854) 23 L. J. Ch. 966; 3 De G. M. & G. 459; 18 Jur. 387; 2 W. R. 322.—CRANWORTH, L.C., KNIGHT BRUCE and TURNER, L.J.J.; *reversing* 2 Sm. & G. 95.—STUART, V.-C.

Sea, Fire and Life Assurance Co., In re, Greenwood's Case, followed.

Norwich Equitable Fire Assurance Society, In re (1857) 58 L. T. 35.—KAY, J.

Marlybone Joint Stock Bank, In re (1856) 25 L. J. Ch. 650.—KINDERSLEY, V.-C., *discussed and not applied*.

Brampton and Longtown Ry., In re, Addison's Case (1875) 44 L. J. Ch. 537; L. R. 20 Eq. 620; 32 L. T. 592; 24 W. R. 115.—BACON, V.-C.; *affirmed, nom.* **Brampton and Longtown Ry., In re, Shaw's Claim** (1875) 44 L. J. Ch. 670; L. R. 10 Ch. 177; 33 L. T. 5; 23 W. R. 813.—CAIRNS, L.C. and MELLISH, L.J. *And see supra*, col. 439.

General International Agency Co., In re (1867) 16 L. T. 725; 15 W. R. 973.—

TURNER and CAIRNS, L.J.J., *distinguished*. **Anglo-African Steamship Co., In re** (1886) 32 Ch. D. 348; 55 L. J. Ch. 579; 54 L. T. 807; 34 W. R. 554.—C.A. COTTON, LINDLEY and LOPES, L.J.J.

COTTON, L.J.—*General International Agency Co., In re*, was referred to, and it is said that there the Court gave leave to serve something—but what? It was only a notice that an application was going to be made for an order for a call. It only amounted to a notice that unless cause was shown to the contrary an order would be made for a call. The L.J., according to the report, said that the making of the call could only be the foundation of proceedings in the Courts of law abroad to compel payment of the call when made, and in those proceedings the question might be raised whether the service so effected was good or not; but if it was, they

were of opinion that service by post would be sufficient. That is very different from the present case.—p. 351.

Anglo-African Steamship Co., In re (*supra*), *distinguished*.

Nathan Newman & Co., In re (1887) 35 Ch. D. 1; 56 L. J. Ch. 752; 56 L. T. 95; 35 W. R. 293.—C.A.

COTTON, L.J.—There it was sought to serve on persons residing out of the jurisdiction an order for a call, with a view to found proceedings against them to compel payment, and it was held that the Court had no jurisdiction to order such service. In the present case the notice is not intended to be the foundation of any proceedings against the persons on whom it is served. The official liquidator is only performing a duty cast upon him by the Companies Acts of giving certain information to persons whom it is proposed to place on the list of contributories. . . . It is merely a notice that they will be placed on the list unless they show cause to the contrary, and is quite of a different nature from the notice in *Anglo-African Steamship Co., In re*.—p. 2. LINDLEY and LOPES, L.J.J. concurred.

Nathan Newman & Co., In re, *followed*.

Baron Liebig's Cocoa and Chocolate Works, In re (1888) 59 L. T. 313.—NORTH, J.

Chalk, Webb & Co. v. Tennant (1887) 57 L. T. 598; 36 W. R. 368.—NORTH, J., *approved and distinguished*.

Westmorland Green and Blue Slate Co. v. Feilden (1891) 60 L. J. Ch. 301, 680; [1891] 3 Ch. 15; 65 L. T. 428; 40 W. R. 23.—KEKEWICH, J. (*see judgment*): *affirmed*, C.A. LINDLEY, BOWEN and FRY, L.J.J.

Creditors.

East of England Banking Co., Ex parte, Norwich Yarn Co., In re (1831) 21 L. J. Ch. 822.—KNIGHT BRUCE and CRANWORTH, L.J.J., *discussed and approved*.

Independent Insurance Co., In re. Terrell v. Hutton (1854) 23 L. J. Ch. 345; 4 H. L. Cas. 1901; 18 Jur. 707.—H. L. (E.). CRANWORTH, L.C. LORDS BROUGHAM and ST. LEONARDS.

Wyatt v. Metropolitan Board of Works (1862) 31 L. J. C. P. 217; 11 C. B. (N.S.) 744.—ERLE, C.J., WILLIAMS, WILLES and KEATING, JJ.: **Kent Tramways Co., In re** (1879) 12 Ch. D. 312; 40 L. T. 339.—FRY, J.; *affirmed*, C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.J.J., *followed*.

Kensington Station Act, In re (1875) L. R. 20 Eq. 197; 32 L. T. 183; 23 W. R. 463.—MALINS, V.-C.: and Terrell v. Hutton, *discussed and distinguished*.

Skegness and St. Leonard's Tramways Co., In re. Hanly, Ex parte (1888) 58 L. J. Ch. 737; 41 Ch. D. 215; 60 L. T. 906; 37 W. R. 225.—C.A. COTTON, LINDLEY and BOWEN, L.J.J. *And see* "PARLIAMENT."

Wyatt v. Metropolitan Board of Works and Skegness, &c. Tramways Co., In re, *distinguished*.

Haddon's (Lord) Estate Act, 1885, W. N.

(1889) 96.—C.A. ESHER, M.R., COTTON and FRY, L.J.J.

Skegness &c. Tramways Co., In re, *referred to*.

Cutbill v. Shropshire Rys. (1891) 7 Times L. R. 382.—STIRLING, J.

Royal Bank of Australia, In re, Forest, Ex parte (1860) 29 L. J. Ch. 295; 2 Gift. 42.—STUART, V.-C., *not applied*.

General Rolling Stock Co., In re. Joint Stock Discount Co.'s Claim (1872) 41 L. J. Ch. 732; L. R. 7 Ch. 646; 27 L. T. 88; 20 W. R. 762.—JAMES and MELLISH, L.J.J.; *reversing* 26 L. T. 755.—ROMILLY, M.R.

Wiltshire Iron Co. v. G. W. Ry. (1871) 40

L. J. Q. B. 43. 308; L. R. 6 Q. B. 776; 23 L. T. 666; 19 W. R. 935.—EX. CH., *not followed*.

Llangennech Coal Co., In re (1887) 56 L. T. 475.—CHITTY, J.

Rigby v. Macnamara (1795) 2 Cox 415; 2

R. R. 92.—ELDON, L.C., *approved*.

Oriental Commercial Bank, In re, European Bank, Ex parte (1871) 41 L. J. Ch. 217; L. R. 7 Ch. 99; 25 L. T. 648; 20 W. R. 82.—JAMES and MELLISH, L.J.J.; *reversing* 1. R. 12 Eq. 501; 24 L. T. 936.—BACON, V.-C.

Northern Counties of England Fire Insurance Co., In re, Macfarlane's Claim (1880)

50 L. J. Ch. 273; 17 Ch. D. 837; 44 L. T. 299.—JESSEL, M.R., *followed*.

Bridges, In re, Hill v. Bridges (1881) 50 L. J. Ch. 470; 17 Ch. D. 342; 44 L. T. 730.—JESSEL, M.R.

Commercial Bank Corporation of India and the East, In re, Smith, Fleming & Co's Case, Gledstanee & Co's Case (1867)

36 L. J. Ch. 383; L. R. 1 Ch. 538; 12 Jur. (N.S.) 806; 15 L. T. 148; 16 W. R. 78.—KNIGHT BRUCE and TURNER, L.J.J.; *reversing* 35 L. J. Ch. 617.—ROMILLY, M.R., *approved*.

Xeres Wine Shipping Co., In re, Alliance Bank, Ex parte; Barned's Banking Co., In re, Kellock's Case (1868) 39 L. J. Ch. 112; L. R. 3 Ch. 769.—WOOD and SELWYN, L.J.J.; *reversing* 37 L. J. Ch. 415.—MALINS, V.-C. *And see post*, col. 601.

Kellock's Case, *not applied*.

Blakely Ordnance Co., In re, Metropolitan and Provincial Bank's Claim (1869) L. R. 8 Eq. 244; 21 L. T. 12; 17 W. R. 869.—ROMILLY, M.R.

Kellock's Case, *distinguished*.

Humber Ironworks and Shipbuilding Co., In re, Warrant Finance Co.'s Case (1869) 38 L. J. Ch. 712; L. R. 4 Ch. 643; 20 L. T. 859; 17 W. R. 780.—SELWYN and GIFFARD, L.J.J.

SELWYN, L.J.—The case is, I believe, unaffected by any other decision, for the cases which were referred to—*Kellock's Case* and *Xeres Wine Co., In re*—relate to an entirely different point, and the effect of the decision in those cases is only this, that the right of a creditor having a mortgage security to proceed upon all his remedies at once was not taken away from him by any of the provisions of the Companies Act.—p. 713.

Warrant Finance Co.'s Case, *not applied*.
Joint Stock Discount Co., *In re*, Warrant Finance Co., Ex parte (1869) 39 L. J. Ch. 122; L. R. 5 Ch. 86; 21 L. T. 626; 18 W. R. 102.—GIFFARD, L.J.; reversing 38 L. J. Ch. 565.—ROMILLY, M.R., *considered*, Contract Corporation, *In re*, Ebbw Vale Co.'s Claim (*post*); *applied*, Whittinghall v. Grover (1886) 55 L. T. 213; 35 W. R. 4.—CHITTY, J. •

Kellock's Case (*supra*), *explained*.

Barned's Banking Co., *In re*, Forwood's Claim (1869) 39 L. J. Ch. 183; L. R. 5 Ch. 18; 21 L. T. 411; 8 W. R. 53.—GIFFARD, L.J.

Joint Stock Discount Co., *In re* (*supra*), *followed*.

Humber Iron, &c. Co., *In re*, Warrant Finance Co.'s Case (No. 2) (1869) 39 L. J. Ch. 185; L. R. 5 Ch. 88; 21 L. T. 626; 18 W. R. 102.—GIFFARD, L.J.

Kellock's Case, *distinguished*.

Barned's Banking Co., *In re*, Coupland's Claim (1869) 39 L. J. Ch. 287; L. R. 5 Ch. 187; 21 L. T. 807.

GIFFARD, L.J.—I think that this case is quite different from *Kellock's Case*. In that case the company had no interest in the mortgaged property except as mortgagors. Here the company are in fact mortgagages. The letters of credit authorised bills to be drawn, but they were to be accompanied by bills of lading, and those were to be given up to the company on the bills being accepted.—p. 288.

Kellock's Case, *explained*.

Contract Corporation, *In re*, Ebbw Vale Co.'s Claim (1869) L. R. 5 Ch. 112; 39 L. J. Ch. 363; 18 W. R. 222.

HATHERLEY, L.G.—It was argued by Mr. Jessel that the rule laid down in *Kellock's Case*, in cases of winding-up, is not the rule in bankruptcy. But that case turned on a principle of a different kind, namely, that there was nothing in the Companies Act which intercepted the original contract existing between the debtor and his creditor, namely, that he was to have the security of the personal estate of the debtor, and at the same time the full security of the mortgage; and therefore the Court would not deprive the creditor of his rights by following the analogy of the practice in bankruptcy, where the position of the creditor was governed by the express enactments of the Bankruptcy Act.—p. 115.

Kellock's Case, *commented on*. Coal Consumers' Association, *In re* (1876) 46 L. J. Ch. 501; 4 Ch. D. 625 (*post*, col. 602); *rule applied*, Ligoniel Spinning Co., *In re*, Bank of Ireland, Ex parte [1900] 1 Ir. R. 324.—CHATTERTON, V.-C.

Warrant Finance Co.'s Case and Warrant Finance Co.'s Case (No. 2) (*supra*), *distinguished*.

Collie, *In re*, Findlay, Ex parte (1881) 17 Ch. D. 334; 50 L. J. Ch. 696; 45 L. T. 61; 29 W. R. 837.—C.A.

JAMES, L.J.—In the first of these cases there were two distinct winding-up proceedings, and the creditor applied his security in payment of interest. . . . The certificate of the official assignee which was referred to in *Warrant Finance Co.'s Case* related to the practice in bankruptcy in the case of two distinct bankruptcies.—pp. 335, 336. BAGGALLAY and LUSH, L.J., concurred.

Coal Consumers' Association, *In re* (1876)

46 L. J. Ch. 501; 4 Ch. D. 625; 85 L. T. 729; 25 W. R. 300.—MALINS, V.-C.; and **Knott, *In re* (1877) 7 Ch. D. 549, n.—HALL, V.-C., *approved*.**

Albion Steel and Wire Co., *In re* (1878) 47 L. J. Ch. 229; 7 Ch. D. 547; 38 L. T. 207; 26 W. R. 848.—JESSEL, M.R. *And see post*, col. 608.

Albion Steel and Wire Co., *In re*, *explained*.

Printing and Numerical Registering Co., *In re* (1878) 8 Ch. D. 535; 47 L. J. Ch. 580; 38 L. T. 676; 26 W. R. 627.

JESSEL, M.R.—But it was said that my decision in *Albion Steel and Wire Co., In re*, was in effect a decision the other way. I do not think so; at all events it was not intended by me to be so. If the words "secured creditors" are to include a man who gets a security by virtue of the Rules in Bankruptcy, as, for instance, under the 32nd section of the Bankruptcy Act, then my decision in that case would have been contrary to what I now decide; what I meant to say was that a "secured creditor" is a creditor who has a security as against the company itself. In no sense could a man who acquired his security for the first time under the law of bankruptcy be said to be a secured creditor of the bankrupt, because after bankruptcy it is to the property of the bankrupt, and not to the bankrupt himself that he must look. In the case of the *Albion Steel and Wire Co.* the creditor never had any security as against the company. I make these observations on that case as I see that view is not there so clearly expressed as it might have been.—p. 539.

Printing and Numerical Registering Co., *not followed*.

Richards & Co., *In re*, Crawshaw, Ex parte (1879) 48 L. J. Ch. 555; 11 Ch. D. 676; 40 L. T. 315; 27 W. R. 530.—FRY, J. *And see post*, col. 604.

Coal Consumers' Association, *In re* (*supra*), *followed*.

Bridgewater Engineering Co., *In re* (1879) 12 Ch. D. 181; 48 L. J. Ch. 389.

HALL, V.-C.—The case is, I think, governed by that of *Coal Consumers' Association, In re*. The decision there I am, I consider, bound to follow until there be a subsequent case which treats that as not law. The M.R., in *Albion Steel and Wire Co., In re*, refers to that case with approval. It was submitted that the M.R. had qualified his judgment in *Albion Steel and Wire Co., In re*, by his judgment in *Printing and Numerical Registering Co., In re*, but his lordship has in the latter case merely explained what he thought was not in his former judgment, *i.e.*, what he thought might be misleading in regard to secured creditors, but he did not say anything which intimated directly or indirectly that the case approved of by him, and which was decided by Malins, V.-C., was not sound law and ought not to be followed.—p. 186.

Richards & Co., *In re* (*supra*), *approved*.

Printing and Numerical Registering Co., *In re*, *overruled*.

Withernsea Brickworks Co., *In re* (1880) 16 Ch. D. 337; 50 L. J. Ch. 185; 43 L. T. 713; 29 W. R. 178.—C.A. JAMES, COTTON and LUSH, L.J.,

JAMES, L.J.—Since the Court rose on Saturday I have considered this case, and see no reason to differ from the decision of the V.-C. [*Malins*], who followed the opinion of Fry, J. in *Richards & Co., In re*, dissenting from that of the M.R. in *Printing, &c. Registering Co.* It appears to me, with deference to the M.R., that there is a fallacy in his argument. . . . The M.R. thinks that this enactment [Judicature Act, 1875, s. 10] involves the proposition that, whereas under certain circumstances a security is avoided in bankruptcy, therefore, in the administration of the assets of a deceased person and in the winding up of a company, a security is to be avoided under similar circumstances. There are, to my mind, no words in the section which, expressly or by implication, lead to that result. The question is not as to the administration of a fund, but what is the fund to be administered. —p. 340.

And see post.

Norton Ironworks Co., In re (1877) 26 W. R.

53.—**JESSEL, M.R., followed**

Albion Steel and Wire Co., In re (*supra*), not followed.

Printing and Numerical Registering Co., In re (*supra*), commented upon.

Association of Land Financiers. *In re* (1881) 16 Ch. D. 373; 50 L. J. Ch. 201; 43 L. T. 753; 29 W. R. 277.

[The headline in 16 Ch. D. 373, is incorrect—it should be *Albion, &c. Co., In re*, “not followed,” instead of “followed.”]

MALINS, V.-C.—As to authority there is no case exactly in point, except in *Norton Ironworks Co., In re*, and that is distinctly in favour of the claim. The M.R. had the point distinctly before him, and if the Act applies to one class it applies to all. *Albion, &c. Co., In re* was only two months later, and his lordship’s attention does not seem to have been called to the former case, and his decision seems quite inconsistent with it. Then came *Printing, &c. Co., In re*, in which he had to discuss *Albion, &c. Co., In re*, and he seems to have doubted whether it was right. Therefore, so far as there is authority, I must consider that the M.R. has taken my view. —p. 375.

Withernsea Brickworks Co., In re (*supra*, col. 602), *followed*.

Norton Ironworks Co., In re; Association of Land Financiers, *In re*; and **Albion Steel and Wire Co., In re**, *discussed*.

Maggi, In re, *Winehouse v. Winehouse* (1882) 51 L. J. Ch. 560; 20 Ch. D. 545; 46 L. T. 362; 30 W. R. 729.—**FRY, J.** *And see* “EXECUTOR AND ADMINISTRATOR.”

Crumlin Viaduct Works Co., In re (1879) 48 L. J. Ch. 537; 11 Ch. D. 755; 27 W. R. 722.—**JESSEL, M.R., approved.**

Withernsea Brickworks Co., In re, *discussed*.

Gorringe v. Irwell India Rubber and Gutta Percha Works (1886) 34 Ch. D. 128; 56 L. J. Ch. 85; 55 L. T. 572; 35 W. R. 86.—**C.A.**

COTTON, L.J.—It is clear to my mind that this [*i.e.*, Bankruptcy Act, 1883, s. 44, sub-s. iii.] was not made applicable to the winding up of a company by sect. 10 of the Judicature Act, 1875, and so it was decided by the late M.R., Sir G. Jessel, in *Crumlin Viaduct Works, In re*, and the same principle was acted on by the C. A. in *Withernsea*

Brickworks, In re. . . . That case did not decide the precise point in this case, because the question there related to the rights of an execution creditor, but it shows that in the opinion of the Court the 10th section could not affect cases where the question was whether the property belonged to the company or to somebody else.—p. 134.

BOWEN, L.J. to the same effect. **FRY, L.J.** concurred.

Withernsea Brickworks Co., In re, *followed*. *And see post.*

Thomas v. Patent Lionite Co. (1881) 50 L. J. Ch. 544; 17 Ch. D. 250; 44 L. T. 392; 29 W. R. 596.—**C.A.** **JESSEL, M.R., BRETT and COTTON, L.JJ.**; *reversing* 44 L. T. 94; 29 W. R. 349.—**MALINS, V.-C.**

Thomas v. Patent Lionite Co., distinguished. *Taurine Co., In re* (1883) 53 L. J. Ch. 271; 25 Ch. D. 118; 49 L. T. 514; 32 W. R. 129.—**C.A.** (*supra*, col. 543).

Richards & Co., In re (*supra*, col. 602), *doubted*.

Vron Colliery Co., In re (1882) 20 Ch. D. 442; 51 L. J. Ch. 389; 30 W. R. 388.—**C.A.**

BRETT, L.J.—In that case [*Railway Steel and Plant Co. &c. parte*, (*supra*, col. 579)] the V.-C. found as a matter of fact that the creditor had been requested by the company to postpone his action, and had accordingly postponed it, and that the assets of the company were sufficient to pay all its debts in full. No such facts are established here, so that case does not apply, and I decline to give any opinion whether the decision on those facts was right. In *Richards & Co., In re*, the creditor had delayed his proceedings on the faith of a promise by the company that they would not present a winding-up petition, and a petition was presented which was found as a matter of fact to have been in reality presented on behalf of the company. I give no opinion whether that case was rightly decided, but right or wrong it does not govern the present where the facts are quite different.—p. 449.

JESSEL, M.R. and HOLKER, L.J. to the same effect.

Potts, In re, Taylor, Ex parte (1893) 62 L. J. Q. B. 392; [1893] 1 Q. B. 648.—**C.A.**

ESHER, M.R., LINDLEY and BOWEN, L.JJ.; and **Stanhope Silkstone Collieries, In re** (1879) 48 L. J. Ch. 409; 11 Ch. D. 160; 40 L. T. 204; 27 W. R. 561.—**C.A.** **JESSEL, M.R., JAMES and BRANWELL, L.JJ.**, *applied*.

Lough Neagh Ship Co., In re, Thompson, Ex parte (1895) [1896] 1 Ir. R. 29.—**PORTER, M.R., followed.**

Croshaw v. Lyndhurst Ship Co. (1897) 66 L. J. Ch. 576; [1897] 2 Ch. 184; 76 L. T. 553; 45 W. R. 870.—**STIRLING, J.**

Withernsea Brickworks Co., In re (*supra*, col. 602), *discussed*

Stanhope Silkstone Collieries Co., In re, *principle applied.*

National United Investment Corporation, In re (1901) 70 L. J. Ch. 461; [1901] 1 Ch. 950; 84 L. T. 766; 8 Manson 399.—**WRIGHT, J.**

English Joint Stock Bank, In re, Yelland's Case (1867) L. R. 4 Eq. 350.—**WOOD, V.-C., followed.** *London and Colonial Co., In re, Clark, Ex parte* (1869) 38 L. J. Ch. 562; L. R. 7 Eq. 950; 20

L. T. 774.—JAMES, V.-C.; and London and Scottish Bank, In re, Logan, Ex parte (1870) L. R. 9 Eq. 149; 21 L. T. 742; 18 W. R. 273.—ROMILLY, M.R.

Set-off.

Overend, Gurney & Co., In re, Grissell's Case (1866) 35 L. J. Ch. 752; L. R. 1 Ch. 528; 12 Jur. (N.S.) 718; 14 L. T. 843; 14 W. R. 1015.—C.A. CRANWORTH, L.C., KNIGHT BRUCE and TURNER, 1 J.J. (and see post, col. 606); *distinguished*, Duckworth, In re, Cooper, Ex parte (1867) 36 L. J. Bk. 28; L. R. 2 Ch. 578; 16 L. T. 580, 15 W. R. 888.—CAIRNS and TURNER, 1 J.J. (and see post, col. 607); *discussed*, Breechloading Armoury Co., In re, Calisher, Ex parte (1868) 37 L. J. Ch. 208; L. R. 5 Eq. 214; 16 W. R. 303.—ROMILLY, M.R. (and see post, col. 606), *distinguished*, Brighton Arcade Co. v. Dowling (1868) 37 L. J. C. P. 125; L. R. 3 C. P. 125; 17 L. T. 541; 16 W. R. 361.—C.P. (and see post, col. 606), *commented on*, China Steamship Co., In re, Mackenzie, Ex parte (1869) 38 L. J. Ch. 199; L. R. 7 Eq. 240; 19 L. T. 667; 17 W. R. 343.—ROMILLY, M.R.

China Steamship Co., In re, Mackenzie, Ex parte, discussed.

Gwelo (Matabeland) Exploration and Development Co., In re, Williamson's Claim (1900) [1901] 1 Ir. R. 38.—C.A. WALKER and HOLMES, 1 J.J.

Duckworth, In re (*supra*), *followed*, Universal Banking Corporation, In re, Strang's Case (1870) 39 L. J. Ch. 844; L. R. 5 Ch. 492; 22 L. T. 85; 18 W. R. 475.—GIFFARD, 1 J.J. (and see post, col. 607); *discussed*, National Funds Assurance Co., In re (1878) 48 L. J. Ch. 169; 10 Ch. D. 118; 39 L. T. 420; 27 W. R. 302.—JESSEL, M.R. See post, col. 607.

Grissell's Case (*supra*) and **Brighton Arcade Co. v. Dowling** (*supra*), *commented on*.

Imperial Life Assurance Society, In re, Gibbs and West, Ex parte (1870) 39 L. J. Ch. 667; L. R. 10 Eq. 312; 23 L. T. 850; 18 W. R. 970.—MALINS, V.-C. And see post.

Brighton Arcade Co. v. Dowling, dicta followed.

Sankey Brook Coal Co. v. Marsh (1871) 40 L. J. Ex. 125; L. R. 6 Ex. 185; 24 L. T. 479; 19 W. R. 1012.—MARTIN and BRAMWELL, BB.

Grissell's Case, approved.

Brighton Arcade Co. v. Dowling, doubted.

Parguassu Steam Tramroad Co., In re, Black, Hawthorn & Co.'s Case (1872) 42 L. J. Ch. 404; L. R. 8 Ch. 234; 23 L. T. 50; 21 W. R. 68, 249.—C.A.; *reversing* 27 L. T. 509.—BACON, V.-C. And see post, col. 612.

SELBORNE, L.C.—I think it right, rather in consequence of what was said by the Court of C. P. in *Brighton Arcade Co. v. Dowling*, than for any other reason, to observe that I entertain no doubt whatever that *Grissell's Case* was decided on the soundest principles. . . . As the case in the C. P. substantially is not before us, I think it wiser and better not to say more on the subject than this—that although recognising the soundness of *Grissell's Case*, when the winding up is by the Court, or voluntarily under the supervision of the Court, and professing not to depart from it, the Court of C. P. has thought it inapplicable to a case of voluntary liquidation where the Court has not intervened, and in order to arrive at that conclusion, has certainly

shaken, by some of the observations made, a portion of the foundation for the conclusion in *Grissell's Case*. I mean that part which relates to the 133rd section, which will be found in Lord Chelmsford's judgment—the Court of C. P., apparently thinking that when you deal with a voluntary liquidation under the Act, it is merely a question in which the shareholders are concerned. Whenever that subject shall require to be reviewed and further considered I hope attention will be paid to various sections in the Act to which, as far as I can see, attention was not particularly directed on that occasion.—p. 408. MELLISH, L.J. concurred.

JAMES, L.J.—I desire to be distinctly understood as saying that I concur in the doubts which the L.C. has expressed whether the decision in the case in the C. P. can be reconciled with *Grissell's Case*.—p. 410.

Grissell's Case, Calisher's Case (*supra*), col. 605), **Black, Hawthorn & Co.'s Case** and **Gibbs and West's Case** (*supra*), *discussed*, **Brighton Arcade Co. v. Dowling, disapproved.**

Whitehouse & Co., In re, (1878) 9 Ch. D. 595; 47 L. J. Ch. 801; 39 L. T. 415; 27 W. R. 181.

JESSEL, M.R.—The principle in *Grissell's Case* appears to me to cover the case of a voluntary winding up as much as that of a compulsory winding up. The next case in order of date was *Calisher's Case*, which was decided a few days before the case before the Court of C. P., and there Lord Romilly decided that you could not set off a debt due from the company to the contributory in the absence of special agreement. That latter portion of the decision has been overruled, and it has been held that you cannot do so even by special agreement. But, subject to that, so far as the case before the Court went, Lord Romilly decided most distinctly that the Court could not, having regard to the terms of sect. 101, and the decision of Lord Chelmsford in *Grissell's Case*, allow a contributory to set off a debt against a call. . . . The whole of the judgments of the full Court of C. P. [*Brighton Arcade Co. v. Dowling*] proceed, as I said before, on the assumption that the Statute of Set-off applies unless the other side can show a negative. I think if you examine the Act you can show the negative, but I do not think it is necessary to show the negative. I should have gone into this matter more fully had it not been for the elaborate discussion which the matter received from Lord Selborne in *Black & Co.'s Case*. That was the case in which the Court overruled the distinction which Lord Romilly thought might exist of a special contract, but in the course of it there is an elaborate discussion by Lord Selborne of *Brighton Arcade Co. v. Dowling*, and he so clearly points out his reasons that it would be a work of supererogation on my part to repeat what he has indicated; and I need hardly say I entirely agree with what he says on the subject. . . . There is only one observation of the V.-C. in that case [*Gibbs and West's Case*] to which it is necessary for me to refer. After discussing the decision in *Grissell's Case*, he refers to *Brighton Arcade Co. v. Dowling*. He says, "I have been referred to *Brighton Arcade Co. v. Dowling*, with regard to which I confess, after all that has been said upon it, and after all that learned judges have said, I am unable to see that it is not in conflict with *Grissell's Case*, which has

settled that, where the liability is limited, the right to set-off cannot exist." I merely cite that to show that at least one other judge has considered that there is a direct conflict between the authorities; but I am not by citing that case to be supposed to agree with the decision in other respects. Indeed, the observations I have made show that I could not agree with it. I cite it merely with reference to that observation.—pp. 603—605.

Black, Hawthorn & Co.'s Case (*supra*), referred to

Hiram Maxim Lamp Co., in re (*post*).

Gibbs and West's Case (*supra*), adhered to. Hamilton's Windsor Ironworks, in re. Pitman and Edwards, Ex parte (1879) 12 Ch. D. 707.—MALINS, V.-C. (*supra*, col. 453); not followed. West of England, &c. Bank, in re, Branwhite. Ex parte (1879) 48 L. J. Ch. 463; 40 L. T. 652; 27 W. R. 646.—FRY, J.

Grissell's Case, followed. West of England Bank, in re, Brown, Ex parte (1879) 48 L. J. Ch. 604; 12 Ch. D. 823; 41 L. T. 27; 27 W. R. 869.—FRY, J.; explained, Exchange Banking Co., in re. Flitcroft's Case (1882) 52 L. J. Ch. 217; 21 Ch. D. 519.—C.A. (*supra*, col. 429); followed. Auriferous Properties, Ltd., in re (No. 2) (1898) 67 L. J. Ch. 574; [1898] 2 Ch. 428; 79 L. T. 71; 47 W. R. 75; 5 Manson 260.—WRIGHT, J. (*and see post*, col. 608); referred to. Hiram Maxim Lamp Co., in re (1902) 72 L. J. Ch. 18; [1903] 1 Ch. 70; 61 W. R. 74.—BYRNE, J.

Duckworth, in re (*supra*, col. 605),

Strang's Case (col. 605), distinguished.

Whitehouse & Co., in re (col. 606), discussed.

General Works Co., in re, Gill's Case (1879) 48 L. J. Ch. 774; 12 Ch. D. 755; 41 L. T. 21; 27 W. R. 934.—BACON, V.-C.

Gill's Case, referred to.

Washington Diamond Mining Co., in re (1893) 62 L. J. Ch. 895; [1893] 3 Ch. 95; 2 R. 523; 69 L. T. 27; 41 W. R. 851.—C.A. LINDLEY and KAY, L.J.

Gill's Case, followed.

Auriferous Properties, Ltd., in re (No. 1) (1898) 67 L. J. Ch. 367; [1898] 1 Ch. 691; 79 L. T. 71; 47 W. R. 75; 5 Manson 260.

WRIGHT, J.—Here the creditor contributory is not a bankrupt individual, but is a company in liquidation, and therefore the particular ground on which *Duckworth*, in re, was decided is not applicable. . . . It is true that in *Gill's Case* the creditor contributory was not a company in liquidation, but that circumstance does not prevent it from being in point as a decision that the bankruptcy law of set-off is not imported by the Judicature Act into the law of companies so as to allow a set-off against calls. . . . *Duckworth*, in re, therefore has no application. . . . I think there is some difficulty in reconciling *Duckworth*, in re, with what Lord Selborne said in *Black & Co.'s Case* (*supra*, col. 605) with reference to a "statutory trustee," but I do not suppose the H. L. would now overrule what was said in *Duckworth*, in re.—p. 369.

Asphaltic Wood Pavement Co., in re, Lee and Chapman. Ex parte (1885) 54 L. J. Ch. 460; 30 Ch. D. 216; 53 L. T. 65; 33 W. R. 513.—C.A. BRETT, M.R.,

COTTON and LINDLEY, L.J.; varying (1884) 26 Ch. D. 624; 51 L. T. 321; 32 W. R. 915.—BACON, V.-C., discussed. **Price**, Ex parte, **Launceston**, in re (1875) L. R. 10 Ch. 648; 33 L. T. 113; 23 W. R. 844.—JAMES and MELLISH, L.J., distinguished.

Sovereign Life Assurance Co. v. Dodd (1892) 62 L. J. Q. B. 19; [1892] 2 Q. B. 573; 67 L. T. 396; 41 W. R. 4.—C.A.

ESHER, M.R.—I apprehend that the true distinction between that case [*Price*, Ex parte] and the present one is that pointed out in *Asphaltic Wood Pavement Co.*, in re—namely, that there was no action at all, and that the Court was only dealing with the rights of proof in bankruptcy. It is not necessary to consider what would have been the rights of the defendant if there had been no action, and if the proceedings had only been in bankruptcy; but the question is, what are his rights in this action in which the amount of his set-off is large enough to bar the company's claim altogether? This view of the case is in accordance with the decision in *Asphaltic Wood Pavement Co.*, in re, and is not contrary to that in *Price*, Ex parte.—p. 23.

BOWEN and KAY, L.J., to the same effect.

Milan Tramways Co., in re, **Thays**, Ex parte

(1884) 25 Ch. D. 587.—C.A. SELBORNE, L.C. COTTON and FRY, L.J.; affirming 52 L. J. Ch. 29; 48 L. T. 213; 31 W. R. 107.—KAY, J., applied.

Gillespie, in re, Reid, Ex parte (1885) 54 L. J. Q. B. 342; 14 Q. B. D. 963; 52 L. T. 692; 33 W. R. 707; 2 Morrell 100.—GAYE, J.

Thays, Ex parte, and **Sovereign Life Assurance Co. v. Dodd** (*supra*), discussed.

Daintrey, in re, Mant and Mant, Ex parte (1900) 69 L. J. Q. B. 207; [1900] 1 Q. B. 546; 82 L. T. 239; 7 Manson 107.—C.A. LINDLEY, M.R., SIR F. JEUNE and ROMER, L.J.

Auriferous Properties, Ltd., in re (No. 2)

(*supra*, col. 607), and **Thays**, Ex parte, principle applied.

Goy & Co., in re, Farmer v. Goy & Co. (1900) 69 L. J. Ch. 481; [1900] 2 Ch. 149; 83 L. T. 309; 48 W. R. 425.—STIRLING, J.

Liquidator.

Kemp v. Tucker, 42 L. J. Ch. 222.—MALINS, V.-C.; reversed, (1873) 42 L. J. Ch. 532; L. R. 8 Ch. 369; 28 L. T. 458; 21 W. R. 257, 470.—SELBORNE, L.C. and MELLISH, L.J.

Boyle, Ex parte, **Scholes**, in re (1878) 47

L. J. Bk. 28; 26 W. R. 216.—BACON, C.J., explained. Dempster, in re, Chesney, Ex parte (1878) 9 Ch. D. 701; 47 L. J. Bk. 117; 38 L. T. 887; 26 W. R. 633.

BACON, C.J.—My decision in *Boyle*, Ex parte, was founded on another principle, viz., that the trustee in a liquidation stands in a fiduciary relation. He is entrusted with very large powers and must use them justly. In that case it appeared that the trustee had not discharged his duty properly. There was no shadow of a reason why he should not have discharged his duty by satisfying himself that the debtor had rendered all the assistance in his power in realising the estate, and therefore I ordered the registrar to give the certificate.—p. 703.

Old Wheel Neptune Mining Co., in re, Pulbrook, *Ex parte*, Rawlings, *Ex parte* (1864) 2 De G. J. & S. 848; 10 L. T. 828; 18 W. R. 3.—KNIGHT BRUCE and TURNER, *L.J.s*, applied.
 Marselles Extension Ry. and Land Co., in re (1867) L. R. 4 Eq. 692; 17 L. T. 61; 15 W. R. 1167.—MALINS, V.-C.

Marselles Extension Ry., &c. Co., in re, *considered*.
 British Nation Life Assurance Association, in re, Henderson, *Ex parte* (1872) L. R. 14 Eq. 492; 20 W. R. 651.—MALINS, V.-C.

British Nation, &c. Association, in re, *discussed*.
 Sir John Moore Gold Mining Co., in re (1879) 12 Ch. D. 325; 28 W. R. 203.—C.A. JESSEL, M.R., RAGGALLAY and THESIGER, *L.J.s*.
 JESSEL, M.R.—Now, what is the meaning of the words "undue cause shown" in the Companies Act, 1862, s. 141? I am not prepared altogether to adopt the view of Malins, V.-C. in *British Nation, &c. Association, in re*. The words must have some meaning, but it is difficult to define the extent to which they distinguish a case from one in which the ordinary words "if the Court shall think fit" are used.—p. 330.

Sir John Moore, &c. Co., in re, *explained*.
 Adam Eytton & Co., in re, Charlesworth, *Ex parte* (1887) 57 L. J. Ch. 127; 36 Ch. D. 299; 57 L. T. 899; 36 W. R. 275.—C.A.
 COTTON, *L.J.*—I do not think that the late M.R., in *Sir John Moore, &c. Co., in re*, which has been quoted, intended to give an exhaustive definition of "due cause" or to confine it to that particular matter—namely, personal unfitness. In fact, he points out that, and what he says is this, "I should say that as a general rule it points to some general unfitness of the person, it may be from personal character, or from his connection with other parties, or the circumstances in which he is mixed up—some unfitness in the wide sense of the term." He does not intend to exhaust all the grounds; but, in my opinion—and I believe the rest of the Court agree with me—if the Court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company in liquidation, that a particular person should remain liquidator, then the Court has power to remove the present liquidator, and, of course, then to appoint some other person in his place.—p. 129.
 BOWEN, *L.J.* to the same effect. FREY, *L.J.* concurred.

Northumberland and Durham District Banking Co., in re, Totty, *Ex parte* (1860) 29 L. J. Ch. 702; 1 Dr. & Sm. 273; 6 Jur. (N.S.) 849; 8 W. R. 624.—KNIGHT BRUCE and TURNER, *L.J.s*, distinguished.
 Bank of Hindustan, China and Japan v. Eastern Financial Association (1869) L. R. 2 P. C. 489; 20 L. T. 889; 17 W. R. 554.
 SELWYN, *L.J.* (for self, SIR J. COLVILLE, GIFFARD, *L.J.* and SIR L. PEEL).—The authority of *Totty, Ex parte*, has been much pressed upon the consideration of their lordships, but the real ground of the decision in that case is explained in the marginal note of the case, which states

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that "A company was being wound up compulsorily, after an abortive attempt had been made to wind it up voluntarily, and the official liquidators agreed with thirty-five shareholders to compromise their liabilities for a fixed sum, those shareholders insisting as a condition that the data upon which the compromise was founded should not be divulged. The compromise was sworn to be founded upon details of property and circumstances, which if made known would operate detrimentally to the thirty-five shareholders and to the interests of the company. The official liquidators applied to the Court to sanction the compromise under that condition, in pursuance of sect. 19 of 21 & 22 Vict. c. 60, some of the creditors opposed on the ground of the data not being stated, and the application was refused with costs;" and on appeal the decision was affirmed. But in that case there was no question as to the liability of the thirty-five shareholders: the question was as to the amount which was likely to be recovered from those thirty-five shareholders, and that, of course, was the question which the Court had to decide when it came to consider whether such a compromise was advisable or not; and the grounds upon which that question was to be determined were, from the very terms of the compromise itself, to be kept secret. The mere statement of these facts is sufficient to distinguish that case from the present, in which there are two very different questions; first, whether those persons who are alleged to be contributories are contributories at all? and secondly, whether, assuming them to be fixed upon the list of contributories, they would be able to pay any, and if any what, proportion of the amount of the calls which might be made upon them.—p. 501.

Bank of Hindustan, &c. v. Eastern Financial Co., *followed*.
 Commercial Bank Corporation of India and the East (1860) 38 L. J. Ch. 525; L. R. 8 Eq. 241; 20 L. T. 839; 17 W. R. 840.—ROMILLY, M.R.

Totty, *Ex parte* (*supra*), *discussed*.
 Nicholl v. Eberhardt Mining Co. (1888) 58 L. J. Ch. 399; 3 Times L. R. 73.—KEKEWICH, J., *affirmed*, C.A. (*supra*, col. 482).

Trent and Humber Co., in re, Cambrian Steam Packet Co., *Ex parte*, L. R. 6 Eq. 396.—GIFFARD, V.-C.; *varied*, (1868) L. R. 4 Ch. 112; 19 L. T. 466; 17 W. R. 181.—CAIRNS, L.C.

Stearic Acid Co., in re (1863) 32 L. J. Ch. 784; 9 Jur. (N.S.) 1066; 8 L. T. 759; 11 W. R. 980.—KINDERSLEY, V.-C., *not followed*.

Welsh Flannel and Tweed Co., in re (1875) 44 L. J. Ch. 391; L. R. 20 Eq. 360; 32 L. T. 361; 23 W. R. 558.

MALINS, V.-C. said . . . that that decision [*Stearic Acid Co., in re*] did not commit itself to his judgment so strongly as the decisions of Kindersley, V.-C. generally did, "because, in his opinion as a company could not be wound up voluntarily without the appointment of liquidators, a notice of the intention to wind up voluntarily involved a notice of the intention to appoint liquidators. He therefore could not concur in that decision, and he was supported in his view by Lord Chelmsford, who in his

judgment in the *Overend Gurney Case, Oakes v. Turquand* [*supra*, col. 504], after referring to sect. 133 of the Companies Act, said, "The necessary consequence of a voluntary winding up being the appointment of liquidators, I am disposed to think that they may be appointed at the same general meeting at which the resolution for voluntary winding up is passed, without special notice." Inasmuch as this particular question had not to be decided in that case it was not necessary to give an actual decision upon it, but as *Stearie Acid Co., In re*, had been cited, if the H. L. had concurred in that decision they would have said so.—p. 398.

Angerstein, Ex parte, Angerstein, In re (1874) 43 L. J. Bk. 131; L. R. 9 Ch. 479; 30 L. T. 446; 22 W. R. 581.—JAMES and MELLISH, L.J.J.; and Stapleton, **Ex parte, Nathan, In re** (1879) 10 Ch. D. 586; 40 L. T. 14; 27 W. R. 827.—C.A. JESSEL, M.R., JAMES and BRAMWELL, L.J.J., *discussed*.

Pitts v. La Fontaine (1880) 50 L. J. P. C. 8; 6 App. Cas. 452; 43 L. T. 519.—P.C. SIR J. COLVILLE, SIR M. SMITH and SIR R. COLLIER.

Angerstein, Ex parte, and Pitts v. La Fontaine, dictum explained.

Fraser v. Province of Brescia Steam Tramways Co. (1887) 56 L. T. 771.—KEKEWICH, J.

London and Mediterranean Banking Co., In re, Birmingham Banking Co., Ex parte (1868) 37 L. J. Ch. 905; L. R. 3 Ch. 551; 19 L. T. 193; 16 W. R. 1003.—WOOD and SELWYN, L.J.J., *observed on*.

London and Mediterranean Bank, In re, Agra and Masterman's Bank, Ex parte (1871) L. R. 6 Ch. 206; 24 L. T. 376; 19 W. R. 486.—JAMES and MELLISH, L.J.J.

JAMES, L.J.—Now that we have the resolutions before us upon which the judgment of the L.J.J. proceeded in *Birmingham Banking Co., Ex parte*, I am unable really to make any substantial distinction between that case and this. . . . I cannot, therefore, distinguish the 7,500*l.* in this case from the 16,500*l.* as to which there has been a positive decision of the L.J.J., that it was not within the competency of one liquidator to accept the bills as being a merely ministerial act. It is also to be observed that there was no actual decision of the Court that the act of one liquidator under any circumstances would be sufficient. It was not necessary to decide the point in that case. I must confess I do not consider it is a decision that the acceptance of the bills can be delegated to one liquidator when the Act of Parliament says that the thing ought to be done by the two.—p. 209.

Waterhouse v. Jamieson (1870) L. R. 2 H. L. (Sc.) 29.—H. L. (Sc.). HATHERLEY, L.C., LORDS CHILMSFORD, WESTBURY and COLONSAY, *dictum* of LORD HATHERLEY *approved*. And see *supra*, col. 508.

National Funds Assurance Co., In re (1878) 10 Ch. D. 118; 48 L. J. Ch. 163; 39 L. T. 420; 27 W. R. 302.

[It was said in argument: Lord Hatherley (at p. 32) expresses it as his opinion, though he does not actually decide the point, that the liquidator, being bound to collect all the assets of the company, and distribute them amongst the creditors,

is in a position in which he may assert rights as against the company, and assume a position against its members which the company itself possibly might not be in a position to assert.]

JESSEL, M.R.—My view of the Act [of 1862] certainly agrees with that of Lord Hatherley. It seems to me that the powers of the liquidator are more extensive than those of the company. For instance, under sect. 78 he can make a member of the company pay what the company itself could never have made him pay; for he can enforce contributions from the member which the company could not have enforced.—p. 123.

And see *supra*, col. 481.

Freehold Land and Brickmaking Co., In re, Massey, Ex parte (1870) 39 L. J. Ch. 492; L. R. 9 Eq. 307; 22 L. T. 195; 18 W. R. 44.—ROMILLY, M.R.; and Trueman, **In re, Hooke v. Piper** (1872) 41 L. J. Ch. 585; L. R. 14 Eq. 278; 20 W. R. 700.—BACON, V.-C., *approved and followed*.

Grand Trunk, &c. Ry. v. Brodie (1853) 22 L. J. Ch. 514; 3 De G. M. & G. 146; 17 Jur. 309.—KENT BRUCE and TURNER, L.J.J., *distinguished*.

Anglo-Moravian Hungarian Junction Ry., In re, Watkin, Ex parte (1875) 1 Ch. D. 130; 45 L. J. Ch. 115; 83 L. T. 650; 24 W. R. 122.—C.A.

JAMES, L.J.—It is impossible to read that decision [*Massey, Ex parte*], without seeing that really it decided that which Bacon, V.-C. afterwards [*Trueman, In re*] held that it decided, namely, that credit in these cases is given to the assets of the company; that is to say, that the official liquidator is only the agent or person acting for the company. In a voluntary winding up the liquidator is appointed by the company itself to act as their agent. In a compulsory winding up he is appointed by the Court to act for the company; and that seems to be good sense, and has been so settled.—p. 133.

MELLISH, L.J. to the same effect. BAGGALLAY, J.A. concurred.

BRETT, J.—Then it is argued that there is a decision of the C. A. in *Chancery* which is inconsistent with that view [that there is no personal liability on the part of the official liquidator to the solicitor], *Grand Trunk, &c. Ry. v. Brodie*, where an order was made that the official liquidator should be personally liable to pay the costs of the opposite party, because he had appealed without, as the Court thought, sufficient grounds. . . . In the case cited there was no pretence for a contract; it was an order of the Court against a litigating party for having improperly instituted that litigation.—p. 136.

Black, Hawthorn & Co.'s Case (*supra*, col. 605), *dicta considered*.

Anglo-Moravian, &c. Ry., In re, referred to, Knowles v. Scott (1891) 60 L. J. Ch. 284; [1891] 1 Ch. 717; 64 L. T. 135; 39 W. R. 523.

BOHER, J.—In the first case [*Oriental Inland Steam Co., In re* (*supra*, col. 576)], James, L.J. used the expression "trust property"; but that was with reference to the case then before the Court; and in my opinion the judge who used that phrase was using it in order to point out that the property of the company had ceased to belong beneficially to the company after it had been wound up. There is also the phrase in

that case as to the liquidator holding the assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors, and that sect. 95 of the Act of 1862 constitutes "a trust for the benefit of all the creditors." That again is used in a general sense, and no doubt correctly, as showing that the liquidator held the assets with certain obligations resting on him; but those expressions were obviously not intended to apply to a case like this, and the learned judges were not in my opinion intending to describe the liquidator of a company as a trustee for each creditor or contributory of the company. In *Black & Co.'s Case* the expression used is that the liquidator is "a statutory trustee." That phrase again was, I think, used not in the sense in which the plaintiff seeks to use it here, but with reference to a question concerning the powers of a company and its directors as distinguished from the powers of a liquidator, and I take it as pointing out what the duty of the liquidator was. In *London and Caledonian, &c. Co., In re* (*supra*, col 554), James, L.J., in pointing out that possibly a creditor who had not been paid his debt might have his remedy against the liquidator personally, confined his observations to a case where the liquidator had acted "knowingly and wilfully," or to a case where he had been guilty of bad faith or gross or personal misconduct. In my view a voluntary liquidator is more rightly described as the agent of the company—an agent who has, no doubt, cast upon him by statute and otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders. James, L.J. referred to this as being his true position in *Anglo-Moravian, &c. Ry., In re*.—p. 722.

Freehold Land and Brickmaking Co., In re

(*supra*), explained.
New York Exchange Co., *In re* (1892), [1893] 1 Ch. 371; 3 R. 144; 68 L. T. 247.—KERKEWICH, J.

New York Exchange Co., In re, considered.

Sanitary Burial Association, Ltd., *In re* (1900) 69 L. J. Ch. 551; [1900] 2 Ch. 289; 82 L. T. 639; 48 W. R. 529; *I* Manson 459.—O.A.; varying WRIGHT, J.

WEBSTER, M.R.—The question there decided does not arise in this case; and it is only by an attempted extension of the doctrine there applied to a different state of circumstances that the decision in that case can be said to be an authority for what Wright, J. has done here.—p. 554. RIGBY and COLLINS, L.J.J. concurred.

Trench Tubeless Tyre Co., In re, Bethell v. Trench, & Co., 69 L. J. Ch. 97.—KERKEWICH, J.; *reversed*, (1900) 69 L. J. Ch. 213; [1900] 1 Ch. 408; 82 L. T. 247; 48 W. R. 810.—O.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.J.J.

Regulation as to Remuneration of Official Liquidators (1868) L. R. 3 Ch. lxiv.—*not applied.*

Amalgamated Syndicates, *In re* (1901) 70 L. J. Ch. 726; [1901] 2 Ch. 181; 84 L. T. 864. WRIGHT, J.—That was applicable only to official liquidators. There is nothing that binds me to apply it. In the matter of a voluntary liquidator each case must be considered with regard to its own particular circumstances.—p. 727.

Examination of Persons under Companies Act, 1862, s. 115.

Barned's Banking Co., In re, Contract Corporation, Ex parte (1867) 36 L. J. Ch. 262; L. R. 2 Ch. 350.—TURNER and CAIRNS, L.J.J., *considered.*

Contract Corporation, *In re, Gooch's Case* (1872) 41 L. J. Ch. 338; L. R. 7 Ch. 207; 26 L. T. 177; 20 W. R. 845.

JAMES, L.J. (for self and MELLISH, L.J.J.)—Our attention has, however, been called to the language of the L.J.J. in a case relating to this very company, who, in their observations refer to the liquidator as being in a position analogous to the secretary or other public officer of a corporation made a defendant for the purposes of discovery, and who is compellable to make the same discovery as a defendant proper would be. The point which actually arose in that case was whether an official liquidator, examined as a witness, could protect himself from answering, and it was held that he could not. We see no reason to dissent from that decision, nor from the reasons or observations of our predecessors when rightly applied to the proper kind of case. Among the other duties of an official liquidator it may fall to him to represent the company as a party litigant. The company can only sue or be sued through him, and where there is such a suit, or where there is in the winding-up a proceeding which is in substance, though not in form, a bill or action by or against the company, there, from the very necessity of the case, the adverse party has a right to deal with the official liquidator as the litigant, and to obtain from him the same measure of discovery in the same manner as he would from any other litigant. That is the principle of that case, and that principle sufficiently indicates the limits of its application.—p. 840.

Financial Insurance Co., In re, Bloxam's Case (1867) 36 L. J. Ch. 687.—STUART, V.-C.; and **Mercantile Credit Association, In re, Clement's Case** (1868) 41 L. J. Ch. 279, n.; L. R. 13 Eq. 179, n.—CAIRNS, L.C., *principle approved.*

Bank of Hindustan, China and Japan, *In re, Swan's Case* (1870) L. R. 10 Eq. 675; 22 L. T. 854; 18 W. R. 1017.—STUART, V.-C.

Swan's Case, followed.

Bank of Hindustan, China and Japan, *In re, Fricker's Case* (1871) 41 L. J. Ch. 278; L. R. 13 Eq. 178.—WICKENS, V.-C.

Clement's Case and Fricker's Case, discussed.

Gold Co., *In re* (1879) 48 L. J. Ch. 650; 12 Ch. D. 77; 40 L. T. 865; 27 W. R. 757.—O.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.J.J.

Pennyfylog Mining Co., In re (1874) 30 L. T. 861.—JESSEL, M.R., *considered.*

Silkstone and Dods-worth Coal and Iron Co., *In re, Whitworth's Case* (1881) 51 L. J. Ch. 71; 19 Ch. D. 118; 45 L. T. 449; 30 W. R. 33.—O.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J.J.

Merchants' Co., In re (1867) L. R. 3 Eq. 454.—ROMILEY, M.R.; **Gold Co., In re, and Empire Assurance Corporation, In re** (1868) 17 L. T. 488.—STUART, V.-C., *discussed.*

Grey's Brewery Co., *In re* (1883) 53 L. J. Ch.

262; 25 Ch. D. 400; 50 L. T. 14; 32 W. R. 81.
—CHITTY, J. See judgment.

Grey's Brewery Co., In re (*supra*), and **Towsey, In re** (1863) 9 L. T. 613.—GOULBURN, COMM.R., *referred to*.

London and Northern Bank, In re, Haddock's Case (1902) 71 L. J. Ch. 511; [1902] 2 Ch. 73; 88 L. T. 430, 50 W. R. 536.—BYRNE, J.; *affirmed*, C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.

Gold Co., In re (*supra*), *dictum questioned*.

Metropolitan Bank, In re, Heiron's Case (1880) 49 L. J. Ch. 651; 15 Ch. D. 139; 43 L. T. 299.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.JJ., *discussed*.

North Australian Territory Co., In re (1890) 59 L. J. Ch. 654; 45 Ch. D. 87; 63 L. T. 77; 38 W. R. 561; 2 Meg 239.—C.A. COTTON, BOWEN and FRY, L.JJ.

BOWEN, L.J.—Having regard to those characteristics of this section (sect. 115) which I have touched upon, I certainly should be loth to conclude that the witness, if I may call him a witness, the examinee, the person who is to be examined, and against whom or upon whom the order has been served, has not a *locus standi* to complain that that order is oppressive or hard upon him; and though it is not necessary to decide one way or the other in this case, it seems to me that the point ought to be left open, notwithstanding the language of the late M.R. in *Gold Co., In re*, which seem to me, at the first blush, to go too far, and indeed to be contrary to the decision in *Heiron's Case*.—p. 658.

North Australian Territory Co., In re, distinguished.

London and Northern Bank, In re, Archer, Ex parte (1901) 85 L. T. 698; 50 W. R. 262.—C.A. V. WILLIAMS, ROMER and COZENS-HARDY, L.JJ.

Costs.

Humber Ironworks, and Shipbuilding Co., In re (1866) 35 Beav. 346; L. R. 2 Eq. 15; 12 Jur. (N.S.) 265; 14 L. T. 216.—ROMILLY, M.R., *not followed*.

European Banking Co., In re, Baylis, Ex parte (1866) 35 L. J. Ch. 690; L. R. 2 Eq. 521; 12 Jur. (N.S.) 615; 15 L. T. 310.—KINDERSLEY, V.-C.

Humber Ironworks & Co., In re, and European Banking Co., In re, considered. Anglo-Egyptian Navigation Co., In re (1869) L. R. 8 Eq. 660; 21 L. T. 19.

[Counsel having urged that in *Albion Bank, In re*, on December 8, 1866, where the petition was opposed by more than one set of creditors and dismissed, Stuart, V.-C. went further than *European Banking Co., In re*.]

JAMES, V.-C.—I am of opinion that the proper view of all these cases is that which is attributed to Stuart, V.-C., who is understood to have said he would not adopt any rule as to allowing only one set of costs to opposing shareholders or creditors.—p. 662.

Bank of London Assurance Association, In re, Part's Case (1870) L. R. 10 Eq. 622; 23 L. T. 805; 18 W. R. 977.—BACON, V.-C., *not followed on question of costs*.

Mutual Society, In re, Grimwade v. Mutual

Society (1881) 50 L. J. Ch. 400; 18 Ch. D. 530; 30 W. R. 242.—JESSEL, M.R.

Bank of Hindustan, China and Japan, In re, Mackrill-Smith's Case (1867) 37 L. J. Ch. 185; L. R. 3 Ch. 125; 17 L. T. 339; 16 W. R. 170.—CAIRNS, L.J., *followed*.

Trent and Humber Shipbuilding Co., In re, Bailey and Leetham, Ex parte (1869) 38 L. J. Ch. 485; L. R. 8 Eq. 94; 20 L. T. 301; 17 W. R. 1079.—JAMES, V.-C.

Mackrill-Smith's Case and Bailey and Leetham's Case, followed.

Home Investment Society, In re (1880) 14 Ch. D. 167; 23 W. R. 576.—MALINS, V.-C.

Marlborough Club Co., In re (1868) L. R. 5 Eq. 365.—ROMILLY, M.R.; and **Marlborough Club Co., In re, Percival, Ex parte** (1868) L. R. 6 Eq. 519.—ROMILLY, M.R., *explained*. And see post, col. 617.

Cape Breton Co. v. Fenn (1881) 50 L. J. Ch. 321; 17 Ch. D. 198; 44 L. T. 445; 29 W. R. 386.—C.A. JESSEL, M.R., COTTON and LUSH, JJ., *applied*. And see post, col. 617.

Home Investment Co., In re, discussed and distinguished.

Dronfield Silkstone Coal Co., In re (No. 2) (1893) 52 L. J. Ch. 963; 23 Ch. D. 511; 31 W. R. 671.—CHITTY, J.

Home Investment Society, In re, followed.

Dronfield Silkstone Coal Co., In re (No. 2), *not followed*.

Dominion of Canada Plumbago Co., In re (1884) 53 L. J. Ch. 394, 702; 27 Ch. D. 33; 50 L. T. 518.—PEARSON, J. and C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ.

Mackrill-Smith's Case; Home Investment Society, In re, and Percival, Ex parte (*supra*), *applied*.

National Building and Land Co., In re, Clitheroe, Ex parte (1885) 15 L. R. 47.—CHATTERTON, V.-C. And see post, col. 617.

Home Investment Society, In re, and Dominion of Canada Plumbago Co., In re, principle applied.

Blundell, In re, Blundell v. Blundell (1890) 59 L. J. Ch. 269; 44 Ch. D. 1; 62 L. T. 620; 38 W. R. 707.—C.A. COLLINS, LINDLEY and LOPES, L.JJ.

Dominion of Canada Plumbago Co., In re, discussed.

Staffordshire Gas and Coal Co., In re (1893) 63 L. J. Ch. 69; [1893] 3 Ch. 523; 8 R. 365; 69 L. T. 376.—KEKEWICH, J.

Staffordshire Gas and Coke Co., In re, overruled.

R. Bolton & Co., In re, Salisbury-Jones and Dale's Case (1895) 64 L. J. Ch. 285; [1895] 1 Ch. 333; 12 R. 177; 72 L. T. 171; 2 Manson 221.—C.A.

LINDLEY, L.J.—The summons in this case was taken out by the appellants, not by the liquidator. Under such circumstances it is clear that the appellants are only entitled to costs out of the assets of the company. Kekewich, J. appears to have thought, in the similar case of *Staffordshire Gas and Coke Co., In re*, that the practice was the other way, and that an order ought to be

made against the liquidator personally; but that is not so unless the liquidator has done something to make himself personally liable for the costs.—*p.* 285. A. L. SMITH, L.J. concurred.

Marseilles Extension Ry. and Land Co., In re, Smallpage's and Brandon's Cases (1885) 55 L. J. Ch. 116; 80 Ch. D. 598.—PEARSON, J.; **Home Investment Society, In re; Mackrill-Smith's Case, and Dominion of Canada Plumbago Co., In re** (*supra*), discussed and followed.

Cape Breton Co. v. Fenn (*supra*), explained. **Perceival, Ex parte** (*supra*), **Dronfield Silkstone Coal Co., In re** (No. 2) (*supra*), and **Clitheroe, Ex parte** (*supra*), not followed.

London Metallurgical Co., In re, Parker, Ex parte [1895] 1 Ch. 758; 64 L. J. Ch. 442; 72 L. T. 421; 13 R. 486; 48 W. R. 476; 2 Manson 276.

V. WILLIAMS, J.—It was at one time contended that the terms of the Companies Act, 1862, were such that a successful litigant in proceedings with the liquidator, or with the company through its liquidators, or with the company after liquidation had begun, must come in and prove in respect of his claim *pari passu* with the creditors of the company who were such at the date of the order for winding up. But that contention was disposed of by Malins, V.-C. in *Home Investment Society, In re*. . . Lord Cairns, in *Smith, Ex parte* (which Mr. Cross says has been misunderstood), decided at least this, that a successful litigant in proceedings commenced after the winding-up order has a right to be paid in priority to the general costs of the liquidation. To my mind that is laid down in the plainest possible manner by Lord Cairns, and subsequent cases recognise that he did so. The proposition that a successful litigant is entitled to be paid in priority to the general costs of the liquidation was affirmed in *Home Investment Society, In re*, and also in *Dominion of Canada Plumbago Co., In re*—certainly by Pearson, J. and as I read it by the C. A. also. . . . When once a person is in a position to say, "I am entitled to rank on this fund," that is to say, the assets available for the purposes of liquidation, he and all other persons in the same position must be dealt with on a footing of equality irrespective of the dates of their judgments. The obtaining of the order for costs creates no sort of a charge on the assets, but I cannot see that *Cape Breton Co. v. Fenn* decides more than that. . . . The remarks of Sir G. Jessel in that case only show that when there is an insolvent fund, and various claimants have obtained orders for costs entitling them to rank on that fund, such persons obtain no charge on the fund, and the dates of the orders give no priority. The liquidator seeks to treat that case as a decision that a successful litigant who gets an order for costs is not entitled to payment until the liquidation has been completed, so that provision may be made for the whole costs of the liquidation, including contingent debts, and fresh debts incurred of the character of those to which priority is given under r. 31 of the Rules of 1890, or the general practice of the Chancery Division. I do not understand the case to decide anything of the kind, and I am not going to hold that the right to payment is postponed until all possible claims, contingent or otherwise, in the winding-up have come in. . . . It is said that Lord Romilly decided in *Perceival, Ex parte*, that the litigant was not entitled to immediate payment,

and that no order for payment to him could be made while the liquidator's remuneration remained unpaid, and it seems to me that he did so decide. But I cannot agree that that decision was recognised as correct by the C. A. in *Dominion of Canada Plumbago Co., In re*. When that case was before Pearson, J. he said in terms that the litigant was entitled to be paid forthwith, and that means, of course, in conjunction with others in the same position, and subject to abatement in case of deficiency. But it is said that the L.J.J. went on a different principle and followed *Perceival, Ex parte*. It seems to me that they did nothing of the kind. The order made in *Dominion of Canada Plumbago Co., In re*, was that the liquidator should pay Kirby, who was the litigant, the taxed costs of his litigation, and should be at liberty to retain the amount out of the assets of the company. . . . The decision there [*Smallpage's and Brandon's Cases*] was as to the circumstances under which a liquidator ought to be ordered personally to pay the costs of proceedings in which he has been unsuccessful, and has nothing to do with the question raised in the present case. . . . I might be thought wanting in respect for the Irish Court if I did not refer to *Clitheroe, Ex parte*. The final words of the judgment in that case are as follows: "I do not, however, think that they are entitled to an order for immediate payment, as this might possibly interfere with the rights of other persons; and *Perceival, Ex parte*, and *Dunson's Estate Fireclay Co., In re* (*supra*, col. 578), are authorities against making such an order." Those words seem to support the contention of the liquidator in the present case; but the Irish case is perhaps the only direct authority in his favour, unless *Perceival, Ex parte*, is one. In *Clitheroe, Ex parte*, however, the Court was dealing with a very different case from this. The company was being wound up under the supervision of the Court, and the landlords of property held by the company, without obtaining the leave of the Court, brought an action to recover possession, and obtained judgment. Under these circumstances it was held that they could not have an order for immediate payment of their taxed costs. The decision does not seem to me to accord with the current of authority in this country—*pp.* 768—770.

Horlock v. Priestley (1837) 8 Sim. 621.—SHADWELL, V.-C., approved.

Boynton v. Boynton (1879) 4 App. Cas. 783; 41 L. T. 450; 27 W. R. 825.—H.L. (M.). CAIRNS, L.C., LORDS HATHERLEY and BLACKBURN; affirming (1878) 9 Ch. D. 250.—C.A. JAMES, BRETT and COTTON, L.J.J., principle applied.

London Drapery Stores, In re (1898) 67 L. J. Ch. 690; [1898] 2 Ch. 684; 79 L. T. 592; 47 W. R. 118; 5 Manson 338.—WRIGHT, J.

COMPROMISE.

Gordon v. Gordon (1816—1821) 3 Swanst. 400. 468; 19 R. R. 280, commented on.

Malone v. Malone (1841) 8 Cl. & F. 179. West 637; 8 Ir. Eq. R. 536; S. C. *nom.* *Malone v. O'Connor*, 2 Dr. & Wal. 491, 536.

COTTENHAM, L.C.—The case of *Gordon v. Gordon* is entitled to the highest consideration; because it is a case which Lord Eldon decided; and Lord Eldon's observations, as reported, would imply that he doubted, at least, whether it might not have been better to have decided upon the other parts of the case before the expense was incurred of an issue as to whether the plaintiff was heir-at-law or not. I cannot but feel very considerable doubt whether these expressions did fall from Lord Eldon at least, without some qualification, which is not to be found in the report; because when the facts of that case are considered (and I very well remember the case in the Court of Chancery), it is clear that the Court could not deal with the question without knowing who was the heir-at-law. That was a contest between two brothers for the family estates; it related to the legitimacy of the elder one, the younger brother claiming, because he alleged the elder brother was illegitimate. In that contest the parties came to an arrangement between themselves, by which they agreed upon a certain division of the property. It afterwards appeared that the younger brother, at the time he got his elder brother to enter into this compromise upon the supposed doubt whether the marriage of their parents had taken place anterior to the birth of the eldest son, was in possession of evidence of the marriage; and that he, therefore, had induced his brother to part with this property, to which the elder brother was clearly entitled, upon the supposition of there being a doubt as to the marriage, when, in point of fact, he was in possession of evidence to prove it. The elder brother discovering this, filed his bill to be released from that arrangement, upon the ground that the younger brother had practised a fraud upon him, and ultimately he succeeded. But how could that question have been decided between the parties without the fact being known whether the elder brother was legitimate or illegitimate? The whole foundation of the charge was, that his younger brother knew it, and concealed the fact from him when he got him to come into the arrangement. It is impossible, therefore, that Lord Eldon could have meant this: that the Court had decided whether the arrangement was fraudulent or not, without first ascertaining the fact upon which the existence of the alleged fraud rested.—p. 200.

Grey v. Pearson (1857) 26 L. J. Ch. 473; 6 H. L. Cas. 61; 3 Jur. (N.S.) 823, *followed*.
Faber v. Lathom (Earl) (1897) 77 L. T. 168.—
 HAWKINS, J.

Collingham v. Sloper; Foreign, American and General Investments Trust v. Sloper (1893) 62 L. J. Ch. 416; [1893] 2 Ch. 96; 3 R. 272; 69 L. T. 39; 41 W. R. 550.—**NORTH, J.; reversed**, (1894) 64 L. J. Ch. 149; [1894] 3 Ch. 716; 12 R. 87; 71 L. T. 456.—**C.A.**

Gilbert v. Endean (1878) 9 Ch. D. 259; 30 L. T. 404; 27 W. R. 252.—**C.A. JESSEL, M.R., BRETT and COTTON, L.J., followed**.
Emery v. Woodward (1880) 59 L. J. Ch. 230; 43 Ch. D. 185; 61 L. T. 666; 38 W. R. 346.—
NORTH, J.

Walters v. Morgan (1861) 3 De G. F. & J. 718, 723; 4 L. T. 758.—**L.C.**; and **Ellard v.**

Llandaff (Lord) (1810) 1 Ball & B. 241; 12 R. R. 23, *discussed*.

Turner v. Green (1895) 64 L. J. Ch. 539; [1895] 2 Ch. 205; 13 R. 551; 72 L. T. 763; 43 W. R. 537.

CHITTY, J.—I cannot discover that *Ellard v. Llandaff* (Lord) has been either approved or disapproved in any other case; but it is questioned in Fry on Specific Performance (3rd ed.), p. 333, where the author says that if the case is to be supported on the ground of the silence of the lessee as to the life being *in retinens*, it must be on the principle that the silence, though not fraud, constituted such unfairness in the contract as to stay the hand of the Court.—p. 541.

CONDITION.

CONSTRUCTION AND VALIDITY.

France's Case (1610) 8 Co. Rep. 89, b.: **Fry v. Porter** (1670) 1 Vent. 199; 1 Mod. 300. Raym. 286; and **Mallou v. Fitzgerald** (1683) 3 Mod. 29; Skm. 125, *followed*.

Rundall v. Ealey (1666) Cart. 92, 170; 1 Mod. 314.—**BRIDGEMAN, C.J., overruled**.
Doe d. Kenrick v. Beauchamp (1809) 11 Rast 657; 11 R. R. 307.—**ELLENBOROUGH, C.J.**

Byng v. Strafford (Lord) (1843) 12 L. J. Ch. 169; 5 Beav. 558; 7 Jur. 98.—**LANGDALE, M.B.; affirmed, non. Hoare v. Byng** (1844) 10 Cl. & F. 508; 8 Jur. 563.—**H. L. (E).** **LYNDHURST, L.C., LORDS BROUGHAM, COTTENHAM and CAMPBELL.**

Mitchel v. Reynolds (1711) 1 P. Wms 181. —**PARKER, C.J., approved**

Wilkinson v. Wilkinson (1871) 40 L. J. Ch. 242; L. R. 12 Eq. 604; 24 L. T. 314; 19 W. R. 558.

STUART, V.-C.—In *Mitchel v. Reynolds*, Parker, C.J. has classified such conditions as these. He said, "All the instances of conditions against law in a proper sense are reducible under one of these heads: First, either to do something that is *malum in se*, or *malum prohibitum*. Secondly, to omit the doing of something which is a duty. Thirdly, to encourage such crimes and omissions. Such conditions as these the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes."—p. 244.

Stapilton v. Stapilton (1789) 1 Atk. 2.—

HARDWICKE, L.C., principle applied.
Cooke v. Turner (1846) 17 L. J. Ex. 106; 15 M. & W. 727.—**ROLFE, B. (for the Court);** (1847) 16 L. J. Ch. 487; 15 Sim. 611; 11 Jur. 702.—**SHADWELL, V.-C.**

Cooke v. Turner, approved.

Dickson, in re (1850) 20 L. J. Ch. 33.—**ROLFE, V.-C., discussed**.

Evanturel v. Evanturel (1874) 43 L. J. P. C. 53; L. R. 6 P. C. 1; 23 W. R. 32; 51 L. T. 105.
SIR J. COLVILLE (for self, SIR B. PEACOCK, SIR M. SMITH and SIR R. COLLIER).—There are undoubtedly *dicta* and even decisions in some of the earlier cases to the effect that conditions of this kind [that a legatee disputing the will

should be deprived of its benefits] were to be held to be *in terrorem* only, and, in the language of the Touchstone, "against the liberty of the law." But in the case of personal legacies, effect was given to the condition if there was a gift over on the breach of the condition. The whole law on this subject appears to their lordships to have been considered and put upon a sound foundation by the Court of Ex. in *Cooke v. Turner*, upon the case sent to them by the Court of Ch. It was suggested at the bar that that ruling was not acted upon by the Court of Ch. in the particular case. But, from the report of that case in the 15th volume of Simons' Reports, it appears that, though pressed to send the case before another Court of law, the V.-C. of England declined to do so, but directed, in the interest of the unborn issue of a marriage, an issue so framed as not to involve the forfeiture by the legatees of their legacy under the clause assumed to be valid. *Dickson, Ex parte*, which was decided by Lord Cranworth as V.-C. after his judgment in *Cooke v. Turner*, is supposed to conflict with the latter. But it does not really do so. No doubt the learned judge says of such conditions as the present, that they had been "considered (whether justly or not it is unnecessary to inquire) as contrary to the policy of the law." But he was not in any way called upon to decide that question: he was dealing with a condition of a very different kind, to which he gave effect. The real effect of his judgment is only that, if the condition be *conditio rei licite*, it ought to be enforced. It does not affect the authority of *Cooke v. Turner*. —p. 68.

Tennant v. Brais (1609) Toth. ed. 1671, p. 141; ed. 1820, p. 78; **Brown v. Peck** (1758) 1 Eden 140. — **HENLEY, L.K.**; and **Wren v. Bradley** (1848) 17 L. J. Ch. 172; 2 De G. & Sm. 49; 13 Jur. 168. — **KNIGHT BRUCE, V.-C., considered.**
Moore, In re, Trafford v. Maconochie (1888) 57 L. J. Ch. 320, 986; 39 Ch. D. 116; 59 L. T. 681; 37 W. R. 83; 52 J. P. 596. — C.A.; affirming 36 W. R. 427. — **KAY, J.**

COTTON, L.J. — In *Tennant v. Brais*, upon the fair construction of the words, the gift was a gift upon condition, not a limited gift. A sum was to be paid once for all if a woman was divorced; there was nothing imposing a limit on the duration of the gift. In *Brown v. Peck* the report is not clear either as regards the facts or the principle laid down. The testator, after noting that his niece had married without the consent of her mother, directed that if she lived with her husband his executors should pay her 2l. per month and no more, but if she lived from him and with her mother, then they should allow her 5l. per month. Lord Henley treated this as a condition, for he says, "the condition annexed being both impossible at the time of imposing it and *contra bonos mores*, the legacy was simple and pure." What was meant by "impossible" it is hard to say; but that is not material. All that is of importance is that it was treated as a condition, and the words could reasonably be so construed. *Wren v. Bradley* occasions more difficulty. There was first a gift of an annuity to the testator's daughter, subject to conditions which were *contra bonos mores*. Then there was a gift of the income of one-third of an accumulated fund to the same daughter "during such time as she shall continue to live

apart from her husband, Abraham Wren;" and then came a condition in the form of a subsequent condition, that if she should at any time cohabit with her husband, then "during such time as she should cohabit with him" the income should be paid to other persons. It was proved that at the date of the will she was living apart from her husband. The V.-C. appears to have been impressed by that, and to have looked at the gift of the income as an immediate gift of it to the wife, subject to a proviso that if she returned to cohabitation the trust for payment to her should cease. I think this was the real ground of his decision, though he does not clearly state his reasons. . . . If that construction of the will be adopted as correct, there is no difficulty about the decision, for as to the annuity, the rule of the civil law clearly applied. — p. 938.

BOWEN, L.J. to the same effect. **FRY, L.J.** concurred.

Moore, In re, Trafford v. Maconochie, distinguished.

Corbett v. Corbett (1888) 58 L. J. P. 17; 14 P. D. 7; 60 L. T. 74; 37 W. R. 114. — C.A. **COTTON, LINDLEY and BOWEN, L.JJ.**

Franco v. Alvares (1746) 3 Atk. 342. — **HARDWICKE, L.C., followed.**

Tollner v. Marriott (1830) 9 L. J. (o.s.) Ch. 14; 4 Sim. 19. — **STUART, V.-C.**

Tollner v. Marriott, distinguished.

Hartley, In re, Stedman v. Dunster (1887) 56 L. J. Ch. 564; 34 Ch. D. 742; 56 L. T. 565; 35 W. R. 624.

NORTH, J., after referring to this case, and pointing out that the report in the Law Journal contained facts not in the other report, said: That seems to differ from the present case in various respects. In the first place, I do not see my way to construe this will as the V.-C. construed the will in that case, because I should have to say that the condition imposed on the next-of-kin of establishing their rights within a year was of no importance, and I cannot see how that requirement can be got rid of by any judgment for the administration of the estate. In the next place there is this difference. The learned judge proceeded on the fact that a general decree had been made for the administration of the estate. That is not the case here. The parties have taken advantage of a mode of proceeding which enables them to do without a general administration decree, and have adopted proceedings by which the Court can deal with questions which arise in administering the trusts of the will without administering the trusts generally. Therefore, whatever the effect of a general administration decree would have been, it has no application in the present case. — p. 566.

Stul's Trusts, In re (1853) 22 L. J. Ch. 917; 4 De G. M. & G. 404; 17 Jur. 749; 1 W. R. 499. — **KNIGHT BRUCE and TURNER, L.JJ., approved.**

Sutton, Garden & Co. v. Goodrich (1899) 80 L. T. 765. — **KENNEDY, J.**; and **Sampson, In re, Sampson v. Sampson** (1896) 65 L. J. Ch. 406; [1896] 1 Ch. 630; 74 L. T. 246; 44 W. R. 557. — **STIRLING, J., principle applied.**

Bates v. Bates (1884) 19 L. J. N. C. 67;

W. N. (1884) 129.—PEARSON, J., *not followed*.
Greenwood, In re, Sutcliffe v. Gledhill (1901)
70 L. J. Ch. 326; [1901] 1 Ch. 887; 84 L. T.
118; 49 W. R. 461.—FARWELL, J.

Sheffield v. Orerry (Lord) (1745) 3 Atk. 282.
—HARDWICK, L.C. *applied*.
Webb v. Grace (1848) 18 L. J. Ch. 13; 2 Ph.
701; 12 Jur. 987.—COTTENHAM, L.C.; *reversing*
S. C. *nom.* Grace v. Webb (1846) 16 L. J. Ch.
113; 15 Sim. 384.—SHADWELL, V.-C.

Webb v. Grace, distinguished. Machu, In re
(1882) 21 Ch. D. 838; 47 L. T. 577; 30 W. R.
887.—CRITTY, J.; Corbett v. Corbett (col. 622).

Machu, In re, discussed.
Dugdale, In re, Dugdale v. Dugdale (1888) 57
L. J. Ch. 684; 38 Ch. D. 176; 58 L. T. 581; 36
W. R. 462.

KAY, J.—The words "conditional limitation"
seem to be used in that case not in the sense in
which Fearne and Butler employ them, but rather
to describe an estate upon which a contingent
remainder might be limited. According to the
illustration which I have given from the definition
by Fearne (Contingent Remainders, 10th
ed., p. 15), the limitation in *Machu, In re*, would be
in a deed a conditional limitation defeating a
fee-simple, and in a will an executory devise.—
p. 637. See judgment at length, where the cases
are reviewed.

Ross v. Ross (1819) 1 J. & W. 154; 20 R. R.
263.—PLUMER, M.R., *applied*.
Cuthbert v. Purrier (1822) Jacob 415; 23 R. R.
104.—PLUMER, M.R.

**Ross v. Ross; Cuthbert v. Purrier, and
Doe d. Stevenson v. Glover** (1845) 14 L. J.
C. P. 169; 1 C. B. 448.—TINDAL, C.J.,
discussed.

Palmer, Ex parte (1852) 5 De G. & Sm. 649; 17
Jur. 108.

PARKER, V.-C. said that *Ross v. Ross* and
Cuthbert v. Purrier were not altogether to be
reconciled with *Doe v. Glover*.

Doe v. Glover, questioned.
Gulliver v. Vaux (1746) 8 De G. M. & G.
167, n.—WILLES, C.J., *approved*.
Holmes v. Godson (1856) 8 De G. M. & G. 152;
25 L. J. Ch. 317; 2 Jur. (N.S.) 383; 4 W. R.
415.

TURNER, L.J. (after discussing *Gulliver v. Vaux* and other cases) said—In the argument of
this case, great reliance was placed, on the part of
the defendants, on *Doe v. Glover*, but in that case
the Court seems to me to have proceeded upon
the ground, that the devise over was not repug-
nant to or inconsistent with the prior devise,
and the Court, therefore, certainly did not intend
to disturb the previous authorities or the prin-
ciple on which they proceeded. The devise was
there a devise in fee, and in case the devisees
should not have parted with or disposed of the
same, then over. The Court was of opinion that
he could not, under that, dispose of it by will,
but that the testator meant, unless there was a
parting with or disposition of the estate by deed
in the lifetime of the first devisee, the devisees
over would take, and the executory devise over
to them would be good. I may observe, too,
that the attention of the Court seems hardly to

have been drawn to the point, that the devise
over, as it was construed, took away the testa-
mentary power which was incident to the fee
first devised. Not one word seems to have fallen
from the Court or from counsel in the course of
the argument as to the effect of that decision
being to contravene the rule of law by which
every devise in fee has a testamentary power.
But it is plain on looking at the cases, that if a
man says the estate shall go over if you do not
dispose of it by deed; he says, you shall not
have that power which the law gives of disposi-
tion by will. That point seems not to have been
drawn to the attention of the Court, and, I will
venture to add, that, if *Doe v. Glover* is to be
considered as conflicting with the other authori-
ties, I think that the other authorities, and
especially *Gulliver v. Vaux*, ought to prevail
against it.—p. 165.

KNIGHT BRUCE, L.J. to the same effect.

Maseham v. Bluet (1618) Bridgm. Rep.
132; and **Daniel v. Ubley** (1625) W.
Jones 137; Latch. 9, 30, 134, *followed*.
Doe d. Gill v. Pearson (1805) 6 East 173; 2
Smith 295; 8 R. R. 447.—ELLENBOROUGH, C.J.

Doe v. Pearson, questioned
Attwater v. Attwater (1853) 23 L. J. Ch. 692;
18 Beav. 330; 18 Jur. 50; 2 W. R. 81.—
ROMILLY, M.R.

Bragg and Tanner's Case (1622) Sheppard's
Touchstone, 7th ed., vol. i., p. 180,
approved.

Attwater v. Attwater, followed.
Billing v. Welch (1871) 6 Ir. C. L. Rep. 88.—
WHITESIDE, C.J., O'BRIEN and GEORGE, JJ.

Attwater v. Attwater, distinguished.
Macleay, In re (1875) 41 L. J. Ch. 441; L. R.
20 Eq. 186; 32 L. T. 682; 23 W. R. 718.

JESSEL, M.R.—I must consider that case,
recognising, as it does, those older authorities
as being good law, to have proceeded on the
particular wording of that will, and more
especially on the latter clause. I do not say
that the clause does have the same effect on my
mind that it had upon the mind of my pre-
decessor; but it is useless to criticise a question
of construction, when you come to the conclusion
that the judge is intending not to lay down a
new rule of law, but is simply construing the
particular instrument before him. Therefore I
consider that *Attwater v. Attwater* does not
affect the law of the case.—p. 445.

Bragg and Tanner's Case, approved.
Macleay, In re, commented on.
Large's Case (1587) 2 Leon. 82; 3 *Ibid.*
182, *considered*.

Rosher, In re, Rosher v. Rosher (1884) 26
Ch. D. 801; 53 L. J. Ch. 722; 51 L. T. 785;
32 W. R. 820.

PEARSON, J. (after discussing *Maseham v. Bluet*, *Daniel v. Ubley*, and *Doe v. Pearson*, continued).—In *Attwater v. Attwater*, no doubt,
Lord Romilly challenged the correctness of the
decision in *Doe v. Pearson*. In *Macleay, In re*,
Jessel, M.R., thought that, as *Doe v. Pearson* was
decided in the year 1805, it was too late to go
contrary to it, and, having in *Macleay, In re*, a
devise which was very similar to that in *Doe v. Pearson*,
he followed what he conceived to be the
rule in *Doe v. Pearson*, and decided that the

condition in *Maclean, In re*, was a valid condition. If there were nothing else in *Maclean, In re*, I do not think I need have discussed it any further, because the condition with which I have now to deal is not like the conditions in any one of the cases to which I have referred. But, no doubt, there are some observations of the M.R. in *Maclean, In re*, which were very strongly and very properly relied upon by Mr. Barber, because the authority of Sir G. Jessel is very great. I cannot possibly ignore those observations, and I feel bound to take exception to them, for I cannot agree with the propositions which they lay down. After citing those sections from Littleton to which I first referred (sects. 360—362), and also referring to *Muschamp v. Bluet*, Jessel, M.R., says: "So that, according to the old books, Sheppard's Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially; it is a question of substance and not of mere form." I apprehend that the meaning of the word "substantially" is this: Does it really deprive the devise of the power of alienation, or does it only so restrain it that in effect he still has the power of alienation? If the latter it is good. The M.R. continues: "Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled, or is not good law, this is a good condition." With all deference to Sir G. Jessel, I do not find in Coke upon Littleton that which he seems to have found, and I must say this, that when you refer to Coke upon Littleton, with all deference to that learned judge, we must bear in mind that he was not always consistent with himself. I find, for instance, this (Co. Litt. 223 b): "And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the estate be lawful, yet the condition is good, because the reversion is in the donor." When, however, I turn to *Sir Anthony Mildmay's Case* (1606) 6 Co. Rep. 43 a I find this: "So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant." I find also this (Co. Litt. 223 b): "If a man make a gift in

tail, upon condition that he shall not make a lease for three lives, or twenty-one years, according to the statute of 32 Hen. 8, the condition is good, for the statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the Act, according to that rule of law, *quilibet potest renuocare juri pro se introducto.*" And in *Mary Portington's Case* (1614) 10 Co. Rep. 39 a there is this: "For suppose that a man makes a gift in tail, and further grants, that he may make leases for years or lives according to the said Act: or to levy a fine with proclamations, according to the Acts in such case to bar his issues: provided always, that he shall not make leases, or levy a fine: none will deny but such proviso would be repugnant: and, by consequence, in the other case, when such incidents are tacitly implied"—that is, whether the incidents are mentioned or not, you cannot make a condition of that kind. I think, therefore, Lord Coke must be read with a certain amount of caution, and I may say that, if any one will take the trouble to read two or three passages in Sheppard's Touchstone, he will find that the learned professors of the law are perpetually at loggerheads as to what is a good condition, and the reason is that they have departed from the first principle, that a condition which is repugnant to a gift is a void condition, and the exceptions have been made without any principle at all, and it is therefore perfectly impossible to say by any rule what exceptions are good and what are bad. I should be very sorry to do Sir G. Jessel any injustice, and I must honestly say that in attempting to criticise so able and learned a judge I am always afraid of falling into some error myself, and I am not quite certain that I understand correctly the extent to which in those passages he means to go. If he means to assert that, provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is, that I most respectfully differ from him, and I cannot understand how, after he had cited the maxim from Coke which he had quoted, he should have tried to lay down any such doctrine.—p. 817.

His lordship then considered *Large's Case*.

Serjeant Rudhall's Case, Savile, Case clv. p. 76; *S. C. nom. Rudhall v. Milward* (1586) Moore 212; 1 Leon. 298, approved. **Maclean, In re**, dictum of JESSEL, M.R.; and **Dunn v. Flood** (1888) 53 L. J. Ch. 537; 25 Ch. D. 629, dictum of NORTH, J., discussed and followed. See "VENDOR AND PURCHASER."

Hollis' Hospital Trustees and Hague's Contract, In re (1899) 68 L. J. Ch. 673; [1899] 2 Ch. 540; 81 L. T. 90; 47 W. R. 691.—BYRNES, J. See judgment at length.

PERFORMANCE.

Yates v. University College, London, 27 L. T. 538; 21 W. R. 242.—BACON, V.-C.; reversed, (1878) 42 L. J. Ch. 566; L. R. 8 Ch. 454; 28 L. T. 461; 21 W. R. 533.—C.A. SELBORNE, L.C. and MELLISH, L.J.; C.A. affirmed, (1875) 45 L. J. Ch. 187; L. R. 7 H. L. 498.—H.L. (E). CAIRNS, L.C., LORDS CHELMSFORD and HATHERLEY.

Hawkins v. Luscombe (1816) 2 Swanst. 375.—ELDON, L.C.; and **Doe d. Luscombe v. Yates** (1822) 5 B. & Ald. 544.—ABBOTT, C.J. (for the Court), *discussed*.

Walker v. Walker (1860) 29 L. J. Ch. 856; 2 De G. F. & J. 255.—CAMPBELL, L.C.; **Guth v. Burton** (1839) 1 Beav. 478; 3 Jur. 817.—LANGDALE, M.R.; **Smith, In re, Keeling v. Smith** (*post*) col. 634; and **Tanner v. Tebbutt** (1843) 12 L. J. Ch. 216; 2 Y. & C. C. C. 225; 7 Jur. 339.—KNIGHT BRUCE, V.-C., *distinguished*.

Bevan v. Mahon-Hagan (1893) 31 L. R. Ir. 342.—C.A. PORTER, M.R., PALLES, C.B., FITZGIBBON and BARRY, L.JJ.

PORTER, M.R.—*Doe v. Yates* shows that a name may be voluntarily assumed, and I know of no authority for saying that arms also may not be voluntarily assumed by a person entitled to bear them. Some cases were cited to show that the conduct of the testator had freed the defendant from the condition. . . . That (*Walker v. Walker*) was a case where the testator by his own act, subsequent to the will, rendered impossible the performance of the condition imposed by the will, and it was held that the condition had been discharged by the testator himself. In *Guth v. Burton* the condition was that if the legatee should pay a debt due to the testator immediately after the death of the testator, he should receive the legacy, "but not otherwise." The testator, before his death, accepted a composition in bankruptcy from the legatee in discharge of the debt, and the Court held that the legacy was payable, as the debt had been forgiven and abolished by the act of the testator himself. Here again the *ratio decidendi* was, that owing to what the testator had himself done, the performance of the condition would have involved an impossibility. In the case before us, however, there was no impossibility in the way of assuming the testator's arms. It is absurd to say that by not giving money to do the act he rendered it impossible. We were also referred to *Smith, In re*. There the question was whether a marriage had been consented to by trustees, and it was held on the facts that their consent had been substantially given. Similarly in *Tanner v. Tebbutt* there was a condition that the legatees should appear personally before the executors, and prove their identity, and the condition was held to be substantially satisfied by the legatees appearing personally before the solicitor of one executor and the partner of the other acting for them, and establishing their identity to them, on the ground that the condition "personally" only applied to the legatees and not to the executors. Whether rightly or wrongly, these two cases were decided simply on the ground that the conditions imposed on the legatees had been substantially perfected.—p. 355.

Brandon v. Robinson (1811) 1 Rose 197; S. C. *nom. Brandon, Ex parte*, 18 Ves. 429; 11 R. R. 226.—ELDON, L.C.; and **Dickson's Trusts, In re** (1850) 20 L. J. Ch. 33; 1 Sim. (N.S.) 87; 15 Jur. 252.—ROLF, V.-C., *discussed*.

Brandon v. Aston (1842) 3 Y. & C. C. C. 24; 7 Jur. 10.—KNIGHT BRUCE, V.-C.;

and **Shree v. Hale** (1807) 13 Ves. 404; 9 R. R. 198.—GRANT, M.R., *followed*.
Rochford v. Hackman (1852) 21 L. J. Ch. 511; 9 Hare 475; 16 Jur. 212.—TURNER, V.-C.

Rochford v. Hackman, approved.
Catt's Trusts, In re (1864) 33 L. J. Ch. 495; 2 H. & M. 46; 10 Jur. (N.S.) 536; 10 L. T. 409; 12 W. R. 739.—WOOD, V.-C. *And see post*, col. 637.

FORFEITURE ON BANKRUPTCY.

Lear v. Leggett (1830) 2 Sim. 479; 7 L. J. (O.S.) Ch. 126.—SHADWELL, V.-C.; *affirmed*, 1 Russ. & M. 690, 29 R. R. 143.—LYNDHURST, L.C., *distinguished*.

Rochford v. Hackman, applied.
Amherst's Trusts, In re (1872) 41 L. J. Ch. 222; L. R. 13 Eq. 464; 25 L. T. 870; 20 W. R. 290.—BAOON, V.-C. *And see "BANKRUPTCY."*

Shree v. Hale, Rochford v. Hackman and Amherst's Trusts, In re, discussed.
Riggs, In re, Trustee, Ex parte (1901) 70 L. J. K. B. 341. [1901] 2 K. B. 16; 84 L. T. 428; 49 W. R. 624; 8 Manson 238.—WRIGHT, J.

White v. Chitty (1866) 35 L. J. Ch. 343; L. R. 1 Eq. 372; 12 Jur. (N.S.) 181.—WOOD, V.-C., *followed*.

Lloyd v. Lloyd (1866) L. R. 2 Eq. 722; 13 L. T. 750; 14 W. R. 366.—WOOD, V.-C.

White v. Chitty and Lloyd v. Lloyd, distinguished.

Cox v. Fonblanque (1868) 37 L. J. Ch. 622; L. R. 6 Eq. 482; 16 W. R. 1032.—ROMILLY, M.R.

White v. Chitty, followed.
Trappes v. Meredith (1871) 41 L. J. Ch. 237; L. R. 7 Ch. 248; 26 L. T. 5; 20 W. R. 130.—HATHERLEY, L.C.; *reversing* (1869) 39 L. J. Ch. 366, 727; L. R. 9 Eq. 229; L. T. 10 Eq. 604; 21 L. T. 782; 18 W. R. 1017.—JAMES, V.-C.

White v. Chitty and Lloyd v. Lloyd, distinguished.
Parnham's Trusts, In re (1872) L. R. 13 Eq. 413.—ROMILLY, M.R.

White v. Chitty, followed but doubted.
Parnham's Trusts, In re (1876) 46 L. J. Ch. 80.—JESSEL, M.R.

White v. Chitty, Lloyd v. Lloyd, and Parnham's Trusts, In re, applied and followed.
Ancona v. Waddell (1878) 48 L. J. Ch. 115; 10 Ch. D. 167; 40 L. T. 31; 27 W. R. 186.—HALL, V.-C.

White v. Chitty, discussed.
Parnham's Trusts, In re, explained.
Samuel v. Samuel (1879) 47 L. J. Ch. 716; 12 Ch. D. 152; 26 W. R. 750.—JESSEL, M.R.

White v. Chitty, Lloyd v. Lloyd, and Ancona v. Waddell, distinguished.

Robertson v. Richardson (1885) 55 L. J. Ch. 275; 30 Ch. D. 623; 33 W. R. 897.

PEARSON, J.—The circumstance which was relied on in all the three cases [*i.e.*, the above three cases] to which I have referred, in order to escape from the chance of forfeiture—namely, that no right to receive the income in question had accrued to the assignee in bankruptcy—is

wanting in the present case, and I am bound to decide that the forfeiture clause took effect, and is still in operation.—p. 278.

Robertson v. Richardson, followed.

Broughton, *In re*, Peat v. Broughton (1887) 57 L. T. 8.—CHITTY, J.

Trappes v. Meredith, commented on but followed.

White v. Chitty and Lloyd v. Lloyd, distinguished.

Metcalfe, In re, *Metcalfe v. Metcalfe* [1891] 3 Ch. 1; 60 L. J. Ch. 647; 65 L. T. 426.—C.A., affirming (1889) 59 L. J. Ch. 159; 43 Ch. D. 638.—KEKEWICH, J.

LINDLEY, L.J.—It has been held that in order to give effect in such cases [*i.e.*, of forfeiture on bankruptcy] to the obvious intention of the testator, which is to secure the personal enjoyment by the legatee of the property left by the will, a clause of this kind applies to a bankruptcy existing at the testator's death. And so far has this doctrine been carried that in *Trappes v. Meredith*, which was followed by *Ancona v. Waddell*, it was held by the C. A. that a forfeiture clause applied to a bankruptcy which took effect before the date of the will, although it was known to the testator. In *Trappes v. Meredith* the decision of James V.-C. was overruled by the C. A.; but I should have thought the reasoning of the V.-C. in that case was sounder than that of the C. A. However, that decision is binding upon us, and we are not at liberty to hold that this clause does not apply to a bankruptcy which took effect before the will came into operation. . . . It was contended that because the plaintiff had assets falling in which proved sufficient to pay off her creditors, and to enable her to obtain an annulment of the bankruptcy, that gave her the right to deprive the other legatees of the rents and profits which they had received. None of the authorities go to anything like that length, although they have strained the language of these forfeiture clauses. In all those cases nothing had in fact been done before the bankruptcy was annulled. In one case, *White v. Chitty* Wood, V.-C. said: "I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position to receive them." So, also, in *Lloyd v. Lloyd*, the bankruptcy was annulled before anything was done, no steps having been taken to realise the assets; and the same principle was followed in *Ancona v. Waddell*. On the other hand, in *Robertson v. Richardson*, it was laid down that if any income became due under the testator's will which the trustee in bankruptcy of the legatee might, but for the forfeiture clause, have received, the forfeiture took effect.—p. 5.

BOWEN, L.J. to the same effect. FRY, L.J. concurred.

White v. Chitty, followed.

Samuel v. Samuel (supra), considered.

Lottus-Otway, In re, *Otway v. Otway* (1895) 64 L. J. Ch. 529; [1895] 2 Ch. 235; 13 R. 536; 72 L. T. 656; 43 W. R. 501.—STIRLING, J. See judgment, where the other cases are reviewed.

Manning v. Chambers (1847) 16 L. J. Ch. 245; 1 De G. & Sm. 282; 11 Jur. 466.—KNIGHT BRUCE, V.-C.; and *Seymour v.*

Lucas (1860) 29 L. J. Ch. 841; 1 Dr. & Sm. 177; 8 W. R. 599.—KINDERSLEY, V.-C., distinguished.

Metcalfe, In re (supra), approved.

West v. Williams (1898) 68 L. J. Ch. 127; [1899] 1 Ch. 182; 79 L. T. 575; 47 W. R. 398.—C.A., reversing 67 L. J. Ch. 213; [1898] 1 Ch. 488; 78 L. T. 147; 46 W. R. 362.—KEKEWICH, J.

CHITTY, L.J. (for self, LINDLEY, M.R. and V. WILLIAMS, L.J.).—Words which grammatically refer only to the future have been construed in a settlement of the kind, made by will or otherwise, as including the past, in order to give effect to the intention manifested. It is sufficient to refer to *Metcalfe v. Metcalfe*. There is no authority applying any such doctrine to the case of a condition in a covenant. In this case there is the recital in the settlement that the nephew had created certain charges (without specifying what they were) on his interests under his father's will. In the fact of the recital, it seems to me that it cannot be held that there was an intention to make past charges a ground of forfeiture. Any such supposed intention is directly negatived. . . . If the past charges formed a ground of forfeiture, then the life interest of the nephew ceased the moment it arose, and the covenant never became operative.—p. 134.

Roffey v. Bent (1867) L. R. 3 Eq. 759.—ROMILLY, M.R., approved and followed.

Eyston, Ex parte, *Throckmorton, Re* (1877) 47 L. J. Bk. 62; 7 Ch. D. 145; 37 L. T. 447; 26 W. R. 181.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ.

[The word "suffer" was used in *Roffey v. Bent* in contradistinction to the word "do." This was held to mean the same as "permit" in the case under consideration.]

Blithman, In re (1866) 35 L. J. Ch. 255; L. R. 2 Eq. 23; 35 Beav. 219; 12 Jur. (N.S.) 84; 14 L. T. 6.—ROMILLY, M.R., commented on.

Davidson's Settlement Trusts, In re (1873) 42 L. J. Ch. 347; L. R. 15 Eq. 389; 21 W. R. 452.—JAMES, L.J. (for WICKENS, V.-C.).

Davidson's Settlement Trusts, In re, followed.

Lawson's Trusts, In re (1895) 65 L. J. Ch. 95; [1896] 1 Ch. 175; 73 L. T. 571; 44 W. R. 280.—NORTH, J.

Blithman, In re, applied.

Davidson's Settlement Trusts, In re, and Lawson's Trusts, In re, discussed.

Hayward, In re, *Hayward v. Hayward* (1897) 66 L. J. Ch. 392; [1897] 1 Ch. 905; 76 L. T. 383; 45 W. R. 439; 4 Manson 130.

KEKEWICH, J.—The learned judge in that case [*Davidson's Settlement Trusts, In re*] said it was not necessary to consider *Blithman, In re*, for in the case which was then before him the debtor had been adjudicated a bankrupt upon his own petition. Here that is not the case; F. B. Hayward was made a bankrupt behind his back. He was domiciled in England, and *Davidson's Settlement Trusts, In re*, although apparently *ad rem*, does not go to the extent of overruling *Blithman, In re*. *Lawson's Trusts, In re*, does not help us, because *Blithman, In re*, was not

cited, and North, J. followed *Davidson's Settlement Trusts, In re*. There I think the man must have been domiciled in England.—p. 394.

RESTRAINT OF MARRIAGE.

Peyton v. Bury (1731) 2 P. Wms. 626.—JEKYL, M.R. *distinguished*.

Graydon v. Hicks (1739) 2 Atk 16, 9 Mod. 215.—HARDWICKE, L.C., *referred to*.

Knight v. Cameron (1807) 14 Ves. 389.—GRANT, M.R.

Graydon v. Hicks, *doubted*

Evens v. Addison (1858) 7 W. R. 23; 4 Jur. (N.S.) 1034.

WOOD, V.C.—I think there must be something omitted in the report of this case before Lord Hardwicke. It is one on which the Court could not act without further inquiry.—p. 26.

Peyton v. Bury and **Knight v. Cameron**, *referred to*.

Fitzgerald v. Ryan [1899] 2 Ir. R. 637.—Q.B.D.; *affirmed*, C.A. O'BRIEN, C.J., O'BRIEN and ANDREWS, JJ.

Green v. Green (1845) 2 Jo. & Lat. 529; 8 Ir. Eq. R. 473.—SUGDEN, L.C., *discussed*.

Knight v. Cameron and **Collett v. Collett** (1866) 35 Beav. 312; 12 Jur. (N.S.) 180; 14 L. T. 94; 14 W. R. 446.—ROMILLY, M.R., *distinguished*.

Dawson v. Oliver-Massey (1876) 45 L. J. Ch. 217, 519; 2 Ch. D. 753; 34 L. T. 120, 551; 24 W. R. 908.—C.A.; *reversing* JESSEL, M.R.

JAMES, L.J.—From the year 1828 at least, to the present time, wherever the English language is spoken, wherever the English law prevails, and the English legal literature has been studied, it has been taught and accepted as the unquestioned doctrine of this Court that the death of one of two persons whose consent is required does not destroy the gift, but that the consent of the survivor is sufficient. Lord St. Leonards in Ireland has carried it even further, because, dealing with a question as to land which is supposed to be not subject to the peculiar civil law on which these cases to some extent proceed with relation to real estate, he has decided [*Green v. Green*] that where a man had the power of jointuring any wife he should marry with the consent of A. B., the death of A. B. did not prevent him from jointuring a wife with whom he afterwards intermarried. On the other hand it is said, and it seems to have been thought by the M.R., in dealing with this petition, that the two authorities which he referred to were the other way. One was *Knight v. Cameron* . . . but in that case the point was not only not decided, but could not have been decided. There was there the consent required of two executors; one being dead, the lady married without the consent of the other, and all that the M.R. decided in that case was, that she had not married with consent, and there was no decision or *dictum* to the effect that marriage with the consent of the survivor would not have been a sufficient compliance with the condition. Another case before the late M.R. was referred to as having some bearing on the question, *Collett v. Collett*; but when that comes to be considered, so far from being an authority, or recognising as was supposed *Knight v. Cameron*, as an authority the other way, the

decision is really, as far as it goes, a strong authority in favour of the proposition contended for by the petitioner in this case: for there a testator, gave a share of his residuary real and personal estate to his daughter, to be paid at twenty-one, or on her day of marriage, provided it should take place with the consent of his widow. The widow died: the daughter married under age, consequently without the consent of the widow, and the M.R. ordered the money to be paid out to the daughter on her marriage, no doubt treating it as a condition subsequent; but he ordered the money to be paid out to her, and he uses this language: "I think the true and proper conclusion to be drawn from the case is that when the performance of a condition *in toto* has not taken place because the performance of a portion of the condition has become impossible through no act or default of the person who had to perform it, the performance of that portion of the condition will be dispensed with. Here it is reasonably certain that the mother, if she had lived, would have given her consent to this marriage, one eligible in all respects, approved of by the parents and guardian of the lady herself, and sanctioned by the Court. She has therefore performed the condition as far as it was possible for her to do so, but the consent of the dead mother of course could not be procured."—p. 521. MELLISH, L.J. and BAGGALLAY, J.A. concurred.

Dawson v. Oliver-Massey, *considered and applied*.

Booth v. Meyer (1877) 38 L. T. 125.—JESSEL, M.R.

Dawson v. Oliver-Massey, *distinguished*.

Brown's Settlement (or Will), In (1881) 18 Ch. D. 61; 50 L. J. Ch. 724; 44 L. T. 757; 30 W. R. 171.—C.A.

JAMES, L.J.—That [*Dawson v. Oliver-Massey*] was felt to be at the time, and must be admitted to be now, a very strong case indeed. . . . In that case we proceeded in this Court upon a long train of authorities, extending over more than half a century. We considered that, having regard to those authorities, to the opinions of eminent text writers, and to the decision of an eminent L.C. of Ireland in *Green v. Green*, we were warranted in holding, if not bound to hold, that where the consent of parents was required, and one of the parents had died, the consent of the surviving parent was sufficient. That was what we had to decide, and that was the only point before us for decision. In the judgment delivered by me in that case I am reported to have said that apparently the same principle would apply if both the parents had died. Fry, J., in his judgment in this case, considers the logical result of the decision, that if one parent died the consent of the survivor was sufficient, to be that the death of both parents would dispense with the necessity of any consent. But it must be recollected what was the ground upon which we proceeded in putting upon the will a construction which it seemed to the M.R. impossible properly to put upon it. We thought, having regard to the nature of the case, the nature of the provisions the testator had made, and the purpose of those provisions, that he intended to require the consent of the parent or parents, if any, and that if there were none, then the condition had no effect. There was also this element in the case, that it was utterly impossible, by any

mode whatever, to supply the want of a parent or parents. . . . It appears to me that it would be an extension of the decision in *Dawson v. Oliver-Massey*, which proceeded entirely upon former authorities relating only to the death of a parent, to a case wholly beyond and outside its reasoning and principle, if we were to hold that the temporary non-existence of a guardian or guardians, which temporary non-existence could be supplied at any moment with the greatest ease and without detriment to anybody, would be equivalent to the death of the parent.—p. 70—72.

BAGGALLAY and LUSH, L.J.J. to the same effect.

Dawson v. Oliver-Massey; Brown's Will, In re; Booth v. Meyer; and Green v. Green, discussed.

CURRAN v. CORBET (1896) [1897] 1 Ir. R. 343.
FOSTER, M.R.—As regards the cases, *Dawson v. Oliver-Massey* was a case of personal estate. . . . This case [*Brown's Will, In re*] is clearly not inconsistent with *Dawson v. Oliver-Massey*, and indeed recognises its authority; but it, too, is a case of personal estate. The case which most nearly resembles the present is *Booth v. Meyer*. The consent there required was that of the testator. . . . The daughter married James Meyer a year after the death of the testator, but he never gave his consent in writing to the marriage. There was a forfeiture clause in the event of the daughter marrying without such consent. . . . The M.R., after referring to the judgment of the C.A. in *Dawson v. Oliver-Massey*, held that the forfeiture clause did not take effect, as the consent of the testator was not, under the circumstances, a condition at all. *Green v. Green* is a case of real estate, and the only one cited. It turned on a clause in a settlement to which stricter rules of construction are applicable than to a will. . . . That case, as I read it, was decided on a question of construction, that if the intention of the settlor was that the condition should not be a condition precedent in a certain event, it would not be regarded as a condition precedent. No doubt the facts of that case were not the same in all respects as those before me; but it appears to me, so far as I can see, to be very much in point, and, being a decision of Lord St. Leonards, it would certainly bind me in this Court, notwithstanding the view of Mr. Jarman (on Wills (5th ed.), vol. ii., p. 852), and perhaps notwithstanding the dictum of Jessel, M.R., in *Bellairs v. Bellairs* (post, col. 635). Although *Booth v. Meyer* was a case of personal estate, it is just as applicable as if it was a case of real estate, so far as the construction of the will is concerned.—pp. 355—357.

Perrin v. Lyon (1807) 9 East 170; 9 R. R. 520.—ELLENBOROUGH, C.J., followed.

JENNER v. TURNER (1880) 16 Ch. D. 188; 50 L. J. Ch. 161; 43 L. T. 468; 29 W. R. 99; 45 J. P. 124.

BACON, V.-C.—The point, however, is covered by a distinct and express and binding authority. In *Perrin v. Lyon*, the testator devised his real estate to his daughter, subject to the condition that if she should marry a Scotchman, then she should forfeit all benefit under his will, and the estate so given to her should descend to such person or persons as would be entitled to it under the will in the same manner as if her daughter were dead. The daughter, being under

age, married a Scotchman who survived her, and she died leaving a son. A case was sent from the Court of Ch. for the opinion of the Court of K. B. upon the question, "who, under the circumstances, was entitled to the devised real estates?" It was elaborately argued by counsel of great ability, and it was determined by Lord Ellenborough and three other judges that the two children of the testator's nephew (who was named in the will) were entitled to the real estates. There is no detailed judgment of the Court of K. B., but there can be no doubt that the decision, applying to the facts of the case as stated, does determine that the condition upon which the estate devised to the daughter in fee was to go over to other persons was perfectly valid, and that, it being broken by the daughter's marriage with a Scotchman, the gift over took immediate effect and annihilated the estate, which, but for the condition, the daughter would have taken; and that, by the breach of that condition, the title of her heir-at-law, and of her husband, as tenant by the courtesy, were excluded, and immediate effect was given to the subsequent limitation.—p. 197.

Garbut v. Hilton (1739) 1 Atk. 381; 9 Mod. 210.—VERNEY, M.R., followed.

GRAY v. GRAY (1889) 23 L. R. Ir. 399.—CHATTERTON, V.-C.

Harvey v. Aston (1737) 1 Atk. 163; Com. 726.—HARDWICKE, L.C.; Mesgrett v. Mesgrett (1706) 2 Vern. 580.—GOWPER, L.C.; Strange (Lord) v. Smith (1755) Amb. 263.—HARDWICKE, L.C.; Daley v. Desbouverie (1738) 2 Atk. 261.—HARDWICKE, L.C., and Burleton v. Humfrey (1755) Amb. 256.—HARDWICKE, L.C., discussed.

LONG v. DENNIS (1767) 4 Burr. 2052; 1 W. Bl. 630.—MANSFIELD, C.J., observed on.
CLARKE v. PARKER (1812) 19 Ves. 1; 12 R. R. 124.—ELDON, L.C.

Clarke v. Parker, commented on.

HOLTON v. LLOYD (1827) 1 Molloy 80.—HART, L.C.

Harvey v. Aston, applied. And see col. 635.

MARTIN v. MARTIN (1886) 19 L. R. Ir. 72.—CHATTERTON, V.-C.

Daley v. Desbouverie, followed.

SMITH, In re, Keeling v. Smith (1890) 59 L. J. Ch. 284; 44 Ch. D. 654; 62 L. T. 181; 38 W. R. 380.—STIRLING, J. And see *supra*, col. 627.

Marples v. Bainbridge (1816) 1 Madd. 590;

16 R. R. 271.—PLUMER, V.-C.

Crommelin v. Crommelin (1796) 3 Ves. 227.

—LOUGHBOROUGH, L.C.

Bird v. Hunsdon (1818) 2 Swanst. 342; 1

Wils. Ch. 456; 19 R. R. 82.—PLUMER, M.R. Commented on.

RISHTON v. COBB (1839) 9 L. J. Ch. 110; 5 Myl. & Cr. 145; 4 Jur. 261.—COTTENHAM, L.C.; affirming 9 Sim. 615.—SHADWELL, V.-C. And see post.

Scott v. Tyler (1788) 2 Dick. 712; 2 Bro.

C. C. 431.—THURLOW, L.C. (and see post, col. 636); and Stackpole v. Beaumont

(1796) 3 Ves. 89; 3 R. R. 52.—LOUGHBOROUGH, L.C., discussed.

MORLEY v. RENNOLDSON (1843) 12 L. J. Ch. 372; 2 Hare 570; 7 Jur. 988.—WIGRAM, V.-C.

Harvey v. Aston (*supra*, col. 634); **Baker v. White** (1690) 2 Vern. 215; **Lowe v. Peers** (1768) 4 Burr. 2225.—**MANSFIELD, C.J.**; *affirmed*, *Wilmot, Notes of Opinions*, p. 364; **Lloyd v. Lloyd** (1852) 21 L. J. Ch. 596; 2 Sim. (N.S.) 255; 16 Jur. 306.—**KINDERSLEY, V.-C.**; **Scott v. Tyler**; **Stackpole v. Beaumont**, and **Morley v. Rennoldson** (*supra*), *discussed*.

Newton v. Marsden (1862) 31 L. J. Ch. 690; 2 J. & H. 356; 8 Jur. (N.S.) 1034. 6 L. T. 155; 10 W. R. 438.—**WOOD, V.-C.**

Heath v. Lewis (1853) 22 L. J. Ch. 721; 3 De G. M. & G. 954; 17 Jur. 418; 1 W. R. 314.—**KNIGHT BRUCE** and **TURNER, L.J.**, *applied*.

Evans v. Rosser (1864) 2 H. & M. 190; 10 Jur. (N.S.) 385; 10 L. T. 159; 12 W. R. 570.—**WOOD, V.-C.**

Lloyd v. Lloyd and Morley v. Rennoldson, *applied*.

Bellairs v. Bellairs (1874) 43 L. J. Ch. 669; 1 L. R. 18 Eq. 510; 22 W. R. 942.—**JESSEL, M.R.**

Newton v. Marsden, principle applied.
Allen v. Jackson (1875) 45 L. J. Ch. 310; 1 Ch. D. 369; 33 L. T. 719; 24 W. R. 306.—**G.A. JAMES** and **MELLISH, L.J.**; **BAGGALLAY, J.A.**; *reversing* 44 L. J. Ch. 336; 1 L. R. 19 Eq. 631; 32 L. T. 251; 23 W. R. 487.—**HALL, V.-C.**

Rishton v. Cobb (*supra*, col. 634), *doubted*.
Boddington, In re, **Boddington v. Clairart** (1884) 25 Ch. D. 685; 53 L. J. Ch. 475; 50 L. T. 761; 32 W. R. 448.—**G.A.**; *affirming* (1883) 52 L. J. Ch. 236; 22 Ch. D. 597; 48 L. T. 110; 31 W. R. 449.—**FRY, J.**

SELBORNE, L.C.—With regard to **Rishton v. Cobb**, the respect I feel for the great judge who decided it prevents my saying more of the judgment than that I do not understand it, and that if it were applicable to this case, I should hesitate some time before I could follow it. I think, however, that it is not applicable. In saying so I do not rely on what seems to me a somewhat refined distinction between the gift of the income of a fund and the gift of an annuity, but I refer to what Lord Cottenham himself says, regarding, as he did, the annuity in that case as perpetual, and not for life only (on p. 152): "This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow." It is quite plain that it is not to be inferred from his judgment that he would have decided the present case otherwise than Fry, L.J. has decided it. **Rishton v. Cobb**, therefore, does not bear on the present case, and if it did it would take some time to convince me that it ought to be followed.—p. 689. **COLERIDGE, C.J.** concurred.

OOTTON, L.J. to the same effect.

Bullock v. Bennett (1855) 4 L. J. Ch. 397, 512; 7 De G. M. & G. 283; 3 Eq. R. 799; 1 Jur. (N.S.) 567; 3 W. R. 545.—**KNIGHT BRUCE** and **TURNER, L.J.**; *reversing* 1 K. & J. 315.—**WOOD, V.-C.**; and **Rishton v. Cobb, distinguished**.

Morley v. Rennoldson, applied.
King's Trusts, In re (1892) 20 L. R. Ir. 401.—**PORTER, M.R.**

Rishton v. Cobb, followed.

Howard, In re, **Taylor v. Howard** (1901) 70 L. J. Ch. 317; [1901] 1 Ch. 413; 84 L. T. 296; 49 W. R. 480.—**FARWELL, J.**

Gillet v. Wray (1715) 1 P. Wms. 284.—**COWPER, L.C., principle applied.**

Reynish v. Martin (1740) 3 Atk. 330; 1 Wils. 130.—**HARDWICKE, L.C., distinguished.**

Holmes v. Lysaght (1732—1733) 2 Bro. P. C. 201.—**CT. OF EX. (IR.), adopted.**

Nourse, In re, **Hampton v. Nourse** (1898) [1899] 1 Ch. 63; 68 L. J. Ch. 15; 79 L. T. 376; 47 W. R. 116.

STIRLING, J.—In that case [**Reynish v. Martin**] the L.C. held that the condition was inoperative, and that the legacy was payable although the personal estate had been exhausted in the payment of the debts. Nevertheless, as these debts were charged by the will on the real estate, the L.C. made a decree marshalling the assets so that the legacy might be payable. That is an absolute decision that, notwithstanding that the condition was a condition precedent, it was one that was inoperative in a Court of equity, and that the legatee was entitled to the legacy although the condition was not fulfilled. No case has been cited to me, nor am I aware of any, which throws any doubt upon that decision. The rule there laid down is a plain and simple one, which, if it had been strictly adhered to, would have been easy to apply; but Lord Hardwicke himself points out that the rule of the civil and ecclesiastical Courts had not been adopted to its full extent. He says that in many cases where there was a gift over the legacy had been held to be forfeited. . . . Lord Thurlow, in **Scott v. Tyler** (*supra*, col. 634), a well-known case upon the whole of the law relating to this subject, comments thus upon the cases. . . . He therefore recognises Lord Cowper's decision in **Gillet v. Wray**; and that case has been treated as establishing the law by all the subsequent text-writers down to the present time. It is not inconsistent with the decision in **Reynish v. Martin**, for, as I have already pointed out, the payment of 30l. per annum ceased on marriage, whether with or without consent, and there was no alternative bequest such as is found in **Gillet v. Wray**. I must therefore treat that as a valid exception to the general rule laid down by Lord Hardwicke. Whether if it had been my lot to decide the case before Lord Cowper I should have decided it the same way, I need not consider; . . . Lord Thurlow, in the passage already quoted from **Scott v. Tyler**, treats Lord Cowper's decision as determining the general question—What is the effect of a gift of a larger sum to a legatee if she married with consent, and a smaller sum if she did not? Here the question is, What is the effect of a gift to a son in any event with the addition of a larger gift in the event of his marrying with consent? It appears to me that the two cases are substantially the same and ought to be governed by the same rules. This view appears to have been taken in Ireland in **Holmes v. Lysaght**. That case was afterwards taken to the H. L., but was there compromised. It is not, therefore, a very weighty authority; but so far as it goes it is in favour of the view which I have adopted.—pp. 69—72

TO CONVEY AND SETTLE.

Roundel v. Curren (1786) 2 Bro. C. C. 67.—
M.R., *principle applied*.
Robinson v. Wheelwright (1856) 25 L. J. Ch. 385;
6 De G. M. & G. 535; 2 Jur. (N.S.) 554.—L.C. & L.JJ.

Bacchus v. Gilbee, 11 W. R. 846.—KINDERSE-
LEY, V.-C.; *reversed*, (1863) 33 L. J. Ch. 23; 3
De G. J. & S. 577, 9 Jur. (N.S.) 838; 2 N. R. 502;
8 L. T. 714; 11 W. R. 1049.—KNIGHT BRUCE and
TURNER, L.JJ.

Walker v. Walker (1860) 29 L. J. Ch. 856;
2 De G. F. & J. 255.—CAMPBELL, L.C.,
commented on.

Middleton v. Windross (1873) L. R. 16 Eq.
212; 42 L. J. Ch. 555; 21 W. R. 822.

WICKENS, V.-C.—With regard to *Walker v.*
Walker . . . the report was very meagre, and
I cannot help thinking that the decision turned
a good deal on the request referred to in that
case; but be that as it may, I do not think
it applies to the present.—p. 214.

NAME AND ARMS.

Catt's Trusts, In re (*supra*, col. 628), *followed*,
Musgrave v. Brooke (1884) 54 L. J. Ch. 102;
26 Ch. D. 792; 33 W. R. 211.—PEARSON, J.:
explained, *Cornwallis, In re, Cornwallis v.*
Wykeham-Martin (1886) 55 L. J. Ch. 716; 32
Ch. D. 388; 54 L. T. 544.—PEARSON, J.

D'Eyncourt v. Gregory (1876) 45 L. J. Ch.
205; 1 Ch. D. 441; 24 W. R. 424.—
JESSEL, M.R., *distinguished*.

Eversley (Viscount), In re, Mildmay v. Mild-
may (1899) 69 L. J. Ch. 14; [1900] 1 Ch. 96;
81 L. T. 600; 48 W. R. 249.

BYRNE, J.—It is to be observed that there is
this clear distinction, that in the present case
an opportunity is given to use the name either
alone or together with the family surname.
That by itself would distinguish this case from
the other; but, as a matter of fact, I do not
think that the clause in *D'Eyncourt v. Gregory*
can be regarded as a clause equivalent to the
clause used in the present will.—p. 16.

Kingston (Earl) v. Pierrepont (1698) 1
Vern. 5, *discussed*.

Egerton v. Brownlow (Earl) (1853) 23 L. J.
Ch. 348; 4 H. L. Cas. 1; 18 Jur. 71.—H.L. (E.).
LORDS LYNCHBURST, BROUGHAM, TROUB, and ST.
LEONARD; CRANWORTH, L.C. *dissenting; rever-*
sing (1851) 20 L. J. Ch. 645.—CRANWORTH, V.-C.

Woodhouse v. Herrick (1855) 24 L. J. Ch.
649; 1 K. & J. 352; 3 Eq. R. 817; 3 W. R.
303.—V.-C.; **Bennett v. Bennett** (1864) 34
L. J. Ch. 34; 2 Dr. & Sm. 266; 10 Jur. (N.S.)
1170; 11 L. T. 362; 13 W. R. 66.—V.-C.;
Randal v. Payne (1779) 1 Bro. C. C. 55.
—L.C.; **Egerton v. Brownlow (Earl)**; and
Muggeridge's Settlement, In re (1860) 29
L. J. Ch. 288; Johns. 625; 6 Jur. (N.S.) 192;
1 L. T. 436; 8 W. R. 234.—V.-C., *discussed*.

Acherley v. Vernon (1739) Willes 153, *followed*.
Greenwood, In re, Goodhart v. Woodhead (1902)
71 L. J. Ch. 579; [1902] 2 Ch. 198; 86 L. T. 500.
—JOYCE, J.

Egerton v. Brownlow (Earl), observations
adapted.

Janson v. Driefontein Consolidated Mines (1902)
71 L. J. K. B. 857; [1902] A. C. 484; 87 L. T. 872;
51 W. R. 142; 7 Com. Cas. 268.—H.L. (E.).

CONTEMPT OF COURT.

Read and Hugginson, In re (or Roach v.
Hall, or Roche v. Garvan) (1742) 2 Atk.
469; 2 Dick. 794.—HARDWICKE, L.C.,
distinguished.

Baker v. Hart (1742) 2 Atk. 488.—HARD-
WICKE, L.C.

Roach v. Hall and Jones, Ex parte (1806) 13
Ves. 237.—ERSKINE, L.C., *referred to*.
Rex v. Clement (1821) 4 B. & Ald. 218; S. C.
Clement, In re, 11 Price 68; 23 R. R. 260; 26
R. R. 710.—ABBOTT, C.J.

Jones, Ex parte; Pool v. Sacheverel (1720)
1 P. Wms. 675.—PARKER, L.C.; **Roche v.**
Garvan; Cann v. Cann (1754) 3 Hare
333, n.—HARDWICKE, L.C.; and **Littler v.**
Thompson (1839) 9 Beav. 130.—LANG-
DALE, M.R., *discussed*.

Birch v. Walsh (1846) 10 Ir. Eq. R. 93.—
OUSACK-SMITH, M.R.

Roach v. Hall, referred to.

Rainy v. Sierra Leone JJ. (1853) 8 Moore,
P. C. 54.—P.C. KNIGHT BRUCE and
TURNER, L.JJ., DR. LUSHINGTON and SIRE.
RYAN; and **McDermott v. British Guiana**
JJ (1868) 38 L. J. P. C. 1; L. R. 2 P. C.
341; 5 Moore P. C. (N.S.) 466; 20 L. T.
47; 17 W. R. 352.—P.C. LORD CHRELS-
FORD, WOOD, L.J., SIR J. COLVILLE and
SIR E. V. WILLIAMS, *followed*.
Surendranath Banerjee v. C.J. and J.J. of
High Court of Bengal (1883) L. R. 10 Ind. App.
171.—P.C. SIR B. PEACOCK, SIR M. SMITH, SIR
R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

Roach v. Hall, principle applied.

Titchborne v. Mostyn (1867) L. R. 7 Eq. 55, n.;
17 L. T. 5; 15 W. R. 1072.—WOOD, V.-C.

Roach v. Hall, applied.

Cann v. Cann (*supra*), *approved*.
Cheltenham and Swansea Railway Carriage
and Wagon Co., In re (1869) 38 L. J. Ch. 330;
L. R. 8 Eq. 680; 20 L. T. 169; 17 W. R. 463.—
MALINS, V.-C.

Roach v. Hall, rule adopted.

South Meath Election Petition, In re (1892)
30 L. R. Ir. 639.—O'BRIEN, C.J.

Titchborne v. Mostyn, referred to.

Guilding v. Morel Bros., Corbett & Sons, Ltd.
(1888) 4 Times L. R. 198.—KAY, J.

Read and Hugginson, In re (*supra*), *approved*.

McLeod v. St. Aubyn (1899) 68 L. J. P. C.
137; [1899] A. C. 549; 81 L. T. 153; 48 W. R.
173.—P.C. LORDS WATSON, MACNAGHTEN,
MORRIS and DAVEY. *And see col. 641.*

Read and Hugginson, In re, referred to.

Reg. v. Gray (1900) 69 L. J. Q. B. 502; [1900]
2 Q. B. 36; 82 L. T. 534; 48 W. R. 474; 61 J. P.
484.—RUSSELL OF KILLOWEN, C.J., GRANTHAM
and PHILLIMORE, JJ. *And see col. 641.*

Rex v. Almon (1765) Wilm. Notes 243.

—WILMOT, C.J., *principle approved*.

Miller v. Knox (1838) 4 Bing. (N.S.) 574, 6
Scott 1.—H.L. (IR.); **Van Sandau, Ex parte**
(1844) 14 L. J. Bk. 9; 15 L. J. Bk. 18; 1 Ph.
445, 603; 8 Jur. 193.—LYNDHURST, L.C.

Rex v. Almon (*supra*), *approved and applied*.
Macdonald, In re (1842) 6 Jur. 461; S. C.
Wilton, *Ex parte*, 1 Dowl. (N.S.) 805.—
 COLERIDGE, J.

Rex v. Almon, *applied*.

Wilton, *Ex parte*, *discussed*.
Johnson, In re (1887) 57 L. J. Q. B. 1; 20
 Q. B. D. 68; 58 L. T. 160; 36 W. R. 51; 52
 P. 230.—C.A. *ESHER*, M.R., *BOWEN* and
FRY, L.JJ.

Miller v. Knox (*supra*, col. 638), *applied*.

Rex v. Almon, *approved*.

Attorney-General v. Kissane (1893) 32 L. R. Ir.
 220.—C.A. *NORTER*, M.R., *PALLES*, C.B., *FITZ-*
GIBBON and *BARRY*, L.JJ.

Pool v. Sacheverel (*supra*, 638), *questioned*.
Plating Co. v. Farquharson (1881) 17 Ch. D.
 49; 50 L. J. Ch. 406; 44 L. T. 389; 29 W. R.
 510; 45 J. P. 568.—C. A.

JESSEL, M.R.—As regards . . . *Pool v. Sache-*
verel, I do not profess to understand it as it is
 reported. The advertisement seems to have been
 an advertisement for oral evidence to disprove a
 marriage, by showing that a marriage certificate,
 which was alleged to refer to two persons not
 having the names mentioned in the certificate,
 applied in fact to two persons who really bore
 those names. That was treated by Lord Macles-
 field as being a direct inducement to subornation
 of perjury. Of course, if it was an attempt to
 suborn witnesses, it would be a contempt of
 Court, and an undue interference with the course
 of justice. With great respect, however, to that
 learned L.C., I should not have come to the
 same conclusion on the same facts; and it does
 not appear to me that an advertisement for a
 witness to prove a thing not in the knowledge of
 the man who advertises for it, but which he
 believes to be true, can be treated as suborna-
 tion of perjury, because subornation of perjury
 means doing something to induce people to come
 forward to prove that which the person seeking
 to prove it believes to be false; and on that dis-
 tinction, it appears to me, the case ought to turn,
 . . . but I reserve to myself the fullest power of
 saying that if ever such a point should come
 before me, sitting in the C. A., I should feel
 myself at liberty to disregard the conclusion
 which was come to by the L.C. in that case.—
 p. 55. *JAMES* and *COTTON*, L.JJ. concurred.

Daw v. Eley (1868) 38 L. J. Ch. 113; L. R.
 7 Eq. 49; 17 W. R. 245.—*ROMILLY*, M.R.,
followed.

Brodrick v. Brodrick and Wall (1886) 55
 L. J. P. 47; 11 P. D. 66; 56 L. T. 672; 34 W. R.
 580; 50 J. P. 407.—*HANNEN*, P.

Pool v. Sacheverel, *questioned*.

Brodrick v. Brodrick and Wall, *followed*.
Butler v. Butler (1888) 13 P. D. 78; 57 L. J. P.
 42; 58 L. T. 563.

BUTLER, J.—I doubt very much whether a *bona*
fide attempt to procure evidence in a suit, even
 by an advertisement offering a reward, is a con-
 tempt of Court. I do not hesitate to say, that I
 felt somewhat pressed by the judgment in
Peere Williams; but I am glad to find that the
 decision has been questioned in the C. A., and I
 do not feel myself constrained to follow it.—
 p. 75.

Clements, In re, *Republic of Costa Rica v.*
Erlanger (1877) 46 L. J. Ch. 375; 36
 L. T. 382.—C.A. *JESSEL*, M.R., *MELLISH*,
 L.J. and *BAGGALLAY*, J.A., *applied*.

Maria Annie Davies, In re (1888) 21 Q. B. D.
 236; 37 W. R. 57.—*COLERIDGE*, C.J. and
MATHEW, J.

Plating Co. v. Farquharson (*supra*), and
Clements, In re, *approved*.

Hunt v. Clarke (1890) 58 L. J. Q. B. 490; 61
 L. T. 349; 37 W. R. 724.—C.A. *COTTON*, *FRY*
 and *LOPES*, L.JJ.

Hunt v. Clarke, *followed*.

Crown Bank, In re, *O'Malley*, In re (1890)
 59 L. J. Ch. 767; 44 Ch. D. 649; 63 L. T.
 304; 39 W. R. 45.—*NORTH*, J.; and *Coats*
v. Chadwick (1894) 63 L. J. Ch. 328;
 [1894] 1 Ch. 347; 70 L. T. 228; 42 W. R.
 328.—*CHITTY*, J., *disapproved*.

Reg. v. Payne (1896) 65 L. J. Q. B. 426;
 [1896] 1 Q. B. 577; 74 L. T. 851; 44 W. R. 605

RUSSELL OF *KILLOWEN*, C.J.—Referring
 to my previously expressed opinion that the
 Court's have of late been too frequently
 troubled with applications of this nature, I think
 the recent decisions in the Chancery Division
 [*Crown Bank*, In re, and *Coats v. Chadwick*],
 cited by counsel for the applicant have gone too
 far. The true principle has to my mind been
 laid down by the C. A. in *Hunt v. Clarke*. . . . I
 follow the judgment of the late Cotton, L.J.,
 where he says: "I express my opinion that if a
 thing is done wilfully which really will prejudice
 the parties to the cause before it comes on, I
 should not hesitate to commit to prison any one
 who so offended; but of course that jurisdiction
 by the Court is one which is only to be exercised
 in extreme cases. . . ." Accordingly it is a
 jurisdiction which cannot properly be exercised
 in cases where, although a technical contempt
 has been committed, nothing has been done
 likely to interfere seriously with the course of
 justice. The L.J. then proceeds to refer to his
 judgment in *Plating Co. v. Farquharson*, in
 which he said that these applications ought to
 be discouraged, and that in his view he should
 not give any one costs who applied to the Court
 for the purpose of punishing for contempt one
 who was brought before the Court, unless it were
 a serious case of contempt really calling for the
 interference of the Court in order to secure the due
 administration of justice. He explained that he
 still adhered to that view, and pointed out that
James, L.J. went even further in the same case
 when he said: "I should make them pay the costs."
 Later on, in his judgment in *Hunt v. Clarke*,
 Cotton, L.J., alludes to *Clements*, In re, in which
 the late M.R. (Sir G. Jessel) said this: "There-
 fore it seems to me that this jurisdiction of com-
 mitting for contempt being practically arbitrary
 and unlimited should be most jealously and
 carefully watched, and exercised, if I may say so,
 with the greatest reluctance and the greatest
 anxiety on the part of the judges to see whether
 there is no other mode which is not open to the
 objection of arbitrariness, and which can be
 brought to bear upon the subject."—p. 498.

WRIGHT, J.—The true principle which should
 guide us has been laid down in *Hunt v. Clarke*,
 and is this: that motions of this kind should
 never be made except in really serious cases. As
 that authority does not appear in the Law

Reports, it is quite possible that it was not brought to the notice of the Courts responsible for some recent decisions which go a greater length.—p. 428.

Plating Co. v. Farquharson and Reg. v. Payne, *followed*.

Costs v. Chadwick and Crown Bank, In re, *not followed*.

New Gold Coast Exploration Co., *In re* (1901) 70 L. J. Ch. 355; [1901] 1 Ch. 860. 8 Manson 296.—COZENS-HARDY, J.

Reg. v. Payne, *adapted*.

Metropolitan Music Hall v. Lake (1889) 58 L. J. Ch. 513, 60 L. T. 749.—CHITTY, J., *distinguished*.

American Exchange in Europe v. Gillig (1889) 58 L. J. Ch. 706; 61 L. T. 502.—STIRLING, J.; and **McLeod v. St. Aubyn** (*supra*, col. 638), *discussed*.

Onslow's and Whalley's Case (*post*), *applied*.

Rex v. Freeman's Journal (1901) [1902] 2 Ir. R. 82.—O'BRIEN, C. J., GIBSON and BOYD, JJ.

Lechmere Charlton's Case (1836) 6 L. J. Ch. 185; 2 My. & Cr. 316.—COTTENHAM, L.C., *applied*.

Reg. v. Castro; Onslow and Whalley's Case; Skipworth's Case (1873) L. R. 9 Q. B. 219; 28 L. T. 222; 12 Cox C. C. 371.—COCKBURN, C.J., BLACKBURN, MELLOR, LUSH and QUAIN, JJ.

Skipworth's Case and Reg. v. Gray (*supra*, col. 638), *referred to*.

Reg. v. Tibbitts (1901) 71 L. J. K. B. 4; [1902] 1 K. B. 77; 85 L. T. 521; 50 W. R. 125; 66 J. P. 5.—O.C.R. ALVERSTONE, C.J., WILLS, GRANTHAM, KENNEDY and RIDLEY, JJ.

Bromilow v. Phillips (1891) 40 W. R. 220.—NORTH, J., *considered and applied*.

Welby v. Still (1892) 66 L. T. 523.—KEKEWICH, J.

Moseley, In re, Bahama Islands' Case (1892) 62 L. J. P. C. 79; [1893] A. C. 138; 68 L. T. 105; 57 J. P. 277.—P.C. HERSCHELL, L.C., COLLIERIDGE, C.J., LORDS WATSON, HOBHOUSE and ASHBOURNE, ESHER, M.R., LORDS MACNAGHTEN, HANNEN and SHAND, SIR R. COUGH and BOWEN, L.J., *discussed* by RIGBY, L.J.

Seaward v. Paterson (1897) 66 L. J. Ch. 267; [1897] 1 Ch. 545; 76 L. T. 215; 45 W. R. 610.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.J.J. *And see* "INJUNCTION."

Pater, In re (1864) 33 L. J. M. C. 142; 5 B. & S. 299; 10 Jur. (N.S.) 972; 10 L. T. 376; 12 W. R. 823.—Q.B., *followed*.

Reg. v. Jordan (1888) 36 W. R. 589.—CAVE and A. L. SMITH, JJ.; *affirmed*, *nom.* Reg. v. Staffordshire County Court Judge, 57 L. J. Q. B. 483; 36 W. R. 790.—C.A. LINDLEY and LOPES, L.J.J.

Witt v. Corcoran (1876) 45 L. J. Ch. 608; 2 Ch. D. 69; 34 L. T. 550; 24 W. R. 501.—C.A. JAMES and MELLISH, L.J.J., BAGGALLAY, J.A. *distinguished*.

Ashworth v. Outram (No. 2) (1877) 5 Ch. D. 943.—C.A. COLLIERIDGE, C.J., JAMES and BAGGALLAY, L.J.J.

Ashworth v. Outram, *explained*.

Russell v. East Anglian Ry. (1860) 20 L. J. Ch. 287; 3 Mac. & G. 104; 6 Railw.

O.C.

Cas. 504; 14 Jur. 1033.—TRURO, L.C.; and **Tamworth School Case** (1868) 37 L. J. Ch. 473; L. R. 3 Ch. 543; 18 L. T. 54; 16 W. R. 773.—WOOD and SELWYN, L.J.J., *discussed*.

Jarmain v. Chatterton (1882) 20 Ch. D. 493; 51 L. J. Ch. 471; 30 W. R. 461.—C.A.

JESSEL, M.R.—It is said that by reason of the decision of *Ashworth v. Outram*, there can be no appeal against the order of the V.-C. refusing to commit. I have read the report of the case over and over again, and I confess I feel in some difficulty about it. . . . The case is shortly reported, and I never attempt to make minute distinctions between cases, but I think the case really meant this. There was there no question of right at all. It was admitted that the defendant there had done wrong, but that she had done so under a misapprehension, and that the wrong was a very trifling wrong, and that the Court would not under these circumstances interfere with the discretion of the judge below. If that is the meaning, Baggallay, L.J.'s observations are pertinent to that particular case only, and not to the general law. If a question of right were involved, they would not be so. It must be merely where the question is purely a matter of discretion. James, L.J. said: "The V.-C. did not think fit to make an order to commit, thinking that it was not necessary to commit for contempt in order to insure future obedience, and did not consider the case one for costs. Both points are matters of discretion, and you cannot appeal from such an order." It is clear that James, L.J. never intended to lay down a new rule, and thus his words must mean that in the circumstances of that case there was no appeal. It means this, that as a general rule the C. A. will not entertain an appeal unless there has been a gross miscarriage.—p. 497.

BRETT, L.J.—What *Ashworth v. Outram* really meant was, I think, this: In that case there was no dispute as to the meaning of the order, no dispute as to whether the order had been disobeyed or not—but the V.-C., on the circumstances of the case, came to the conclusion that he should exercise his discretion indulgently, that is, he merely made the costs of the motion costs in the cause, and, further, there was no appeal as to the construction of the agreement: the appeal was confined to this: as to the mode of enforcing the order, and was simply from the discretion of the judge; and the C. A. said that when an appeal is simply on this ground, although the Court has jurisdiction on so delicate a matter, it will not exercise it. The case is not now to be questioned. Whether under the circumstances it was a reportable case is another question.—p. 500.

HOLKER, L.J.—I cannot think that the judges who decided *Ashworth v. Outram* intended to overrule the old cases in Chancery, and certainly not without saying a single word about them. . . . I cannot believe that the judges who decided that case, if they had thought that the old rule had been altered or abrogated by the legislature, would not have said so; but there is not a single word in any of their judgments to that effect. In all probability the explanation given by Brett, L.J. is the correct one.—*ib.*

Witt v. Corcoran (*supra*), *followed*.

Stevens v. Metropolitan District Ry. (1885) 54 L. J. Ch. 737; 29 Ch. D. 60; 52 L. T. 832.—C.A. BAGGALLAY, BOWEN and FRY, L.J.J.

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CONTRACT.

1. FORMATION.
2. PARTIES.
3. SUBJECT MATTER.
4. INTERPRETATION.
5. DISCHARGE AND BREACH.

1. FORMATION.

Agreement.

Gerhard v. Bates (1853) 2 E. & B. 476; 22 L. J. Q. B. 364; 1 C. L. R. 868; 17 Jur. 1097; 1 W. R. 383, *discussed*.

Carill v. Carbolic Smoke Ball Co. (1892) 62 L. J. Q. B. 257; [1893] 1 Q. B. 256; 4 R. 176; 67 L. T. 837; 41 W. R. 210; 57 J. P. 325.—C.A. LINDLEY, BOWEN AND SMITH, L.JJ.

LINDLEY, L.J.—I cannot help thinking that Lord Campbell's observations upon consideration would have been very different indeed if the plaintiff in that action had been an original bearer, or if the declaration had gone on to show what a *société anonyme* was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know what a *société anonyme* was—I mean, of course, judicially—and therefore there was no consideration.—p. 261.

Spencer v. Harding (1870) 39 L. J. C. P. 332; L. R. 5 C. P. 561; 23 L. T. 237; 19 W. R. 48.—C.F., *followed*.

Rooke v. Dawson (1895) 64 L. J. Ch. 301; [1895] 1 Ch. 480; 13 R. 270; 72 L. T. 248; 43 W. R. 318; 59 J. P. 231.—CHITTY, J.

Watkins v. Rymill (1883) 52 L. J. Q. B. 121; 10 Q. B. D. 178; 48 L. T. 426; 31 W. R. 337; 47 J. P. 357.—HAWKINS, STEPHEN AND W. WILLIAMS, JJ., *referred to*.

The Stella (1900) 69 L. J. P. 70; [1900] P. 161; 82 L. T. 390; 9 Asp. M. C. 66.—BARNES, J.

Cooke v. Oxley (1790) 3 Term Rep. 653; 1 R. R. 783, *considered*.

Adams v. Lindsell (1818) 1 B. & Ald. 681; 19 R. R. 415.—K.B.

Cooke v. Oxley, *discussed*.

Bryne v. Van Tienhoven (1880) 49 L. J. C. P. 316; 5 C. P. D. 344; 42 L. T. 871; 44 J. P. 667.—LINDLEY, J., *followed*.

Stevenson v. McLean (1880) 5 Q. B. D. 346; 49 L. J. Q. B. 701; 42 L. T. 897; 28 W. R. 916.—LUSH, J.

Bryne v. Van Tienhoven and Stevenson v. McLean, *approved*.

Dickinson v. Dodds (1876) 45 L. J. Ch. 777; 2 Ch. D. 463; 34 L. T. 607; 24 W. R. 594.—C.A., *distinguished*.

Henthorn v. Fraser (1892) 61 L. J. Ch. 373; [1892] 2 Ch. 27; 66 L. T. 499; 40 W. R. 433.—C.A. HERSCHELL, L.C., LINDLEY AND KAY, L.JJ. HERSCHELL, L.C.—The learned V.-C. appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of *Dickinson v. Dodds* was relied upon in support of that defence. In that case, however, the plaintiff knew of the subse-

quent sale before he accepted the offer, which in my judgment, distinguishes it entirely from the present case.

Duncan v. Topham (1849) 8 C. B. 225; 18 L. J. C. P. 310, *questioned*.

British and American Telegraph Co. v. Colson (1871) L. R. 6 Ex. 108; 40 L. J. Ex. 97; 23 L. T. 868.

BRAMWELL, B.—That certainly is directly in favour of the plaintiffs as reported in the Common Bench Report. But I doubt the accuracy of that report. The point is not mentioned in the report of the Law Journal, and in the report in 8 C. B. at p. 212, Maule, J. refers to a case of *Hurey v. Johnston*, mentioned in the report as 7 C. B. 295, but really 6 C. B. 295. That case was an action for breach of promise of marriage, and the evidence of acceptance of the offer was, the plaintiff's going to the place where she was to be married; and in *Duncan v. Topham*, the plaintiff accepted the offer by sending off the goods as desired; and see *per* Cresswell, J. (6 C. B. at p. 304). So that it may be that the Court refused the rule, not on the ground that the posting of the letter, without delivery, was a sufficient acceptance of the offer, but on the ground that the sending of the goods was sufficient.—p. 120.

Dunlop v. Higgins (1848) 1 H. L. C. 381; 12 Jur. 295, *considered*.

National Savings Bank Association, In re, Hebb's Case (1867) 36 L. J. Ch. 748; L. R. 4 Eq. 9; 16 L. T. 308; 15 W. R. 754.—M.R.

Dunlop v. Higgins, *commented on*.

British and American Telegraph Co. v. Colson, *supra*.

Dunlop v. Higgins, *discussed and approved*. **British and American Telegraph Co. v. Colson**, *disapproved*.

Imperial Land Co. of Marseilles, In re, Harris's Case (1872) L. R. 7 Ch. 587; 41 L. J. Ch. 621; 26 L. T. 781; 20 W. R. 690.—L.JJ.

JAMES, L.J.—The decision of the Vice-Chancellor Malins seems to me to be entirely in accordance with a great number of cases in this Court, and to be utterly undistinguishable, in principle or in fact, from *Dunlop v. Higgins*, a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment. He arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it. That is in fact the decision in *Hebb's Case* (L. R. 4 Eq. 9), though in that particular case a distinction was taken by the Master of the Rolls that the company chose to send the letter to their own agent, which agent had not been authorised by the applicant to receive it, on his behalf. Against this current of authority there is the case of *British and American Telegraph Co. v. Colson*, in which the Court of Exchequer—not disputing the authority of previous decisions, because, of course, they could not dispute the authority of a case in the House of Lords—established a distinction which does not apply to

this case at all. The Court there held that, although the posting of a letter, if the letter arrives, is a complete contract, yet if from any cause, such as a failure of duty by the Post Office, the letter never arrives at all, then there is a difference. It seems to me not necessary to express an opinion whether the distinction is sound or not, but that was the ground upon which the judges proceeded in that case.—p. 592.

British and American Telegraph Co. v. Colson, *disapproved*.

Imperial Land Company of Marseilles, in re. Wall's Case (1872) L. R. 15 Eq. 18; 42 L. J. Ch. 372.—V.-C.

Dunlop v. Higgins (*supra*): Duncan v. Topham, and Imperial Land Co. of Marseilles, in re, Harris's Case, *considered*.

Taylor v. Jones (1875) 45 L. J. C. P. 110; 1 C. P. D. 87; 84 L. T. 131.

British and American Telegraph Co. v. Colson, *overruled*.

Household Fire Insurance Co. v. Grant (1879) 48 L. J. Ex. 577; 4 Ex. D. 216; 41 L. T. 298; 27 W. R. 858.—C.A. THESTIGER and BAGGALLAY, L.J.; BRAMWELL, L.J. *dissenting*.

Imperial Land Co. of Marseilles, in re, Harris's Case, *approved*.

Brogden v. Metropolitan Ry. (1877) 2 App. Cas. 666.—H.L.

Household Fire Insurance Co. v. Grant, *followed*.

Carta Para Gold-Mining Co. v. Fastnedge (1882) 30 W. R. 880.—C.A.

Dunlop v. Higgins, *considered*.

Gurney v. Townsend (1888) 36 W. R. 531.—C.A.

Dunlop v. Higgins and Household Fire Insurance Co. v. Grant, *applied*.

Henthorn v. Fraser (1892)—C.A. (*supra*, col. 648).

Imperial Land Co. of Marseilles, in re, Harris's Case, *applied*.

London and Northern Bank, in re, Jones, Ex parte (1899) 69 L. J. Ch. 24; [1900] 1 Ch. 220; 81 L. T. 512; 7 Manson 60.—COZENS-HARDY, J.

Hussey v. Horne-Payne, 47 L. J. Ch. 519; 38 L. T. 341; 36 W. R. 532; *reversed*, (1878) 47 L. J. Ch. 751; 8 Ch. D. 670; 38 L. T. 543; 26 W. R. 703.—C.A.: the latter decision *affirmed*, (1879) 48 L. J. Ch. 846; 4 App. Cas. 311, 41 L. T. 1; 27 W. R. 585.—H.L. (E.).

Hussey v. Horne-Payne (1879) 48 L. J. Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 585.—H.L. (E.), *distinguished*.

Wilcox v. Redhead (1880) 49 L. J. Ch. 539, 28 W. R. 795.—V.-C.

Hussey v. Horne-Payne, *applied*.

May v. Thomson (1882) 51 L. J. Ch. 917; 20 Ch. D. 705; 47 L. T. 295.—C.A. JESSEL, M.R., LINDLEY and HOLKER, L.JJ.

Hussey v. Horne-Payne, *explained*.

Bolton v. Lambert (1889) 58 L. J. Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

COTTON, L.J.—Then it was said that these letters referred to letters, and that we should consider those other letters and that other terms were introduced by them: and the case of *Hussey v. Horne-Payne* was relied on as showing that in such circumstances there was no concluded contract. But the judgment of Lord Cairns in that case shows that it was not because the subsequent letters raised a doubt that it was held that the two original letters did not form a complete agreement, but because the two original letters of themselves contained terms which raised the doubt. That case, therefore, is not applicable, and in my opinion there was a binding contract constituted by these two letters alone.—p. 430.

Hussey v. Horne-Payne, *followed*.

Bolton v. Lambert (1889) 58 L. J. Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434.—C.A., *dissenting from*.

Bristol Aërated Bread Co. v. Maggs (1890) 59 L. J. Ch. 472; 44 Ch. D. 616; 62 L. T. 416; 38 W. R. 393.

KAY, J.—I have read Lord Cairns' judgment [in *Hussey v. Horne-Payne*] more than once, and, with deference, I do not think that the observation of Cotton, L.J. in *Bolton v. Lambert* to be a just criticism. Both he and Lord Selborne seemed to me to lay down broadly that where it is sought to make out a binding contract from correspondence, the whole of it, as well as the verbal communications at interviewing, should be regarded, and it is not right to stop at one letter of the correspondence, which with what preceded might constitute a sufficient agreement within the Statute of Frauds, whereas if the whole of the correspondence were considered, and, particularly, as Lord Selborne says, "the sequel" of the communications, it may clearly appear that those letters were in truth only part of an uncompleted negotiation. As was said by Lindley, L.J. in *May v. Thomson* (51 L. J. Ch. 917; 20 Ch. D. 705), the case of *Hussey v. Horne-Payne* before the H. L., shows that we must look at the whole correspondence from beginning to end. . . . In my opinion the decision of *Hussey v. Horne-Payne* completely covers this case. I understand it to mean that if two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to show that the contract was not complete; and, so far as my own judgment is concerned, I entirely agree in the justice and equity of such a rule.—pp. 475, 476.

Hussey v. Horne-Payne, *discussed*.

Bellamy v. Debenham (1890) 60 L. J. Ch. 166; 45 Ch. D. 481; 63 L. T. 220; 39 W. R. 257.—NORTH, J.; *affirmed in C.A., infra*.

Bolton v. Lambert, *distinguished*.

Dibbins v. Dibbins (1896) 65 L. J. Ch. 724; [1896] 2 Ch. 348; 75 L. T. 137; 44 W. R. 696.—CHITTY, J.

Hussey v. Horne-Payne, *dictum discussed and followed*.

Lever v. Koffler (1901) 70 L. J. Ch. 395; [1901] 1 Ch. 543; 84 L. T. 584; 49 W. R. 506.—BYRNE, J.

Rossiter v. Miller (1877) 46 L. J. Ch. 228; 36 L. T. 304.—M.R.; *reversed*, (1877) 46 L. J. Ch. 737; 5 Ch. D. 648; 37 L. T. 14.—C.A.; the latter decision *reversed*, (1878) 48 L. J. Ch. 10; 3 App. Cas. 1124; 39 L. T. 173; 26 W. R. 863.—H.L. (E.).

Rossiter v. Miller (1877) (*supra*), in C.A., *distinguished*.
Bonnewell v. Jenkins (1878) 47 L. J. Ch. 758; 8 Ch. D. 70; 38 L. T. 581; 26 W. R. 294.—C.A.

Crossley v. Maycock (1874) 43 L. J. Ch. 379; L. R. 18 Eq. 180; 22 W. R. 387.—JESSEL, M.R. *approved*.

Rossiter v. Miller (*supra*), in C.A., *distinguished*.
 Lewis v. Brass (1877) 3 Q. B. D. 667; 37 L. T. 738; 26 W. R. 152.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Lewis v. Brass, *not followed*.
 Wood v. Silcock (1884) 50 L. T. 251; 32 W. R. 845.

BACON, V.-C.—The common law case which has been cited I should not accept as an authority under any circumstances in this Court of equity, where the doctrine of specific performance of an agreement has been established for so many years and in so many cases. That case has really no application to the one now before me. In that case the agreement was to do a thing clearly defined. The manner of doing it was not to be settled afterwards. That is not the agreement before me.

Crossley v. Maycock, *approved*.
 Bolton v. Lambert (1889) 58 L. J. Ch. 425; 41 Ch. D. 293; 60 L. T. 687; 37 W. R. 434.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Crossley v. Maycock, *followed*.
Gibbins v. North-Eastern Metropolitan District Asylum (1847) 11 Beav. 1; 17 L. J. Ch. 5; 12 Jur. 22, *distinguished*.
 Jones v. Daniel (1894) 63 L. J. Ch. 562; [1894] 2 Ch. 332; 8 R. 579; 70 L. T. 588; 42 W. R. 687.

ROMER, J.—I think the case that really comes nearest to the present is *Crossley v. Maycock*, and in my opinion *Gibbins v. North-Eastern Metropolitan District Asylum*, on which the plaintiff relied, is distinguishable. In that case it was alleged in the bill that an enclosure sent to the defendant was only a formal document, merely embodying the contract constituted by an offer and an acceptance. The defendant, in whose possession the document was, did not choose to produce it; and therefore it was assumed, as against him, that that allegation in the bill was correct. Consequently, it was not a case where, simultaneously with a letter purporting to accept an offer, a document containing additional and important terms is sent requiring it to be signed by the person to whom it is sent. That case, therefore, is not an authority for the case before me, and, as I have said, I think the real binding authority is *Crossley v. Maycock*.—p. 565.

Winn v. Bull, *considered*.
 Eadie v. Addison (1882) 52 L. J. C. P. 80; 47 L. T. 543; 31 W. R. 320.—PEARSON, J.

Winn v. Bull (1877) 47 L. J. Ch. 139; 7 Ch. D. 29; 26 W. R. 230.—M.R. *followed*.
 Hawkesworth v. Chaffey (1886) 55 L. J. Ch. 335; 54 L. T. 72.—KAY, J.

Hawkesley v. Outram (1892) 61 L. J. Ch. 429; 66 L. T. 765.—ROMER, J.; *reversed*, (1892) 62 L. J. Ch. 215; [1892] 3 Ch. 359; 2 L. R. 60; 47 L. T. 804.—C.A. LINDLEY, LOPES and SMITH, L.JJ.

Hawkesley v. Outram, *distinguished*.
 Lloyd v. Nowell (1895) 64 L. J. Ch. 744; [1895] 2 Ch. 744; 13 R. 712; 73 L. T. 154; 44 W. R. 43.

KEKEWICH, J. held, distinguishing the above case, that in an agreement for sale of a house by the plaintiff, a condition "subject to the preparation by my solicitor, and completion of a formal contract," was not for the benefit of the plaintiff only, and could not be waived by him, and consequently that he could not enforce specific performance of the agreement.

Statute of Frauds.

Clayton v. Andrews (1767) 4 Burr. 2101, *overruled*.
 Rondan v. Wyatt (1792) 2 H. Black. 63 — LORD LOUGHBOROUGH (for the Court), WILSON, J. *dissenting*.

Clayton v. Andrews, *disapproved*.
 Garbutt v. Watson (1822) 5 B. & Ald. 613.
 BAYLEY, J.—The nearest case to this is *Clayton v. Andrews*. But that decision was, as it seems to me, corrected by *Rondan v. Wyatt*.—p. 614.
 HOLROYD, J.—I cannot agree with the judgment of the Court in *Clayton v. Andrews*.—p. 615.

Leroux v. Brown (1852) 12 C. B. 801; 22 L. J. C. P. 1; 16 Jur. 1021; 1 W. R. 22, *followed but questioned*.

Williams v. Wheeler (1860) 8 C. B. (N.S.) 299.
 WILLES, J.—The general rule is that *locus regit actum*, and, though I fully recognise the principle upon which the judgment in this Court in *Leroux v. Brown* professes to be founded, viz., that the procedure is regulated by the *lex fori*, I am not satisfied that either of the sections of the Statute of Frauds to which reference has been made warrants the decision. We must, however, act upon *Leroux v. Brown*, until it is overruled by a Court of error.—p. 316.

Leroux v. Brown, *considered*.
 Gibson v. Holland (1865) 35 L. J. C. P. 5; 1 H. & R. 1; L. R. 1 C. P. 1; 11 Jur. (N.S.) 1022; 13 L. T. 293; 14 W. R. 86.
 WILLES, J.—I have had some difficulty in understanding *Leroux v. Brown*, because it struck me that it might be considered as unnecessarily extending the operation of the Statute of Frauds; but however that may be, we are bound by it.—p. 6.

Leroux v. Brown; Welford v. Beazely (1747) 3 Atk. 503; and **Barkworth v. Young** (1836) 4 Drew. 1; 26 L. J. Ch. 153; 3 Jur. (N.S.) 34; 5 W. R. 156.—V.-C., *adopted*.

Hoyle, *In re*, *Hoyle v. Hoyle* (1892) 62 L. J. Ch. 182; [1893] 1 Ch. 84; 2 R. 145; 67 L. T. 674; 41 W. R. 81.—C.A. LINDLEY, BOWEN and SMITH, L.J.; *reversing* 67 L. T. 254.—KEKEWICH, J.

LINDLEY, L.J.—It was settled by *Leroux v. Brown* that the Statute [of Frauds] does not affect the validity of the contract, but only makes a particular kind of proof necessary to enable a party to bring an action upon it. . . . The policy of the enactment is well explained in *Welford v. Beazley*, and *Barbours v. Young*. The object of the statute being merely to exclude parol evidence, any writing embodying the terms of the agreement and signed by the person to be charged is sufficient.

Leroux v. Brown, applied.

Rochevoucauld v. Boustead (1896) 66 L. J. Ch. 74; [1897] 1 Ch. 196; 75 L. T. 502; 45 W. R. 272.—C.A. RAISBURY, L.C., LINDLEY and SMITH, L.J.

LINDLEY, L.J. (for the Court).—But having regard to *Leroux v. Brown*, and to the language of sect. 7 of the Statute of Frauds, we are unable to see why the defendant should not be able to rely on that statute as a defence to any proceedings in this country having for their object the proof and enforcing of a trust, even of lands abroad. The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this: it regulates procedure here, not titles to land in other countries. If, therefore, the statute afforded the defendant a defence, he would be entitled to the benefit of it.

Leroux v. Brown, referred to.

Royal Exchange Assurance Corporation v. Sjöforsakrings Kätebolaget Vega (1901) 70 L. J. K. B. 874; [1901] 2 K. B. 567; 85 L. T. 241; 50 W. R. 25; 6 Com. Cas. 189; 9 Asp. M. C. 233.—BIGHAM, J.

Warner v. Willington (1856) 3 Drew. 523; 25 L. J. Ch. 662; 2 Jur. (N.S.) 433; 4 W. R. 531, *approved*.

Rouss v. Pickett (1866) 35 L. J. Ex. 218; L. R. 1 Ex. 242; 12 Jur. (N.S.) 628; 15 L. T. 25; 14 W. R. 924; 4 H. & C. 588.—EX. CH.

Warner v. Willington, observations inapplicable.

Coombs v. Wilkes (1891) 61 L. J. Ch. 42; [1891] 3 Ch. 77; 65 L. T. 56; 40 W. R. 77.—ROMER, J.

Bill v. Bament (1841) 9 M. & W. 36; 11 L. J. Ex. 81, *followed*.

Lucas v. Dixon (1880) 58 L. J. Q. B. 161; 22 Q. B. D. 357; 37 W. R. 370.—C.A. ESHER, M.R., BOWEN and FRY, L.J.

Morris v. Wilson (1859) 5 Jur. (N.S.) 168.—V.-C. and *Commins v. Scott* (1875) 44 L. J. Ch. 563; L. R. 20 Eq. 11; 32 L. T. 420; 23 W. R. 498, *followed*.

Filby v. Hounsell (1896) 65 L. J. Ch. 852; [1896] 2 Ch. 737; 75 L. T. 270; 45 W. R. 232.—ROMER, J.

Shardlow v. Cotterell, 50 L. J. Ch. 613; 18 Ch. D. 280; 44 L. T. 549; 29 W. R. 737.—KAY, J.; *reversed*, (1881) 51 L. J. Ch. 353; 20 Ch. D.

90; 45 L. T. 572; 30 W. R. 143.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J.

Ogilvie v. Foljambe (1817) 3 Mer. 53; 17 R. R. 13.—M.R., *discussed and applied*. *Shardlow v. Cotterell* (*supra*), in C.A.

Ogilvie v. Foljambe and Shardlow v. Cotterell in C.A. (*supra*), *applied*. *Plant v. Bourne* (1897) 65 L. J. Ch. 643; [1897] 2 Ch. 281; 76 L. T. 820; 46 W. R. 59.—C.A. LINDLEY, LOPES and CHITTY, L.J.

Ogilvie v. Foljambe, applied. *Bank of New Zealand v. Simpson* (1900) 69 L. J. P. C. 22; [1900] A. C. 182; 82 L. T. 102; 48 W. R. 591.—P.C.

Sale v. Lambert (1874) 43 L. J. Ch. 470; L. R. 18 Eq. 1; 22 W. R. 478.—JESSEL, M.R., *explained*.

Williams v. Byrnes (1863) 1 Moore P. C. (N.S.) 154; 2 N. R. 47; 9 Jur. (N.S.) 363; 8 L. T. 69; 11 W. R. 487.—C.G. and **Williams v. Lake** (1859) 29 L. J. Q. B. 1; 2 El. & El. 349; 6 Jur. (N.S.) 45; 1 L. T. 56; 8 W. R. 41.—Q.B., *discussed*.

Potter v. Duffield (1874) 43 L. J. Ch. 472; L. R. 18 Eq. 4; 22 W. R. 585.—JESSEL, M.R.

Sale v. Lambert and Potter v. Duffield, discussed.

Casson v. Roberts (1862) 31 Bev. 613; 32 L. J. Ch. 105.—ROMILLY, M.R., *questioned*. *Thomas v. Brown* (1876) 1 Q. B. D. 714; 45 L. J. Q. B. 311; 35 L. T. 237; 24 W. R. 821.

MELLOR, J.—Several cases have been decided on the point now raised, particularly two cases which came before the M.R.: *Sale v. Lambert* and *Potter v. Duffield*. In the first of these cases a memorandum of agreement was held to be sufficient within the Statute of Frauds, though the vendor was not described otherwise than as the "proprietor" of the premises, the M.R. saying that the term "proprietor" was an excellent description, and apparently holding that this word, with nothing else in the document to enlarge it, was quite sufficient. Now, comparing this decision with the later one, *Potter v. Duffield*, where the same learned judge held that the description "vendor" was insufficient, I have some difficulty in assenting to it. I think, however, that we ought to hold ourselves bound by the last of these two cases, holding that the word "vendor" is insufficient, though, as far as my judgment goes, I can see no distinction between the nature of the memorandum in either case. I think that the description which should enable us to dispense with the actual names of the parties ought to be very precise and exact, and that in neither of the cases was this requirement complied with.—p. 720.

QUAIN, J.—With regard to *Casson v. Roberts*, I do not think it has much bearing upon the present question, but I must say that I do not think the reasons upon which it proceeded are satisfactory.—p. 724.

Sale v. Lambert; Potter v. Duffield and Plant v. Bourne (1897) 65 L. J. Ch. 643; [1897] 2 Ch. 281; 76 L. T. 820; 46 W. R. 59.—

C.A. LINDLEY, LOPES and CHITTY, L.J.J.; *reversing* BYRNE, J., *followed*.
 Carr v. Lynch (1900) 69 L. J. Ch. 345; [1900] 1 Ch. 613; 82 L. T. 881; 48 W. R. 616.—
 FARWELL, J.

Jaques v. Miller (1877) 47 L. J. Ch. 544; 6 Ch. D. 153; 37 L. T. 151; 25 W. R. 846.—FRY, J., *overruled*.

Blore v. Sutton (1817) 3 Mer. 237; 17 R. R. 74, *followed*.

Marshall v. Berridge (1881) 19 Ch. D. 233; 51 L. J. Ch. 329; 45 L. T. 599; 30 W. R. 93; 46 J. P. 279.—C.A.

JESSEL, M.R.—The view of Fry, J. was that because the agreement itself had a date, therefore that was the date from which the lease was to begin. I must say that not only is there no authority for such a proposition as a proposition of law, but there is a good deal of authority against it. Amongst other authorities is the case of *Blore v. Sutton*, decided by Sir William Grant, which is exactly in point, but which Fry, J., in his previous decision in *Jaques v. Miller*, attempted to distinguish on the ground that it did not appear in the report of *Blore v. Sutton*, that the date on which the memorandum of agreement was signed appeared on the memorandum itself. I must say, speaking with deference to the learned author of that observation, that I had come to an opposite conclusion on reading the report, but in order to be quite certain I sent for the record, and there it appears, as I expected, that the date was in the memorandum, and, therefore, that supposed distinction between *Jaques v. Miller* and *Blore v. Sutton* does not exist. But, independently of that, I am quite unable to concur in the decision in *Jaques v. Miller*.—p. 239.

BAGGALLAY, L.J. to the same effect.

Marshall v. Berridge, *discussed and applied*.
 Lander and Bagley's Contract, In re (1892) 61 L. J. Ch. 707; [1892] 3 Ch. 41; 67 L. T. 521.—
 CHITTY, J.

Wood v. Aylward, 57 L. T. 54; 51 J. P. 724.—
 KEKEWICH, J.: *reversed*, (1887) 58 L. T. 662.—
 C.A.

Hawes v. Armstrong (1885) 1 Scott 661; 4 L. J. Q. P. 254; 1 Bing. (N.C.) 761; 1 Hodges 179, *followed and applied*.
 Eyre, In re, McAndrew v. Norris (1895) 13 R. 674; 72 L. T. 585; 43 W. R. 538.—ROMER, J.

Cuff v. Penn (1813) 1 M. & S. 21, *overruled*.
 Stead v. Dawber (1839) 2 P. & D. 447; 10 A. & E. 57; 9 L. J. Q. B. 101.

[In *Marshall v. Lynn* (1840) 6 M. & W. 109] Parke, B. said: "The recent case of *Stead v. Dawber* appears to have entirely overturned the authority of *Cuff v. Penn*.—p. 116.]

Jervis v. Berridge (1873) L. R. 8 Ch. 351; 42 L. J. Ch. 518; 28 L. T. 481; 21 W. R. 395.—L.C. and L.J., *affirmed*.

Hussey v. Horne-Payne (1879) 48 L. J. Ch. 846; 4 App. Cas. 311; 41 L. T. 1; 27 W. R. 685.—
 H.L. (E.).

Chinnock v. Ely (Marchioness) 2 H. & M. 221; 11 Jur. (N.S.) 32; 34 L. J. Ch. 399.—v.c.; *reversed*, (1865) 4 De G. J. & S. 638; 11 Jur. (N.S.) 329; 12 L. T. 251; 13 W. R. 597.—L.C.

Chinnock v. Ely (Marchioness) (1865) 4 De G. J. & S. 638 (*supra*), *distinguished*.
 Thomas v. Brown (1876) 45 L. J. Q. B. 811, 35 L. T. 237; 24 W. R. 821.—Q.B.D., *dissented from*.

Rossiter v. Miller (1878) 48 L. J. Ch. 10; 3 App. Cas. 1124; 26 W. R. 863; 39 L. T. 173.—H.L. (E.); *reversing* (1877) 46 L. J. Ch. 737; 5 Ch. D. 648; 37 L. T. 14.—C.A.; and *affirming* 5 Ch. D. 648; 36 L. T. 304; 25 W. R. 890.—M.R. [JESSEL, M.R. held in opposition to *Thomas v. Brown* that the word "proprietors" was a sufficient description within the Statute of Frauds, and the C.A. expressed their concurrence with the M.R. on that point. *Thomas v. Brown* is not referred to in the judgments in the House of Lords.]

Croyston v. Banes (1702) Pra. Chan. 208.—
 M.R.; and Symondson v. Tweed (1713) Pra. Chan. 374, *disapproved*.

Rondeau v. Wyatt (1792) 2 H. Bl. 63.
 LORD LOUGHBOROUGH (for the Court).—The early cases, in Prae. in Chan. 208 and 374, do not seem fairly to admit any other construction than this, namely, that the Court thought that, where a parol agreement was admitted by the defendant's answer, he might or might not take advantage of the statute at his option. I say the Court seem to have thought so, because, in fact, no such decree was made in those cases, which contain merely the extra-judicial opinions of the lord keeper and the Master of the Rolls. It is said in those cases, and has been adopted in the argument, that where the defendant confesses the agreement there is no danger of perjury, which was the only thing the statute intended to prevent. But this seems to be very bad reasoning for the calling upon a party to answer a parol agreement certainly lays him under a great temptation to commit perjury.—
 p. 68.

Smith v. Webster, 45 L. J. Ch. 430; 34 L. T. 479.—v.c.; *reversed*, (1876) 45 L. J. Ch. 528, 3 Ch. D. 49; 35 L. T. 44; 24 W. R. 894.—C.A.

Jones v. Victoria Graving Dock Co. (1877) 46 L. J. Q. B. 219; 2 Q. B. D. 314; 36 L. T. 347; 25 W. R. 501.—C.A., *followed*.
 Smith v. Webster (1876) 45 L. J. Ch. 528; 3 Ch. D. 49; 35 L. T. 44; 24 W. R. 894.—
 C.A., *explained*.

Griffiths Cycle Corporation v. Humber & Co. (1899) 68 L. J. Q. B. 959; [1899] 2 Q. B. 414; 81 L. T. 310.—C.A. SMITH, RIGBY and WILLIAMS, L.J.J.; *reversed on the facts*, (1901) W. N. 110.—
 H.L. (E.).

SMITH, L.J. (for the Court).—Our attention has been called to *Smith v. Webster* as an authority for the proposition that no recognition by the officers of the company of the contract by their signature will avail to take the case out of the operation of the 4th section of the Statute of Frauds, unless such officers had authority to sign a record of the contract as such; but I do not think that *Smith v. Webster* bears this out, although some of the language of Lush, L.J. might bear that interpretation. . . . It seems to me that all that is decided by *Smith v. Webster* is that, if reliance is placed on the signature of an agent, as satisfying the 4th section of the Statute of Frauds, you must, whether the

document signed be a record of the terms, or a document referring to and recognising the document containing the record of the terms, show that the agent signing was an agent "thereunto lawfully authorised," but that is all that is necessary.

Coles v. Treothick (1804) 9 Ves. 234; 1

Smith 233; 74 R. 167, *questioned*.

Gosbell v. Archer (1835) 2 Ad. & E. 500; 4 N. & M. 485; 1 H. & W. 31; 4 L. J. K. B. 78.

DENMAN, C.J.—Lord Eldon says in that case, "Where a party, or principal, or person to be bound, signs as what he cannot be, a witness, he cannot be understood to sign otherwise than as a principal." But I think that remark open to much observation. A witness might be drawn into transactions which he did not contemplate, and of which he was ignorant. That would be a great step to take; no such decision has been actually made; and if it had, I should pause, unless I found it sanctioned by the very highest authority, before I held that a party attesting was bound by the instrument.—p. 508.

Smith v. Neale (1857) 2 C. B. (N.S.) 67; 26

L. J. C. P. 143; 3 Jur. (N.S.) 516; 5 W. R.

563; **Mosley v. Tinkler** (1835) 1 C. M. & R.

692; 5 Tyr. 416; 1 Gale 11; 4 L. J. Ex. 84;

and **Laythorp v. Bryant** (1836) 2 Bing.

(N.C.) 735; 3 Scott 238; 2 Hodges 25; 5

L. J. C. P. 217, *approved*.

Martin v. Mitchell (1820) 2 Jac. & W. 413,

428; 22 R. 184, *considered*.

Reuss v. Pickels (1866) 35 L. J. Ex. 218; L. R. 1 Ex. 342; 12 Jur. (N.S.) 628; 15 L. T. 25; 14 W. R. 924; 4 H. & C. 588.—*ex. ch.*

WILLES, J.—*Mosley v. Tinkler* (1 C. M. & R. 692), therefore, is confirmatory of our decision that the whole evidence of an agreement need not be in writing, but only all the terms, along with the signature of the person to be charged. It has been urged upon us that this conclusion will lead to fraud and perjury, and to the very mischiefs the statute was passed to prevent. We do not concur in that view, because no one will be able to enforce an agreement of the sort we are now discussing, without proving that he did or was ready to do his part to entitle him to performance on the part of the other contracting party. Moreover, if good for anything, that argument is good to show that a regular agreement or memorandum of it, signed by one party only, ought not to bind him. The reason we have given is a good answer to the argument, but that argument was also considered by the Court of Common Pleas in *Laythorp v. Bryant* (2 Bing. N. C. 735), where the Court held, in spite of a weighty dictum of Sir T. Plumer, in *Martin v. Mitchell*, that only the party to be charged need sign; the other party, however, at the same time being ready to fulfil his own part of the agreement before suing.—p. 353.

Saunderson v. Jackson (1800) 2 Bos. & P. 238;

3 Esp. 180; 5 L. R. 382, *distinguished*.

Schneider v. Norris (1814) 2 M. & S. 286; 15 R. R. 825.

DAMPIER, J.—In *Saunderson v. Jackson* it did not appear that there was any signature to the bill of parcels: it was only by connecting the letter with the bill of parcels, that the case was taken out of the statute. Here there is the

handwriting of the party to be charged in the bill of parcels, which authenticates it as a memorandum of the bargain.—p. 390.

Schneider v. Norris, *applied*.

Evans v. Hoare (1892) 61 L. J. Q. B. 470; [1892] 1 Q. B. 593; 66 L. T. 345; 40 W. R. 442; 56 J. P. 664.—**DENMAN** and **CAVE, JJ.**

Schneider v. Norris, Evans v. Hoare and Torret v. Cripps (1879) 27 W. R. 706, *distinguished*.

Hucklesby v. Hook (1900) 82 L. T. 117.

BUCKLEY, J.—These cases, I think, proceed upon the principle that signing for the purposes of the statute does not necessarily mean writing your name, but means ratifying by writing in some form or other the document which contains the contract. That is the principle which lies, I think, at the root of *Schneider v. Norris* . . . and of *Evans v. Hoare* . . . That, therefore, seems to me to be the principle of these two cases, that there was a writing by the defendant, or by an agent of the defendant, of some part or the whole of a document containing the defendant's name. The other case proceeds upon a somewhat different principle. That is the case of *Torret v. Cripps* . . . I think that involves this as a matter of principle, that it may be a signature in writing within the statute for a person to take a document and hand it to another and say, the document being in his writing, "That is the document which I ask you to take as forming the contract which you are going to sign." Now, here, the defendant wrote no part of the document at all. The mere fact that it contained his name, that it was written by the plaintiff and addressed to him, is, I think, upon many grounds, insufficient to make this a contract within the statute.—pp. 117, 118.

Heard v. Pilley (1869) 38 L. J. Ch. 718; L. R.

4 Ch. 548; 21 L. T. 68; 17 W. R. 750.—

L.J.; and **Bartlett v. Pickersgill** (1759)

4 East 577, n.; 1 Eden 515; 1 Cox 16;

Burr. 2255; 1 R. R. 1, *considered*.

James v. Smith (1890) [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396.—**KEEWOICH, J.**; *affirmed on other grounds*, 65 L. T. 544.—**C.A.**

Marshall v. Green (1875) 45 L. J. C. P. 153;

1 C. P. D. 35; 33 L. T. 404; 24 W. R. 175,

discussed and distinguished.

Lavery v. Pursell (1888) 57 L. J. Ch. 570; 39 Ch. D. 508; 58 L. T. 846; 37 W. R. 163.

CHITTY, J.—When the case is examined as a whole, it will be seen that the judgment turned upon this, that they considered that as the trees were to be cut down as soon as possible, and that they were almost immediately cut down, the thing sold was a chattel. . . . The true basis of the present Master of the Rolls' [Brett, L.J.'s] judgment is, I think, found at the bottom of p. 42, where he says that "the contract is not for an interest in land, but relates solely to the thing sold itself." Though that case may be open hereafter to further consideration, of course I cannot reconsider it, nor can I differ from it. . . . I leave that case as it stands on its own footing, and must decide this case, which appears to me to be so different from that as at any rate to justify me in coming to the conclusion, as I do, that this case comes within the 4th section.—pp. 573, 574.

Lavery v. Parsell (*supra*). See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). s. 62 (definition of "Goods").

Forster v. Hale (1798) 3 Ves. 696; 5 *Id.* 308; 4 R. R. 128; and **Dale v. Hamilton** (1846) 16 L. J. Ch. 126, 397; 5 Hare 369; 2 Ph. 266; 11 Jur. 574, *applied*.

De Nicols, *In re*, De Nicols v. Curlier (1900) 69 L. J. Ch. 680; [1900] 2 Ch. 410; 82 L. T. 840; 48 W. R. 602.—KEKEWICH, J.

[The principle applied in the above cases to contracts of partnership is also applicable to a marriage contract, and the defence of the Statute of Frauds will not avail.]

Cawthorne v. Cordrey (1863) 13 C. B. (N.S.) 406; 32 L. J. C. P. 152, *distinguished*.

Snelling v. Huntingfield (Lord) (1834) 1 C. M. & R. 20; 4 Tyr. 606; 3 L. J. Ex. 232, *followed*.

Carrington (Lord) v. Roots (1837) 2 M. & W. 248; 6 L. J. Ex. 35; 1 Jur. 85; and **Reade (or Read) v. Lamb** (1851) 6 Ex. 130, 2 L. M. & P. 67; 20 L. J. Ex. 161, *dicta commented on*.

Britain v. Rossiter (1879) 11 Q. B. D. 123; 48 L. J. Ex. 362, 40 L. T. 240; 27 W. R. 482.

BRETT, L.J.—As to **Cawthorne v. Cordrey** the decision is not different from other cases; as to the *dictum*, we can say nothing about it in this case, because the point does not arise. Therefore we have not to overrule **Cawthorne v. Cordrey** either as to its decision or its *dictum*.—p. 124. COTTON and THESIGER, L.J.J. concurred.

Cawthorne v. Cordrey, *disputed from*.

Bracegirdle v. Heald (1818) 1 B. & Ald. 722; 19 R. R. 442, *followed*.

Dollar v. Parkinson (1901) 84 L. T. 470.—DARLING, J.

Boydell v. Drummond (1808) 11 East 142; 2 Camp. 187; 10 L. R. 450; and see *infra*, *adopted*.

Crane v. Powell (1868) 88 L. J. M. C. 43; 1 L. R. 4 C. P. 123; 20 L. T. 708; 17 W. R. 161.—C.P.

Dobson v. Collis (1856) 1 H. & N. 81; 25 L. J. Ex. 267; 4 W. R. 512.—EX.; **Roberts v. Tucker** (1849) 3 Ex. 632.—EX.; **Sweet v. Lee** (1841) 3 Man. & G. 452; 4 Scott (N.R.) 77; 5 Jur. 1184; **Farrington v. Donohoe** (1860) Ir. R. 1 C. L. 675; **Eley v. Positive Assurance Co.** (1875) 45 L. J. Ex. 58; 1 Ex. D. 20; 33 L. T. 743; 24 W. R. 252.—EX. D.; *affirmed*, (1876) 45 L. J. Ex. 451; 1 Ex. D. 88; 34 L. T. 190; 24 W. R. 338.—C.A.; **Fenton v. Emblers** (1762) 3 Burr. 1278; **Souch v. Strawbridge** (1846) 2 C. B. 808; 15 L. J. C. P. 170; 10 Jur. 857; and **Knowlman v. Bluet** (1874) 43 L. J. Ex. 151; 1 L. R. 9 Ex. 307; 32 L. T. 262; 22 W. R. 758.—EX. CH., *considered and applied*.

Davey v. Shannon (1879) 48 L. J. Ex. 459; 4 Ex. D. 81; 40 L. T. 628; 27 W. R. 599.—HAWKINS, J.

Souch v. Strawbridge (*supra*).

Boydell v. Drummond (1808) (*supra*).

Murphy v. Sullivan (1866) 11 Ir. Jur. (N.S.) 111.—EX. CH.

Wells v. Horton (1826) 4 Bing. 40; 12

Moore 176; 2 Car. & P. 383; 5 L. J. (O.S.) C. P. 41; 29 R. R. 498. *followed*.

Knowlman v. Bluet (*supra*).—EX. CH., *referred to*.

Davey v. Shannon (1879) 48 L. J. Ex. 459; 4 Ex. D. 81; 40 L. T. 628; 27 W. R. 599, *not followed*.

McGregor v. McGregor (1888) 57 L. J. Q. B. 591, 21 Q. B. D. 424; 37 W. R. 45; 62 J. P. 772.—C.A.; *affirming* 58 L. T. 227.—ESHER, M.R., LINDLEY and BOWEN, L.J.J.

BOWEN, L.J.—It was laid down in **Peter v. Clompton** (Skinner 353), as the headnote states, that "an agreement that is not to be performed within the space of one year from the making thereof" means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of performance within the year." **Wells v. Horton** (4 Bing. 40) was decided in accordance with that view, and so also was **Murphy v. Sullivan** (11 Ir. Jur. (N.S.) 111). In so far as **Davey v. Shannon** departs from these principles, it seems to me to run counter to the current of authority on the subject.

Britain v. Rossiter (1879) 48 L. J. Ex. 362; 11 Q. B. D. 123; 40 L. T. 240; 27 W. R. 482.—C.A., *discussed*.

McManus v. Cooke (1887) 56 L. J. Ch. 662; 35 Ch. D. 681; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708.

KAY, J. was of opinion that the *dicta* in **Britain v. Rossiter** to the effect that the doctrine that part performance takes a case out of the Statute of Frauds, is confined to contracts for the sale and purchase of land, or for the acquisition of an interest in land, were not reconcilable with the cases on that doctrine.

Nunn v. Fabian (1865) 35 L. J. Ch. 140; L. R. 1 Ch. 35; 11 Jur. (N.S.) 898; 13 L. T. 343, *followed*.

Williams v. Evans (1875) 44 L. J. Ch. 319; L. R. 19 Eq. 547; 32 L. T. 359; 23 W. R. 466.—V.-C.

Nunn v. Fabian, *commented on*.

Humphreys v. Green (1882) 52 L. J. Q. B. 140; 10 Q. B. D. 148; 48 L. T. 60; 47 J. P. 244.—C.A.

Nunn v. Fabian, *followed*.

Conner v. Fitzgerald (1888) 11 L. R. Ir. 106.

Nunn v. Fabian, *followed*.

Humphreys v. Green, *observations applied*.

Maddison v. Alderson (1883) 52 L. J. Q. B. 787; 8 App. Cas. 467; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.—H.L. (R.), *considered*.

Miller and Aldworth v. Sharp (1899) 68 L. J. Ch. 322; [1899] 1 Ch. 622; 80 L. T. 77; 47 W. R. 268.—BYRNE, J.

Ungley v. Ungley (1877) 46 L. J. Ch. 854; 5 Ch. D. 887; 37 L. T. 52; 25 W. R. 738.—C.A., *followed*.

Sharman v. Sharman (1893) 4 R. 124; 67 L. T. 834.—C.A.

Brodie v. St. Paul (1791) 1 Ves. 326,

disapproved. **Cooth v. Jackson** (1800) 6 Ves. 12. See 10 R. R. 150.

2. PARTIES.

Gore v. Gibson (1845) 13 M. & W. 623; 14 L. J. Ex. 151; 9 Jur. 140, *commented on; dicta questioned*

Matthews v. Baxter (1875) L. R. 8 Ex. 132; 42 L. J. Ex. 73; 28 L. T. 169; 21 W. R. 389.

MARTIN, B.—The judges in *Gore v. Gibson* use the word "void," it is true, but I cannot think they meant absolutely void. They simply meant to say that a drunken man's contract could not be enforced against his will. But it by no means follows that it is incapable of ratification.—p. 133.

COLLOCK, B.—The case of *Gore v. Gibson* was, no doubt, rightly decided, but some of the *dicta* of the judges cannot be supported in all their fulness, since the decision in *Molton v. Camroux* (L. R. 2 Ex. 487; L. R. 4 Ex. 17; 18 L. J. Ex. 68, 356).—p. 134.

Robson v. Drummond (1881) 2 B. & Ad. 303; 9 L. J. (Q.S.) K. B. 187, *disapproved*.

British Waggon Co. v. Lea (1880) 49 L. J. Q. B. 321; 5 Q. B. D. 149; 42 L. T. 437; 28 W. R. 349; 44 J. P. 440.—Q.B.D.

COCKBURN, C.J. (for the Court).—We entirely concur in the principle on which the decision in *Robson v. Drummond* rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party so employed, to execute the work or perform the service, is a sufficient answer to any demand by a stranger to the original contract for the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repairs of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by anyone with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in their stipulation was that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus, if without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in *Robson v. Drummond* went to the utmost length to which it can be carried.—p. 324.

Robson v. Drummond, *considered and applied*.

Dr. Jaegar's Sanitary Woollen, &c. Co. v. Walker (1897) 77 L. T. 180.—C.A. **LINDLEY, LOPES and CRITTY, L.JJ.**

Robson v. Drummond; and Tasker v. Shepherd (1801) 30 L. J. Ex. 207; 6 H. & N. 575; 4 L. T. 19; 9 W. R. 476, *disapproved*.

Phillips v. Hall Alhambra Palace Co. (1900) 70 L. J. Q. B. 26; [1901] 1 Q. B. 59; 83 L. T. 431.—**LORD ALVERSTONE, C.J. and KENNEDY, J.**

LORD ALVERSTONE, C.J.—With regard to the first point, as to the death of one partner putting an end to the contract, there seems to me to be greater difficulty. Apparently the principle of law is this—that it is to be determined in each case whether the obligation to be enforced depends upon the personal conduct of the party deceased. This appears to be the effect of the decisions in *Tasker v. Shepherd* and *Robson v. Drummond*. . . . Accordingly, where in any particular case a contract has relation to the personal conduct of the contracting party, that party's death puts an end to it; but if it has no relation to such personal conduct, the death of the contracting party will not put an end to it. In the case before us, I am of opinion that the plaintiffs did not rely on the personal conduct of the three partners, all of whom were unknown to them. Under these circumstances I come to the conclusion that the liability undertaken by the three partners to carry out their contract can be enforced against the two survivors, notwithstanding the death of one of the three.—p. 28.

Beckham v. Knight (1838) 4 Bing. (N.C.) 243; 7 L. J. C. P. 93; 5 Scott 619, *overruled*.

Beckham v. Drake (1841) 9 M. & W. 79; *affirmed, non.* **Drake v. Beckham** (1843) 11 M. & W. 315; 12 L. J. Ex. 486; 7 Jur. 204.—EX. CH.

British Waggon Co. v. Lea (1880) 49 L. J. Q. B. 321; 5 Q. B. D. 149; 42 L. T. 437; 28 W. R. 349; 44 J. P. 440.—**COCKBURN, C.J. and MANISTY, J., approved and applied**.

Associated Portland Cement Manufacturers v. Tolhurst (1902) 71 L. J. K. B. 949; [1902] 2 K. B. 660; 87 L. T. 465; 51 W. R. 81.—C.A. **COLLINS, M.R., SIR F. JEUNE, and HARDY, L.J., reversing** (1901) 70 L. J. K. B. 1036; [1901] 2 K. B. 811.—**MATHEW, J.**

3. SUBJECT MATTER.

Consideration.

Dutton v. Pool (1677) 2 Lev. 210; 1 Vent. 318; T. Raym. 302, *questioned*.

Tweddle v. Guy (or Atkinson) (1861) 1 B. & S. 393; 30 L. J. Q. B. 265; 8 Jnr. (N.S.) 332; 4 L. T. 468; 9 W. R. 751.

BLACKBURN, J.—We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which case cannot be supported. The cases under statute 27 Eliz. c. 4, which have decided that by sect. 2 voluntary gifts by settlement after marriage are void

against subsequent purchasers for value, and are not saved by sect. 4, show that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.—p. 399.

Lee v. Muggeridge (1813) 5 Taunt. 36, *considered*.

Eastwood v. Kenyon (1840) 11 A. & E. 438; 3 P. & D. 276; 9 L. J. Q. B. 409; 4 Jur. 1081.—Q. B.

Callisher v. Bischoffsheim (1870) 39 L. J. Q. B. 181; L. R. 5 Q. B. 449; 18 W. R. 1137; and **Ockford v. Barelli** (1871) 25 L. T. 504; 20 W. R. 116, *questioned*.

Blythe, In re, Banner, Ex parte (1881) 17 Ch. D. 480; 51 L. J. Ch. 300; 44 L. T. 908; 30 W. R. 24.—C.A. JAMES, BRETT and COTTON, L.J.J. BRETT, L.J.—Whenever a similar case arises, I think it will have to be carefully considered whether the decision in *Callisher v. Bischoffsheim* can be supported, and whether, in order to support a compromise of an action, it is not necessary to show, not only that the plaintiff believed that he had a good cause of action, but that the circumstances did in fact raise some doubt whether there was or was not a good cause of action, and I venture to doubt whether, if there was clearly and obviously no cause of action, the mere belief of the parties that there was would support the compromise. It is true that the subsequent case of *Ockford v. Barelli*, if that be also held to be good law, is an authority against this view, because in it there could not possibly be a doubt that there was no cause of action. But I take it that *Ockford v. Barelli* was decided upon the authority of *Callisher v. Bischoffsheim*, adopting the view that the passage which I have read from the earlier part of the judgment of Cockburn, L.C.J. was the ground of the decision. Of course if it were so taken the Court, in the later case, being a Court of co-ordinate jurisdiction, was bound by the decision in the earlier case; but then, if the first case falls, the second would fall with it.—p. 490.

[The passage referred to from the judgment of Cockburn, L.C.J., in *Callisher v. Bischoffsheim*, is at p. 451: "The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration."]

Cook v. Wright (1861) 1 B. & S. 559; 30 L. J. Q. B. 321; 4 L. T. 704; **Callisher v. Bischoffsheim**, and **Ockford v. Barelli**, *approved*.

Blyth, In re, Banner, Ex parte (*supra*), *observations dissented from*.

Miles v. New Zealand Alford Estate Co. (1886) 32 Ch. D. 286; 55 L. J. Ch. 801; 54 L. T. 582; 34 W. R. 669.—C.A. COTTON and FRY, L.J.J.; BOWEN, L.J. *dissenting*.

COTTON, L.J.—Now there was much argument upon the question, what is a good consideration for a compromise: and there are authorities which for a considerable time were considered as laying down the law upon the subject; but Lord Esher, the present Master of the Rolls, in *Ex parte Banner*, is supposed to have thrown doubt upon these authorities; and what he said was, in fact, that, if the question ever came before this Court, the authority of *Callisher v. Bischoffsheim*, *Ockford v. Barelli* and *Cook v.*

Wright would have to be considered. . . I consider, notwithstanding the doubt expressed by the Master of the Rolls, that the doctrine laid down in *Cook v. Wright* and *Callisher v. Bischoffsheim* and *Ockford v. Barelli* is the law of this Court.

Bryan v. Horseman (1804) 4 East 599, *disapproved*.

Mucklow v. St. George (1812) 4 Taunt. 613. MANSFIELD, C.J.—There never was such another case as that which had been cited.—p. 614.

Potter v. Turnor (1620) Palm 185; Winch 7, *disapproved*.

Morton v. Burn (1837) 7 Ad. & E. 19. DENMAN, C.J. (for the Court).—The question is, whether forbearance for a given time on the part of the assignee of a bond to sue the obligors is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount. . . The cases are all in favour of the action lying, with the exception of *Potter v. Turnor*, which we think inconsistent not only with the current of authorities, but with established principles.—p. 25.

Condition Precedent.

Bruff v. Conybeare, 13 C. B. (N.S.) 263; 6 L. T. 647; 9 Jur. (N.S.) 78; *reversed*, (1868) 17 L. T. 664.—EX. CH.

Impossible Contracts.

Rugg v. Minett (1809) 11 East 210; 10 R. R. 475, *discussed*.

Taylor v. Caldwell (1863) 32 L. J. Q. B. 164; 3 B. & S. 826; 8 L. T. 356; 11 W. R. 726.—BLACKBURN, J. (for the Court).

Taylor v. Caldwell (*supra*), *followed*.

Appleby v. Myers (1867) 36 L. J. C. P. 331; L. R. 2 C. P. 651; 18 L. T. 669.—EX. CH.; and **Robinson v. Davison** (1871) 40 L. J. Ex. 172; L. R. 6 Ex. 269; 24 L. T. 755; 19 W. R. 1036.—EX.

Taylor v. Caldwell (*supra*), *followed*.

Howell v. Coupland (1876) 46 L. J. Q. B. 147; 1 Q. B. D. 258; 24 W. R. 470; 33 L. T. 832.—C.A.

Taylor v. Caldwell, *followed*.

Chapman v. Withers (1888) 57 L. J. Q. B. 457; 20 Q. B. D. 824; 37 W. R. 29.—COLERIDGE, C.J. and MATHEW, J.

Taylor v. Caldwell, *distinguished*.

Turner v. Goldsmith (1891) 60 L. J. Q. B. 247; [1891] 1 Q. B. 544; 64 L. T. 301; 39 W. R. 547.—C.A. LINDLEY, LOPES and KAY, L.J.J.

Taylor v. Caldwell and Howell v. Coupland, *followed*.

Nickoll and Knight v. Ashton, Eldridge & Co. (1901) 70 L. J. K. B. 600; [1901] 2 K. B. 126; 84 L. T. 804; 49 W. R. 613; 6 Com. Cas. 150; 9 Asp. M. C. 209.—C.A. SMITH, M.R. and ROMER, L.J.; WILLIAMS, L.J. *dissenting*.

Taylor v. Caldwell, *referred to*, *Grove v. Johnston* (1889) 21 L. R. Ir. 352, 358—Q.B.D.; *distinguished*, *Gamble v. Accident Life Insurance Co.* (1870) Ir. R. 4 C. L. 204.—EX.

Grove v. Johnston, *distinguished*.
Tracey v. McCabe (1893) 32 L. R. Ir. 21.—EX. D.

Illegal Contracts.

Debenham v. Ox (1749) 1 Ves. sen. 275, *distinguished*.
Higgins v. Hill (1887) 56 L. T. 426.—CHITTY, J.

Gremaire v. Le Clerc Bois Valon (1809) 2 Camp. 144, *disapproved*.
Cope v. Rowlands (1836) 2 M. & W. 149; 2 Gale 231; 6 L. J. Ex. 63.

PARKE, B. (for the Court)—One other case cited for the plaintiff remains to be noticed: it is that of *Grenaire v. Le Clerc Bois Valon*, in which Lord Ellenborough held that the plaintiff could recover for surgery and medicines, though he had not been admitted pursuant to the statute of 3 Hen. 8, c. 11, s. 1. It is certainly difficult to reconcile this case with the rule above laid down, for the provisions of that statute were clearly meant to secure to the public skilful practitioners in surgery and medicine; but, on a motion for a new trial, the Court of King's Bench do not appear to have sanctioned the doctrine of Lord Ellenborough, for they disposed of the case on another ground, namely, that there was no proof that the plaintiff had not been duly licensed. We therefore think that case is not a binding authority.—p. 159.

Cope v. Rowlands, *followed*.
Fergusson v. Norman (1838) 5 Bing. (N.C.) 76; 6 Scott 794; 1 Arn. 418, 8 L. J. C. P. 3; 3 Jur. 10.—C.P.

Pickering v. Ilfracombe Ry. (1868) 37 L. J. C. P. 118; L. R. 3 C. P. 235; 17 L. T. 650; 16 W. R. 458.—C.P., *dictum adopted*.
Royal Exchange Assurance Corporation v. Sjöforskrings Aktiebolaget Vega (1901) 70 L. J. K. B. 874; [1901] 2 K. B. 567; 85 L. T. 241; 50 W. R. 25; 6 Com. Cas. 189; 9 Asp. M. C. 238.—BIGHAM, J.

Davies v. Makuna. 52 L. T. 472; *reversed*, (1885) 54 L. J. Ch. 1148; 29 Ch. D. 596; 53 L. T. 314; 33 W. R. 668; 50 J. P. 5.—C.A.

Lockner v. Strode (1680) 2 Chan. Cas. 48, *disapproved*.
Garforth v. Fearon (1790) 1 H. Black. 327, n.; 2 R. R. 778.

Wilson v. Strugnell (1881) 50 L. J. M. C. 145; 7 Q. B. D. 548, 45 L. T. 2; 1814 Cox C. O. 624; 45 J. P. 831.—STEPHEN, J., *overruled on one point*.

Herman v. Jeuchner (or Zeuchner) (1885) 54 L. J. Q. B. 840; 15 Q. B. D. 561; 53 L. T. 94; 33 W. R. 608; 49 J. P. 502.—C.A. **BRETT, M.R., BAGGALLAY AND BOWEN, L.J.J.**; *reversing* 1 Cab. & E. 364.

Headnote.—A contract is illegal whereby a defendant in a criminal case who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period

for his own protection against the defendant's default, and at the expiration of that period is to be returned, and no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, although the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound.

Herman v. Jeuchner, dicta explained.

Kearley v. Thomson (1890) 59 L. J. Q. B. 283; 24 Q. B. D. 742; 63 L. T. 150; 38 W. R. 614.—COLERIDGE, C.J. and FRY, L.J.
FRY, L.J.—We were pressed with the observations of the M.R. in *Herman v. Jeuchner*, where it was said that he had recognised the proposition that so long as the contract remained imperfectly performed, the money could be recovered back. In my opinion the language used by the M.R. does not bear that construction, because in that case the Court thought the contract had been fully performed, and, therefore, no doubt, in speaking of performance he spoke of full performance; but, whatever the construction of those words may be, I have, as I have already stated, the authority of the M.R. to state his concurrence with the view I have expressed with regard to the partial performance of an illegal contract.

Wilson v. Strugnell and Herman v. Jeuchner, considered.

Consolidated Exploration and Finance Co. v. Musgrave (1899) 69 L. J. Ch. 11; [1900] 1 Ch. 37; 81 L. T. 747; 48 W. R. 298; 64 J. P. 89.—NORTH, J.

Beaumont v. Reeve (1846) 8 Q. B. 483; 15 L. J. Q. B. 141; 18 Jur. 284, *commented on*.
Fisher v. Bridges (1854) 3 El. & Bl. 642; 2 C. L. R. 929; 23 L. J. Q. B. 276; 1 Jur. (N.S.) 157; 2 W. R. 706.—EX. CH.

JERVIS, C.J.—The case of *Beaumont v. Reeve*, much relied upon in the Court below, does not, in our judgment, affect the question. It is clear that past cohabitation and previous seduction are not good considerations for a parole promise; but they are not therefore illegal considerations. They are no considerations at all; and inasmuch as a bond, or other instrument under seal, is good without any consideration, it by no means follows that a covenant to pay a sum of money tainted with illegality, can be enforced merely because a bond for maintenance founded upon past cohabitation or previous seduction is good. If an agreement had been made to pay a sum of money in consideration of future cohabitation, and, after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not, under such circumstances, be enforced.—p. 649.

Gray v. Mathias (1800) 5 Ves. 286; 5 R. R. 48, observed upon.

Vallance, In re, Vallance v. Blagden (1884) 26 Ch. D. 353; 50 L. T. 574; 32 W. R. 918; 48 J. P. 398.

KAY, J.—This amounts to a distinct decision that the mere continuance of a cohabitation raises no kind of presumption that a bond given during such cohabitation was given for an immoral consideration.—p. 356.

Ward v. Lloyd (1843) 7 Scott (N.R.) 499; 6 Man. & G. 785; 13 L. J. C.P. 5, *followed*.

Williams v. Bayley (1866) 35 L. J. Ch 717; L. R. 1 H. L. 200; 12 Jur. (N.S.) 875; 14 L. T. 802, *explained*.

Flower v. Sadler (1882) 10 Q. B. D. 572; *affirming* 9 Q. B. D. 83; 46 J. P. 503.

BRETT, L.J.—I think that we ought to treat that case (*Ward v. Lloyd*) as binding on us. It has been contended that the decision in that case has been in effect overruled by the opinions delivered in the House of Lords in *Williams v. Bayley*. The proposition of law laid down in *Ward v. Lloyd* is that if a debt really exists, the right to sue for it must be upheld, even although there may have been a threat by the creditor of criminal proceedings; in *Williams v. Bayley* the only consideration for the respondent rendering himself liable for his son's debts was the giving up of certain forged documents, in respect of which the son might have been prosecuted. In the present case the indorsement of the bills to the plaintiff was not invalid.—p. 575.

Wallace v. Hardacre (1807) 1 Camp. 45, 179; 10 R. R. 629; **Osbaldiston v. Simpson** (1848) 13 Sim. 513; 7 Jur. 736: and **Williams v. Bayley**, *applied*.

Ward v. Lloyd, *distinguished*.

Jones v. Merionethshire Permanent Benefit Building Society (1891) 61 L. J. Ch. 138; [1892] 1 Ch. 173; 65 L. T. 685; 40 W. R. 278; 17 Cox C. C. 389.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

Drage v. Ibberson (1798) 2 Esp. 643, *commented on*.

Fallowes v. Taylor (1798) 7 Term Rep. 475; Peake Ad. C. 155; and **Pool v. Bousfield** (1807) 1 Camp. 55; 10 R. R. 633, *overruled*.

Johnson v. Ogilby (1734) 3 P. Wms. 277, 279, *commented on*.

Keir v. Leeman (1846) 9 Q. B. 371; 15 L. J. Q. B. 360; 10 Jur. 742.—EX. CH.; *affirming* 6 Q. B. 308; 18 L. J. Q. B. 259; 8 Jur. 824.

TINDAL, C.J. (for Exchequer Chamber).—In *Drage v. Ibberson* Lord Kenyon adverted to, and stated that he should adhere to, the class of cases which held that the consideration for an agreement being the settlement of a misdemeanour, might be good in law. Thus a settlement of an indictment for a nuisance, preferred by public authority, was held [in *Fallowes v. Taylor*] a lawful consideration for a bond binding the defendant to remove the nuisance; we presume, on the ground which is not very satisfactory, that the main object of the prosecution—the removal of the nuisance—was thereby effected. But the Court seem to have overlooked the consideration that a defendant who had infringed a public right was thereby entirely freed from the punishment due to a violation of public law. In *Edgcombe v. Rodd* (5 East 294), Le Blanc, J. assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanour and not for a private injury to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallowes v. Taylor*; nor can *Pool v. Bousfield* be reconciled with it. There an agreement to stifle a motion against the defendant, that he should answer the matters of an affidavit, was held illegal.—p. 393.

It is difficult to comprehend the case of *Johnson v. Ogilby*, as stated in Peere Williams' Reports. There a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanour seems to have been the foundation of the decision, if it was made, by Lord Talbot, a distinction overruled in *Collins v. Blanton* (2 Wils. 341), which was decided at a later period. It is not, indeed, at all clear that the indictment for the fraud was compromised, as a part of the agreement, or that the fraud was an indictable one; and perhaps the case may be so explained; if not, it cannot, we conceive, be sustained as law.—p. 393.

Keir v. Leeman, *followed*.

Fisher v. Apollinaris Co. (1875) 74 L. J. Ch. 500; L. R. 10 Ch. 297; 32 L. T. D. 628; 23 W. R. 460.—L.J., *dictum* of JAMES, L.J. *not followed*.

Windhill Local Board v. Vint (1890) 59 L. J. Ch. 608; 45 Ch. D. 351; 63 L. T. 366; 38 W. R. 788.—C.A. COTTON, FRY, and LOPES, L.JJ.; *affirming* 1 Cox C. C. 41.—STIRLING, J. *Held* by the C. A. that an agreement for the compromise of a public offence, namely, the obstruction of a highway, was founded on an illegal consideration and therefore void.

Norman v. Cole (1801) 3 Esp. 253, *questioned*.

Elliott v. Richardson (1870) 39 L. J. C. P. 340; L. R. 5 C. P. 44; 22 L. T. 858; 18 W. R. 1157.

WILLES, J. (*Norman v. Cole*, cited by Pollock, C.B., in *Egerton v. Brownlow* (Earl) (4 H. L. Cas. 148; 23 L. J. Ch. 548), as showing that the pecuniary motive is the vice of an engagement by a person to use his interest to procure a pardon from the Crown).—This seems contrary to the opinion of Hobart, C.J., in *Lamplugh v. Braithwaite* (1 Smith's L. C. 156, 5th ed.).—p. 343.

Davies v. Davies (1887) 118 L. J. Ch. 481; 56 L. T. 401; 35 W. R. 240.—KEWICH, J.; *reversed in part*, (1887) 56 L. J. Ch. 962; 36 Ch. D. 359; 58 L. T. 209; 36 W. R. 86.—C.A.

Allsopp v. Wheatcroft (1872) 42 L. J. Ch. 12; L. R. 15 Eq. 39; 27 L. T. 272, 21 W. R. 102.—V.C., *disapproved*.

Leather Cloth Co. v. Lonsont (1869) 39 L. J. Ch. 86; L. R. 9 Eq. 345; 21 L. T. 661; 18 W. R. 572.—V.C., *followed*.

Rousillon v. Rousillon (1880) 14 Ch. D. 351; 49 L. J. Ch. 338; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663.

FRY, J.—But then it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract being in its terms unlimited as to space, and, therefore, extending to the whole of England and Wales, must be void (p. 366) . . . Undoubtedly, Vice-Chancellor Wickens, of whose judgments I can never speak without the highest respect, came to the conclusion that such an artificial rule existed, and he so expressed himself in *Allsopp v. Wheatcroft* (p. 367) . . . I have, therefore upon the authorities, to choose between two sets of cases, those which recognise, and those which refuse to recognise this supposed rule, and for the reasons which I have already

mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases, in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable.—p. 369

Leather Cloth Co. v. Lonsort, discussed.

Mills v. Dunham (1891) 60 L. J. Ch. 362; [1891] 1 Ch. 576; 64 L. T. 712; 39 W. R. 289.—C.A. LINDLEY, LOPES and KAY, L.J.J.
LINDLEY, L.J.—I think that Mr. Levett's contention that you are to treat a restraint of trade as *prima facie* bad, and throw upon the person supporting it the onus of showing that it is reasonable, is introducing a wholly unsound principle into the construction of documents. I do not think that James, V.-C., in *Leather Cloth Co. v. Lonsort*, meant to lay down any such rule. . . . Looking at the whole of the language, I do not understand his lordship as saying that you are to approach the contract with a leaning either way. You are to construe the contract and then see whether it is legal.

Rousillon v. Rousillon, followed.

Leather Cloth Co. v. Lonsort and Davies v. Davies (supra), referred to.

Printing and Numerical Registering Co. v. Sampson (1875) L. R. 19 Eq. 462; 41 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463.—M.R., *observations cited*.
Badische Anilin und Soda Fabrik v. Schott (1892) 61 L. J. Ch. 698; [1892] 3 Ch. 447; 67 L. T. 281.—CHITTY, J.

Printing and Numerical Registering Co. v. Sampson, approved.

Tallis v. Jacobson (1892) 61 L. J. Ch. 655; [1892] 3 Ch. 441; 67 L. T. 840; 41 W. R. 11.—CHITTY, J.

Nicholls v. Stretton (1843) 7 Beav. 42; 8 C.

10 Q. B. 346; 11 Jur. 1009, *followed*.
Baines v. Geary (1887) 56 L. J. Ch. 935; 35 Ch. D. 154; 56 L. T. 567; 36 W. R. 98; 51 J. P. 628.—NORTH, J.

Pickering v. Iffracombe Ry. (1868) 37 L. J. C. P. 118; L. R. 3 C. P. 235; 17 L. T. 650; 16 W. R. 458, *dictum approved*.

Price v. Green (1847) 16 L. J. Ex. 108; 16 M. & W. 346; 9 Jur. 880.—EX. CH.; **Nicholls v. Stretton**, and **Baines v. Geary** (1887) 56 L. J. Ch. 935; 35 Ch. D. 154; 56 L. T. 567; 36 W. R. 98; 51 J. P. 628, *discussed*.

Baker v. Hedgecock (1888) 57 L. J. Ch. 889; 32 Ch. D. 520; 59 L. T. 361; 36 W. R. 840.
CHITTY, J.—The principle upon which the Court acts in thus severing the parts of the contract is very neatly stated by Willes, J., in *Pickering v. Iffracombe Ry.*, where he says: "The general rule is, that where you cannot sever the legal from the illegal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good." . . . In *Price v. Green* there were, in fact, two covenants, or one covenant which on its face was divisible into two parts. . . . So, too, in *Nicholls v. Stretton*, there were two classes of persons, and therefore there

was no difficulty in severing the covenant into two parts, the one distinct from the other. . . . In *Baines v. Geary*, as it appears to me—although I am not quite sure whether I read the judgment aright—it was possible to divide the covenant into two parts. Although I am not myself now concerned in putting any construction on the particular instrument which was the subject of that case, I think I should have decided that case in the same way as did North, J. I also think that the principle of his decision was that which I have just now been stating, for he refers to and discusses both *Price v. Green* and *Nicholls v. Stretton*, and, in fact, bases his decision upon those cases. That being so, I think he based his decision on the same principle as that which I am following; nor do I think that he intended to lay down any principle at variance with that upon which I have laid stress—namely, that the Court cannot create or carve out a new covenant for the sake of validating an instrument which would otherwise be void.—pp. 890, 891.

Baines v. Geary, distinguished.

Perls v. Scafield (1892) 61 L. J. Ch. 409; [1892] 2 Ch. 149; 66 L. T. 660; 40 W. R. 548.—C.A. LINDLEY, BOWEN and KAY, L.J.J.

KAY, L.J.—What is proposed here is to sever a proviso from the rest of the agreement; in the other case [*Baines v. Geary*] it was dividing one covenant into two parts. It is not proposed here to separate the part which is bad from the part which is good, but to separate the covenant from the proviso, which explains the meaning of the whole, and then to give a different meaning to the whole case by striking the proviso out. Such a mode of construction is not possible.

Whittaker v. Howe (1841) 3 Beav. 383, *questioned*.

Tallis v. Tallis (1852) 16 Jur. 746, n.
COLLIERIDGE, C.J.—The correctness of Lord Langdale's decision in that case is questioned in the notes to Smith's Leading Cases.

Whittaker v. Howe, followed.

Whitwham v. Moss (1895) 73 L. T. 57.—NORTH, J.

Dellaby and Hassel's Case (1588) 1 Leon. 123, *questioned*.

Tallis v. Tallis (1852) 16 Jur. 746, n.
CAMPBELL, C.J.—That is a strange case, because the matter lay exclusively within the knowledge of the plaintiff.

Young v. Timmins (1831) 1 Cr. & J. 331; 1 Tyr. 226; 9 L. J. (O.S.) Ex. 68, *held overruled*.

Gravelly v. Barnard (1874) 43 L. J. Ch. 659; L. R. 18 Eq. 518; 30 L. T. 863; 22 W. R. 691.
[JESSEL, M.R. held that *Young v. Timmins* was overruled by *Hitchcock v. Coker* (6 A. & E. 438; 6 L. J. Ex. 266).]

Horner v. Graves (1831) 7 Bing. 735; 5 M. & P. 768; 9 L. J. (O.S.) C. P. 192; 33 R. R. 635, *held overruled*.

Archer v. Marsh (1897) 6 A. & E. 959; 2 N. & P. 562; W. W. & D. 641; 6 L. J. K. B. 244.
DENMAN, C.J. (for the Court).—We may observe that our own opinion, when *Hitchcock v. Coker* (6 A. & E. 438) was under discussion, least much the same way; but we thought

ourselves bound by the authority of *Horner v. Graves*, where the Court of Common Pleas entered into an inquiry into the terms of the contract between the parties. The case appears to be overruled by the late decision in *error*. We not only bow to its authority, but think that in this respect it establishes a more correct and much more convenient rule of law.—p. 967.

Mitchel v. Reynolds (1711) 1 P. Wms. 181; 1 Sm. L. C. 182; **Horner v. Graves**, and **Hitchcock v. Coker** (1837) 1 N. & P. 796; 6 A. & E. 438; 2 H. & W. 464; 6 L. J. Ex. 266.—EX. CH., *applied*.

Mallan v. May (1843) 11 M. & W. 653; 12 L. J. Ex. 376; 7 Jur. 586.—PARKER, B. (for the Court).

Hitchcock v. Coker and **Mallan v. May** (1843) 11 M. & W. 653; 12 L. J. Ex. 376; 7 Jur. 586, *applied*.

Elves v. Crofts (*or Croft*) (1850) 10 C. B. 241; 19 L. J. C. P. 385; 14 Jur. 855.—WILDE, C.J., CRESSWELL, WILLIAMS and TALFOURD, JJ.

Mitchel v. Reynolds; **Hitchcock v. Coker**; **Horner v. Graves**, and **Mallan v. May**, *applied*.

Tallis v. Tallis (1853) 22 L. J. Q. B. 185; 1 El. & Bl. 891; 17 Jur. 1149; 1 W. R. 114.—CAMPBELL, C.J., COLERIDGE, WIGHTMAN and ERLE, JJ.

Hitchcock v. Coker, **Mitchel v. Reynolds** and **Davis v. Mason** (1793) 5 Term Rep. 118, *applied*.

Graveley v. Barnard (1874) 43 L. J. Ch. 659; L. R. 18 Eq. 518; 30 L. T. 863; 22 W. R. 891.

Hitchcock v. Coker and **Elves v. Crofts**, *approved and followed*.

Jacoby v. Whitmore (1853) 49 L. T. 335; 32 W. R. 18; 48 J. P. 335.—C.A. BRETT, M.R., COTTON and BOWEN, L.J.J.; *reversing* BACON, V.-C. *And see* **Davies v. Davies** (1887), *supra*, col. 664.

Horner v. Graves, *applied*.

Rogers v. Maddocks (1892) 62 L. J. Ch. 219; [1892] 3 Ch. 346; 67 L. T. 329; 2 R. 53.—C.A. LINDLEY, LOPES and SMITH, L.J.J.

Mitchel v. Reynolds (*supra*); **Horner v. Graves**; **Hinde v. Gray** (1840) 1 Man. & G. 195; 1 Scott (N.R.) 123; 9 L. J. C. P. 253; 4 Jur. 392; and **Ward v. Byrne** (1839) 5 M. & W. 548; 9 L. J. Ex. 14; 8 Jur. 1175, *considered*.

Nordenfellt v. Maxim-Nordenfellt Guns and Ammunition Co. (1894) 63 L. J. Ch. 908; [1894] A. C. 535; 71 L. T. 489; 11 R. L.—H.L. (E.). LORDS HERSCHELL, L.C., WATSON, ASHBOURNE MACNAGHTEN and MORRIS; *affirming* S. C. *nom.* **Maxim-Nordenfellt Guns and Ammunition Co. v. Nordenfellt** (1892) 62 L. J. Ch. 273; [1893] 1 Ch. 630; 2 R. 298; 68 L. T. 833; 41 W. R. 604.—C.A. LINDLEY, BOWEN and SMITH, L.J.J.; *which reversed* 67 L. T. 469.—ROMER, J. *See* judgments of the House of Lords.

Jacoby v. Whitmore (1883) 49 L. T. 335; 32 W. R. 18; 48 J. P. 335.—C.A. BRETT, M.R., COTTON and BOWEN, L.J.J., *followed*. **Smith v. Hawthorne** (1897) 76 L. T. 716.—STIRLING, J.

Nordenfellt v. Maxim-Nordenfellt Guns and Ammunition Co. (*supra*); and **Dubowski v. Goldstein** (1896) 65 L. J. Q. B. 397; [1896] 1 Q. B. 478; 74 L. T. 180; 44 W. R. 436.—C.A. ESHER, M.R., LOPES and RIGBY, L.J.J., *applied*.

Ward v. Byrne, *distinguished*.

Underwood v. Barker (1899) 68 L. J. Ch. 201; [1899] 1 Ch. 800; 80 L. T. 306; 47 W. R. 347.—C.A. LINDLEY, M.R. and RIGBY, L.J.: WILLIAMS, L.J. *dissenting*.

Hitchcock v. Coker; **Underwood v. Barker** (*supra*); and **Mallan v. May**, *applied*.

Perls v. Saalfeld (1892) 61 L. J. Ch. 409; [1892] 2 Ch. 149; 66 L. T. 666; 40 W. R. 548.—C.A. LINDLEY, BOWEN and KAY, L.J.J., *inapplicable*.

Mitchel v. Reynolds; **Rannie v. Irvine** (1844) 7 Man. & G. 969; 8 Scott (N.R.) 674; 14 L. J. C. P. 10; 8 Jur. 1051; **Horner v. Graves**; and **Mills v. Dunham** (1891) 60 L. J. 362; [1891] 1 Ch. 576, 586; 64 L. T. 712; 39 W. R. 289.—C.A. LINDLEY, LOPES and KAY, L.J.J., *dicta cited*.

Haynes v. Doman (1899) 68 L. J. Ch. 419; [1899] 2 Ch. 13; 80 L. T. 569.—C.A. LINDLEY, M.R., RIGBY and ROMER, L.J.J.

Haynes v. Doman (1899) 68 L. J. Ch. 419; [1899] 2 Ch. 13; 80 L. T. 569.—C.A. LINDLEY, M.R., RIGBY and ROMER, L.J.J. *followed*.

Hood and Moore's Stores v. Jones (1899) 81 L. T. 169.—COZENS-HARDY, J.

Horner v. Graves; **Elves v. Crofts** (*ante*, col. 667); and **Jacoby v. Whitmore** (*supra*), *considered and applied*. **Townsend v. Jarman** (1900) 69 L. J. Ch. 823; [1900] 2 Ch. 698; 83 L. T. 366; 49 W. R. 158.—FARWELL, J.

Pilkington v. Scott (1846) 15 M. & W. 657; 15 L. J. Ex. 329; and **Hartley v. Cummings** (1847) 5 C. B. 247; 2 Car. & K. 438; 17 L. J. C. P. 84; 12 Jur. 57, *applied*.

Robinson v. Heuer (1898) 67 L. J. Ch. 644; [1898] 2 Ch. 451; 79 L. T. 281; 47 W. R. 34.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.J.J.

Clark v. Watkins, 7 L. T. 616; 11 W. R. 253; *reversed*. (1863) 9 Jur. (N.S.) 142; 8 L. T. 8; 11 W. R. 819.

Allen v. Taylor (1849) 19 W. R. 556; 24 L. T. 249, *distinguished*.

Palmer v. Mallet (1887) 57 L. J. Ch. 226; 36 Ch. D. 411; 58 L. T. 64; 36 W. R. 460.—C.A. COTTON, BOWEN and FRY, L.J.J.

COTTON, L.J.—It is true that in *Allen v. Taylor*, where there was a contract not to carry on the trade of a rug-merchant, it was held that merely acting as clerk or assistant to a person carrying on that trade was not a breach of the covenant. But an agreement not to carry on a trade is a very different thing from an agreement not to carry on a business or profession. "Carrying on a trade" implies, to my mind, that the person engaged in it is engaged in it

quâ trade—that is to say, as a trade producing profit or loss which is to be shared by him; and that is not the case of a merely salaried assistant. I cannot come to the conclusion that a man is less carrying on the profession of a surgeon because he is doing so as assistant to some one else. "Profession" is different from "trade," and it is much more emphatic to my mind, than if "business" alone were here. When, as here, the words "carry on the business or profession of surgeon" are merely used to denote what is done by a man acting as surgeon, a man, in my opinion, acts as surgeon and carries on the business of a surgeon none the less because he is not the principal or engaged in the business as a partner, but is merely carrying it on as assistant to somebody else.—p. 228.

Smith v. Hancock (1894) 63 L. J. Ch. 477; [1894] 2 Ch. 377; 7 R. 200; 70 L. T. 578; 42 W. R. 456; 68 J. P. 638.—O.A. LINDLEY and SMITH, L.J.; KAY, L.J. *dissenting*; *considered and applied*. Gophir Diamond Co. v. Wood (1902) 71 L. J. Ch. 550; [1902] 1 Ch. 950.—SWINFEN EADY, J.

Hall v. Dyson (1852) 17 Q. B. 785; 21 L. J. Q. B. 224; 16 Jur. 220, *applied*.

Taylor v. Bowers (1876) 46 L. J. Q. B. 39; 1 Q. B. D. 291; 34 L. T. 938; 24 W. R. 499.—O.A., *dicta questioned*.

Kearley v. Thomson (1890) 59 L. J. Q. B. 288; 24 Q. B. D. 742; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.—COLERIDGE, C.J. and FRY, L.J.

FRY, L.J.—In that case (*Taylor v. Bowers*) Melish, L.J., in delivering judgment, says at p. 300: "If money is paid, or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out." . . . Notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal; and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice.

Hall v. Dyson; Murray v. Reeves (or Reid) (1828) 8 B. & C. 421; 2 Man. & Ry. 423; 6 L. J. (O.S.) K. B. 348; and **Nerot v. Wallace** (1789) 3 Term Rep. 17, *inapplicable*.

McHenry, *In re*, McDermott v. Boyd; Levita, *Ex parte* (1894) 64 L. J. Ch. 13; [1894] 3 Ch. 365; 71 L. T. 502.—O.A. HERSCHELL, L.C., LINDLEY and DAVEY, L.J.; *reversing* 42 W. R. 474; 1 Manson 224.—NORTH, J.

4. INTERPRETATION.

Burton v. G. N. R. (1854) 23 L. J. Ex. 184; 9 Ex. 507; 2 W. R. 257, *followed*. Forwood v. Rhodes (1874) 31 L. T. 61.—EX.; *affirmed in H.L., infra*.

McIntyre v. Belcher (1863) 14 C. B. (N.S.) 654; 32 L. J. C. P. 254; 8 L. T. 461; 11 W. R. 889; 10 Jur. (N.S.) 239, *considered*. Rhodes v. Forwood (1876) 47 L. J. Ex. 396;

1 App. Cas. 256; 34 L. T. 890; 24 W. R. 1078.—H.L. (R.); *reversing* S. C. *non*. Forwood v. Rhodes (1875) 33 L. T. 314.—EX. CH.; *which had reversed* (1874) 31 L. T. 61.—EX.

McIntyre v. Belcher, distinguished.

Railway and Electric Appliances Co., *In re* (1888) 57 L. J. Ch. 1027; 38 Ch. D. 597; 59 L. T. 22; 36 W. R. 730.—KAY, J.

Stadholve v. Mandell (1698) 1 Lord Raymond 279, *followed*.

Melliquam v. Taylor (1894) 63 L. J. Ch. 738; [1895] 1 Ch. 53; 8 R. 740; 71 L. T. 484; 43 W. R. 297; *affirmed*, 64 L. J. Ch. 296; 8 R. 750, n.; 71 L. T. 679.—O.A. LORD HALSBURY, LINDLEY and RIGBY, L.J.

Vince, In re, Trustee, Ex parte (1892) 61 L. J. Q. B. 217; [1892] 1 Q. B. 587; 66 L. T. 284; 40 W. R. 428.—WILLIAMS and COLLINS, J.; *reversed, non*. Vince, *In re, Baxter, Ex parte*, 61 L. J. Q. B. 836; [1892] 2 Q. B. 478; 67 L. T. 70; 41 W. R. 138; 9 Morrell 222.—O.A. ESHER, M.R., BOWEN and SMITH, L.J.

5. DISCHARGE AND BREACH.

Suffell v. Bank of England, 7 Q. B. D. 370; 45 L. T. 315; 30 W. R. 48; *reversed*. (1882) 51 L. J. Q. B. 401; 9 Q. B. D. 555; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500.—O.A.

Suffell v. Bank of England (*supra*), in C.A., *discussed*.

Howgate and Osborne's Contract, *In re* (1902) 71 L. J. K. B. 279; [1902] 1 Ch. 451; 86 L. T. 180.—KEKEWICH, J.

Hochster v. De la Tour (1853) 2 E. & B. 678; 22 L. J. Q. B. 455; 17 Jur. 972; 1 W. R. 463, *explained*.

Roberts v. Brett (1859) 6 Jur. (N.S.) 146; 6 C. B. (N.S.) 611; 28 L. J. C. P. 323.—EX. CH.; *affirmed*, (1865) 11 H. L. Cas. 337; 34 L. J. C. P. 241; 11 Jur. (N.S.) 377; 12 L. T. 286; 13 W. R. 587.

BRAMWELL, B.—As to that case, I say nothing, except that there is good authority for saying that the judgment may be supported on the ground of the relation of master and servant having been destroyed.—p. 14.

Hochster v. De la Tour, distinguished.

Churchward v. The Queen (1865) L. R. 1 Q. B. 173; 14 L. T. 57.

Hochster v. De la Tour, applied.

Wilkinson v. Verity (1817) 40 L. J. C. P. 141; L. R. 6 C. P. 206; 24 L. T. 32; 19 W. R. 604.—C.P.

Frost v. Knight, 39 L. J. Ex. 277; L. R. 5 Ex. 322; 23 L. T. 714; 19 W. R. 776.—EX.; *reversed*, (1872) 41 L. J. Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.—EX. CH.

Hochster v. De la Tour, applied.

Frost v. Knight (*supra*), in EX. CH. *Headnote*.—The defendant promised to marry the plaintiff so soon as his (defendant's) father

should die. During the father's lifetime the defendant refused absolutely to marry the plaintiff. The plaintiff sued for breach of the promise, the defendant's father being still alive. Held, reversing the judgment of the Court below, that the principle of *Hochster v. De la Tour* was applicable to the case of such a promise to marry, and that a breach of contract had been committed on which the plaintiff could sue.

Hochster v. De la Tour, considered.

Frost v. Knight (*supra*), in EX. CH., followed.

Roper v. Johnson (1873) 42 L. J. C. P. 65; L. R. 8 C. P. 167; 28 L. T. 297; 21 W. R. 384.—C.P.

Hochster v. De la Tour, approved.

Mersey Steel and Iron Co. v. Naylor (1884) 53 L. J. Q. B. 497; 9 App. Cas. 434; 51 L. T. 637; 32 W. R. 989.—H.L. (E.).

Hochster v. De la Tour and Frost v. Knight, discussed and held inapplicable.

Johnstone v. Milling (1886) 16 Q. B. D. 460; 55 L. J. Q. B. 162; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694.—C.A. FISHER, M.R., COTTON and BOWEN, L.JJ.

COTTON, L.J.—The doctrine of *Hochster v. De la Tour* seems to be that, where a party to a contract has made statements before the time for performance has arrived, importing a refusal to perform or to be bound by the contract, the other party, if he chooses, may elect to act upon such statements as a renunciation of the entire contract, and may thereupon treat the same as a breach of the contract and bring his action. If he so elects, his election relieves the other party from any further obligation, and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken, and is at an end. The law is thus stated by Cockburn, C.J. in the case of *Frost v. Knight*: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour* and *Dumble and Black Sea Co. v. Xenos* (18 C. B. (N.S.) 825; 31 L. J. C. P. 284) on the one hand, and *Avery v. Bourden* (5 E. & B. 714; 26 L. J. Q. B. 3), *Reid v. Hoskins* (6 E. & B. 953; 26 L. J. Q. B. 5) and *Barwick v. Buba* (2 C. B. (N.S.) 563; 26 L. J. C. P. 280) on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it; on the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once

bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." That expression of the law was cited with approval by Keating, J. in the case of *Roper v. Johnson* (L. R. 8 C. P. 167). It must be taken, therefore: that the law is that, when one party has done an act which amounts to wrongful renunciation of the contract and the other has acted upon it as such, there is a cause of action in respect thereof; but, when the other has not done so, then both the parties, as well he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions. The Divisional Court in the present case treated the statements made by the plaintiff as a renunciation of the contract within the doctrine I have mentioned. I cannot say I think they were right in so doing. But, assuming that they were, I can find no case which shows that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract such as a lease, which contains many. And, as at present advised, I am favourably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant put an end to the entire contract.—p. 470.

Johnstone v. Milling, applied.

Smith v. Butler (1900) 69 L. J. Q. B. 521; [1900] 1 Q. B. 694; 82 L. T. 281; 48 W. R. 583.—C.A. SMITH, COLLINS and ROMER, L.JJ.; reversing BUCKNILL, J.

Hochster v. De la Tour; Mersey Steel and Iron Co. v. Naylor (1884) 53 L. J. Q. B. 497, 501; 9 App. Cas. 434, 442; 51 L. T. 637; 32 W. R. 989.—H.L. (E.); and **Johnstone v. Milling, principles followed and applied.**

Rhymney Ry. v. Brecon and Merthyr Tydfil Junction Ry. (1900) 69 L. J. Ch. 813; 83 L. T. 111; 49 W. R. 116.—C.A. LORD ALVERSTONE, M.R., RIGBY and COLLINS, L.JJ.

Mersey Steel and Iron Co. v. Naylor, applied.

Coruwall v. Henson (1900) 69 L. J. Ch. 581; [1900] 2 Ch. 298; 82 L. T. 735; 49 W. R. 42.—C.A. WEBSTER, M.R., RIGBY and COLLINS, L.JJ.; reversing 68 L. J. Ch. 749; [1899] 2 Ch. 710; 81 L. T. 113; 48 W. R. 42.—COZENS-HARDY, J.

Frost v. Knight (*supra*); **Roper v. Johnson** (*supra*); and **Johnstone v. Milling** (*supra*), applied.

Michael v. Hart (1902) 71 L. J. K. B. 265; [1902] 1 K. B. 482; 86 L. T. 474; 50 W. R. 908.—C.A.

Adlard v. Booth (1835) 7 Car. & P. 108, explained.

Appleby v. Myers (1867) 36 L. J. C. P. 331; L. R. 2 C. P. 651; 16 L. T. 669.—EX. CH.;

reversing L. R. 1 C. P. 615; 14 L. T. 594; 14 W. R. 835.

Appleby v. Myers, applied.

O'Neill v. Armstrong (1895) 65 L. J. Q. B. 7; [1895] 2 Q. B. 418; 14 R. 703; 73 L. T. 178.—C.A.; *affirming* 43 W. R. 554.

Appleby v. Myers, followed.

The Madras (1898) 67 L. J. P. 53; [1898] P. 90; 78 L. T. 325; 8 Asp. M. C. 397.—JUNE, P.

Appleby v. Myers, followed.

Forman v. The Liddlestale (1900) 69 L. J. P. C. 41; [1900] A. C. 190; 82 L. T. 331; 9 Asp. M. C. 45.—P. LORDS HOBHOUSE, DAVEY and ROBERTSON and SIR R. COUCH.

CONVERSION AND RECONVERSION.

OPERATION OF DOCTRINE.

Greenway v. Greenway, 6 Jur. (N.S.) 138; 8 W. R. 176.—STUART, V.-C.; *reversed*, [1890] 29 L. J. Ch. 601; 2 De G. F. & J. 128.—CAMPBELL, L.C., KNIGHT BRUCE and TURNER, L.JJ.

Earlom v. Saunders (1754) Amb. 241.—HARDWICKE, L.C.; and **Johnson v. Cookson (1748)** 1 Ves. sen. 169.—HARDWICKE, L.C., *followed*.

Cowley v. Hartstonge (1813) Dow 361; 14 R. R. 86.—H.L. (IR.). ELDON, L.C., LORDS REDENBACH and CARLTON.

Earlom v. Saunders and Cowley v. Hartstonge, applied.

Cookson v. Reay (1842) 5 Beav. 22.—LANGDALE, M.R.; *affirmed*, *nom.* Cookson v. Cookson (1845) 12 Cl. & F. 121; 9 Jur. 499.—H.L. (E.). LORDS BROUGHAM, COTTENHAM and CAMPBELL.

Earlom v. Saunders and Cowley v. Hartstonge, discussed and distinguished.

Evans v. Ball (1882) 47 L. T. 165; 30 W. R. 899.—H.L. (E.).

SELBORN, L.C.—Now, I do not think it possible to deny that *Earlom v. Saunders*, before Lord Hardwicke, and, at all events, the opinion of Lord Redesdale in *Cowley v. Hartstonge*, in this House, show that limitations appropriate to real estate may in such a case be important evidence in the proper construction of a will, and may justify some apparent violence being done to the words of option in order to give effect to the general intent. Before I refer to the particular circumstances under which the decisions in those cases were made, I think it expedient to state what I understand to be the principle which underlies those decisions, and is indeed the universal principle adopted by all the Courts of this country in the construction of wills. You look to the whole will, and endeavour from every part of it to ascertain the intention, and if in some parts the form of expression may point in a particular direction, yet there may be in the rest of the will, and in the general scheme, as is sometimes said, or in its particular provisions taken together, sufficient indication that the first impression arising from the literal construc-

O.C.

tion of a particular portion of it is not to be trusted; and that the true intention was that which the Court can carry out by supplementing the actual words; that is to say, by accomplishing the general purpose at all events, and by making the particular words subordinate to that general purpose. That principle is not exclusively applicable to cases of this particular kind; it is general, though in my judgment one to be always applied with great discrimination and caution. . . . As I have said, it is not for your lordships to express any opinion whatever as to those particular decisions in the way of criticism. Such as they are, they depend upon the general canon which I have mentioned, and upon the particular circumstances; and these circumstances appear to me to be entirely distinguishable from the circumstances of the present case.

—p. 167.
LORDS BLACKBURN and WATSON to the same effect.

Lawes v. Bennett (1785) 1 Cox 167; 1 R. R. 10.—KENYON, L.C.; *observed on*, Ripley v. Waterworth (1892) 7 Ves. 436.—ELDON, L.C.; *commented on but followed*, Townley v. Bedwell (1808) 14 Ves. 591; 9 R. R. 852.—ELDON, L.C.; Collingwood v. Row (1857) 26 L. J. Ch. 649; 3 Jur. (N.S.) 785; 5 W. R. 484.—KINDERSLEY, V.-C.; Weeding v. Weeding (1861) 30 L. J. Ch. 680; 1 J. & H. 424; 4 L. T. 616; 9 W. R. 431.—WOOD, V.-C.; *limited*, Edwards v. West (1878) 47 L. J. Ch. 463; 7 Ch. D. 858; 38 L. T. 481; 26 W. R. 507.—FRY, J.

Emuss v. Smith (1848) 2 De G. & Sm. 732.

—KNIGHT BRUCE, V.-C., *not followed*.
Saxton v. Saxton (1879) 49 L. J. Ch. 128; 13 Ch. D. 359; 41 L. T. 648; 28 W. R. 294.—MALINS, V.-C. *And see post*, col. 675.

Lawes v. Bennett, explained.

Edwards v. West (supra), confirmed.

Green v. Low (1856) 22 Beav. 625; 2 Jur. (N.S.) 848; 4 W. R. 669.—ROMILLY, M.R., *distinguished*.

Adams and Kensington Vestry, In re (1884) 27 Ch. D. 394; 54 L. J. Ch. 87, 51 L. T. 382; 32 W. R. 883.

BAGGALLAY, L.J.—Now I think that *Lawes v. Bennett* decided that, where there is a contract giving an option of purchase of real estate and the option is not exercised till after the death of the person who created the option, nevertheless the proceeds of the sale go as part of his personal estate, and not as part of his real estate. . . . In *Edwards v. West*, which was before Fry, J., it was attempted to extend the principle of *Lawes v. Bennett* to the person exercising the option, *Lawes v. Bennett* only having decided as regards the party giving the option. The view which I take was supported by Fry, J.—pp. 399, 400.

COTTON, L.J.—The contract is one entered into with the lessee, his executors, administrators and assigns, and before I go further I agree that this covenant would be one the benefit of which would pass with the assignment of the lease, because it is a covenant with the lease, if he, his executors, administrators, or assigns shall give a certain notice, that the lessor would convey. The "assigns" there must mean the assigns of the lease, and it is entirely different from . . . *Green v. Low*, where there being not a lease, but

an agreement for a lease, there was superadded to that an independent contract that if the person who had the right to get a lease gave notice, then the lessor, the owner of the estate, would sell it to him: and the M.R. held that though the right to the lease was gone, there was an independent agreement to grant the fee if demanded within a certain time. What the M.R. said shows that this must depend upon the particular form of the contract in each case, and must depend upon the true construction of it. The M.R. said that, upon the true construction of the contract, the right to purchase was independent of the right to a lease, and he decreed the specific performance of the agreement to sell. That is entirely different from this case, where the option given is to the lessee, his executors, administrators, and assigns. There the M.R. recognised the principle, which, of course, could not be disputed, that in such a case the true effect of the contract must depend upon the construction of the particular document.—p. 402. LINDLEY, L.J. concurred.

Edwards v. West (*supra*), distinguished.
Andrews v. Patriotic Assurance Co. (1886) 18 L. R. Ir. 355.—EX. D.

Lawes v. Bennett (*supra*), principle applied.
Emuss v. Smith (*supra*), explained.
Adams and Kensington Vestry, in re, and **Edwards v. West**, distinguished.
Isaacs, in re, Isaacs v. Regnall (1894) 63 L. J. Ch. 813; [1894] 3 Ch. 506. 8 R. 660; 71 L. T. 386; 42 W. R. 685.—CHITTY, J.

Lawes v. Bennett, explained and not applied.
Emuss v. Smith, followed.
Pyle, in re, Pyle v. Pyle (1895) 64 L. J. Ch. 477; [1895] 1 Ch. 724; 13 R. 396; 72 L. T. 327; 43 W. R. 420.—STIRLING, J.

Adams and Kensington Vestry, in re (*supra*), referred to.
Friary, Holroyd and Healey's Breweries v. Singleton (1899) 68 L. J. Ch. 622; [1899] 2 Ch. 261; 81 L. T. 101; 47 W. R. 662.—C.A.
LINDLEY, M.R., SIR P. JEUNE, and RIGBY, L.J.

Cant's Estate, in re, 1 Giff. 12; 5 Jur. (N.S.) 829.—STUART, V.-C.; reversed, (1859) 28 L. J. Ch. 641; 4 De G. & J. 503; 6 Jur. (N.S.) 183; 7 W. R. 624.—KNIGHT BRUCE and TURNER, L.JJ.

Gibson v. Scudamore (1726) 1 Dick. 45; **Witter v. Witter** (1730) 3 P. Wms. 99; **Ashburton (Lord) v. Ashburton (Lady)** (1801) 6 Ves. 6; 5 R. R. 201; and **Ware v. Polhill** (1805) 11 Ves. 257, 278; 8 R. R. 144, referred to.
Att.-Gen. v. Ailesbury (Marquis) (1887) 57 L. J. Q. B. 83; 12 App. Cas. 672; 58 L. T. 192; 36 W. R. 737.—H.L. (E.). See "LUNATIC."

Field v. Brown (1859) 27 Beav. 90.—ROMILLY, M.R. (the marginal note states erroneously that the tenancy for life was "without impeachment of waste"); and **Cooke v. Dealey** (1856) 22 Beav. 196.—M.R., held consistent with one another.
Dyer v. Dyer (1865) 34 L. J. Ch. 513; 34 Beav. 504; 12 L. T. 442; 13 W. R. 732.—ROMILLY, M.R. And see col. 677.

Flanagan v. Flanagan (1768).—CAMDEN, L.C.; cited and distinguished in **Fletcher**

v. Ashburner (1799) 1 Bro. C. C. 498.—SEWELL, M.R., followed.
Jermyn v. Preston (1842) 13 Sim. 356.—V.-C.; and **Cooke v. Dealey**, questioned.
Ackroyd v. Smithson (*post*, col. 678), explained.

Steed v. Preece (1874) L. R. 18 Eq. 192; 43 L. J. Ch. 687; 22 W. R. 432.

JESSEL, M.R.—But then it was said that the decree of the Court was partially wrong. Now, as to that **Flanagan v. Flanagan** appears to me unanswerable. [His honour read the statement of this case contained in the judgment in **Fletcher v. Ashburner**.] I am aware that the decision of Shadwell, V.-C., in **Jermyn v. Preston**, and the decision of Lord Romilly in **Cooke v. Dealey**, appear at first sight to be antagonistic to this. In **Jermyn v. Preston** the report does not state the trusts of the term the estate subject to which had been sold: but counsel on both sides appear to have said that the Court had sold more than was necessary. How that could be is difficult to understand, for it appears from the report that the decree ordered a sale or mortgage, with the Master's approbation, of a sufficient part of the estates comprised in the term, and that the Master made a report approving of the sale, by which he must have found that a sufficient part was sold. Again, the judgment in **Cooke v. Dealey** is based on a general principle assumed to have been laid down in **Ackroyd v. Smithson**, viz., that the conversion of real estate into personally only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that **Ackroyd v. Smithson** decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the Court or a trustee sell more than is necessary there is any equity to convert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale. As I have already remarked, it is not necessary to decide that question now: but it seems to me that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found: and that the sole question to be considered in all these cases is, whether the estate has been rightfully or wrongfully sold.—p. 196.

Steed v. Preece, followed.
Arnold v. Dixon (1874) L. R. 19 Eq. 118; 23 W. R. 314.—HALL, V.-C.

Steed v. Preece, distinguished.
Foster v. Foster (1875) 1 Ch. D. 588; 45 L. J. Ch. 301; 24 W. R. 185.
JESSEL, M.R.—All that I decided in **Steed v. Preece** was, that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of conversion must follow; if there be no equity in favour of the heir or any one else for reconversion.—p. 590.

Foster v. Foster, applied.
Mildmay v. Quicke (1877) 46 L. J. Ch. 667; 6 Ch. D. 553; 25 W. R. 788.—JESSEL, M.R.

Steed v. Preece, Arnold v. Dixon, and Foster v. Foster, discussed.
Hyett v. Mekin (1884) 53 L. J. Ch. 241; 25 Ch. D. 735; 50 L. T. 54; 32 W. R. 513.

KAY, J., after discussing the above cases, continued.—It seems to me that the result of these authorities is clearly this: that if in an administration action the Court exercises its undoubted jurisdiction and makes an order for sale, that order for sale itself amounts to a conversion. That was decided by Hall, V.-C. in *Arnold v. Dixon*.—p. 254.

Steed v. Preece and Hyett v. Mekin, followed.
Field v. Brown (col. 675), *not followed*.
Harley v. Pendarves (1891) 70 L. J. Ch. 745; [1901] 2 Ch. 498; 85 L. T. 64; 50 W. R. 56.
COZENS-HARDY, J.—The jurisdiction of the Court to order the sale of timber on a settled estate, when it is for the benefit of all parties interested in the settled estate, is well established, and in such a case the tenant for life, though impeachable for waste, is entitled to the income produced by the proceeds of sale of the timber.—*Thoker v. Auneley* (1832) 5 Sim. 235.—**SHAW-WELT, V.-C.**... This being so, I think on principle that where timber has been rightfully sold under an order of the Court all the consequences of conversion must follow, and that there is no equity as between the heir and the legal personal representative of the owner in fee. This is the view taken by Sir G. Jessel in *Steed v. Preece*, and by Kay, J. in *Hyett v. Mekin*. It is contended, however, that the point was decided in the opposite sense by Sir J. Romilly in *Field v. Brown*. I cannot regard that case as a satisfactory authority. It seems to me difficult to reconcile it with the decision of the same learned judge in *Dyer v. Dyer* (*supra*). It was apparently based on *Choke v. Dealey* (col. 675)—a case which was disapproved of by Sir G. Jessel in *Steed v. Preece*.—p. 746.

Wright v. Rose (1825) 2 Sim. & S. 323.—**LEACH, V.-C., approved.**
Cooper's Trusts, in re (1853) 23 L. J. Ch. 25; 4 De G. M. & G. 757; 17 Jur. 1087; 2 W. R. 601.—**KNIGHT BRUCE and TURNER, L.JJ.**; *affirming* 1 W. R. 281.—**WOOD, V.-C.**

Cooper's Trusts, in re, explained and distinguished.
Newberry's Trusts, in re (1877) 46 L. J. Ch. 612; 5 Ch. D. 746; 25 W. R. 747.—**HALL, V.-C.** See judgment.

EFFECT ON DEVISES AND BEQUESTS.

Lechmere v. Carlisle (Earl) (1733) 3 P. Wms. 215; Cas. t. Talb. 80.—**JEKYLL, M.R.**; *affirmed in part*, (1735)—**TALBOT, L.C., explained.**
Gillies v. Longlands (1851) 20 L. J. Ch. 441; 4 De G. & Sm. 872; 15 Jur. 570.—**KNIGHT BRUCE, V.-C., distinguished.**
Chandler v. Pocock (1880) 49 L. J. Ch. 442; 15 Ch. D. 491; 43 L. T. 112; 28 W. R. 806.—**JESSEL, M.R.**; *affirmed*, (1881) 50 L. J. Ch. 380; 16 Ch. D. 648; 44 L. T. 115; 29 W. R. 877.—**C.A. JAMES, OOTTON and LUSH, L.JJ.**

Chandler v. Pocock, considered.
Guidot v. Guidot (1745) 3 Atk. 254.—**HARDWICKE, L.C.**; and **Greaves's Settlement Trusts, in re** (1883) 52 L. J. Ch. 753; 23

Ch. D. 313; 48 L. T. 414; 31 W. R. 807.

—**Fry, J., referred to.**

Cleveland's (Duke) Settled Estates, in re (1893) 62 L. J. Ch. 955; [1893] 3 Ch. 244; 13 R. 235, n.; 69 L. T. 735.—**C.A. LINDLEY, LOPES and A. L. SMITH, L.JJ.**
LINDLEY, L.J. (for the Court).—Notwithstanding the observations of Sir G. Jessel in *Chandler v. Pocock*, money which a testator has not got into his own hands, and which he has no right to have in his own hands, and which is held upon trust for investment in land, is, in our opinion, to be treated as real estate, although if he has power to dispose of such money, he can dispose of it either as land or money, as he may think right. The absence of any person after his death to require an investment in land cannot be the real test of what it is in his lifetime. If he says nothing to the contrary, the money must be treated as if it were invested in land, up to and at the time of his death. The older authorities, such as *Guidot v. Guidot*, and the decision of Fry, J. in *Greaves's Settlement Trusts, in re*, all show this; and bearing in mind the point which was before the Court in *Chandler v. Pocock*, we do not feel at all clear that the late M.R. would have held that a devise of real estate would not pass money in the position of that which is here in question. If he really did mean to go that length, we could not agree with him.—p. 957.

Chandler v. Pocock, applied.

Harman, in re, Lloyd v. Tawly (1894) 63 L. J. Ch. 822; [1894] 3 Ch. 607; 8 R. 549; 71 L. T. 401.—**KECKWICH, J.**

Cleveland's (Duke) Settled Estates, in re (*supra*), *discussed and applied.*

Basset v. St. Levan (1894) 13 R. 235; 71 L. T. 718; 43 W. R. 165.—**STIRLING, J.**

RESULTING TRUST.

Arnold v. Chapman (1748) 1 Ves. sen. 108.

—**HARDWICKE, L.C., explained.**

Henchman v. At.-Gen. (1843) 3 Myl. & K. 485.—**BROUGHAM, L.C., reversing** (1826) 4 L. J. (N.S.) Ch. 155; 2 Sim. & S. 498; 25 R. L. 235.—**LEACH, V.-C.**

Mallabar v. Mallabar (1735) Cas. t. Talb.—**TALBOT, L.C.**; and **Durour v. Motteux** (1749) 1 Ves. sen. 320.—**HARDWICKE, L.C., discussed. And see col. 679.**

Amphlett v. Parke (1831) 2 Russ. & M. 221; 9 L. J. (o.s.) Ch. 161.—**BROUGHAM, L.C., reversing** (1827) 4 Russ. 75; 1 Sim. 275; 5 L. J. (o.s.) Ch. 139.—**LEACH, L.-C.** (compromised on appeal to H. L. See 1 Myl. & K. 653, 660, n.).

Mallabar v. Mallabar, Durour v. Motteux and Amphlett v. Parke, referred to.
Phillips v. Phillips (1832) 1 L. J. Ch. 214; 1 Myl. & K. 649; 36 R. R. 410.—**LEACH, M.R.**

Ackroyd v. Smithson (1780) 1 Bro. C. C. 508.—**THURLOW, L.C., applied. And see col. 676.**

Jessopp v. Watson (1838) 2 L. J. Ch. 197; 1 Myl. & K. 665.—**LEACH, M.R. And see cols. 680, 682.**

Ackroyd v. Smithson, principle applied.

Amphlett v. Parke and Phillips v. Phillips, discussed.
Cogan v. Stephens (1835) 5 L. J. Ch. 17; 1 Beav. 482, n.—**PEPYS, M.R. And see cols. 680, 681.**

Cogan v. Stephens, *followed*.
Hereford v. Ravenhill (1839) 1 Beav. 481.—
LANDDALE, M.R.

Mallabar v. Mallabar (*supra*), *explained*.
Barrs v. Fowkes (1865) 34 L. J. Ch. 522; 6
N. R. 355; 11 Jur. (N.S.) 669; 12 L. T. 727; 13
W. R. 987.—WOOD, V.-C.

Mallabar v. Mallabar and Durour v. Motteux (*supra*), *explained and shown not to be overruled*.

Watson v. Arundell (1876) Ir. R. 11 Eq. 53.—C.A.
BALL, L.C., CHRISTIAN, L.J., and LAWSON, J.;
reversing Ir. R. 10 Eq. 307.—CHATTERTON,
V.-C.; C.A. *affirmed, non*. Singleton v. Tomlinson
(1878) 3 App. Cas. 404; 38 L. T. 653; 26 W. R.
722.—H.L. (IR.). CAIRNS, L.C., LORDS HATHER-
LEY, BLACKBURN and GORDON.

Hopkins v. Hopkins (1784) 1 Ves. sen. 268;
Cas. t. Talb. 44.—TALBOT, L.C.; **S. C.**
(1738) 1 Atk. 581.—HARDWICKE, L.C., *held*
overruled.

Ackroyd v. Smithson (*supra*), *discussed*.
Bective (Countess) v. Hodgson (1861) 10 H. L.
Cas. 656; 10 Jur. (N.S.) 373; 3 N. R. 654; 10
L. T. 202; 12 W. R. 625.

WESTBURY, L.C.—That [*Hopkins v. Hopkins*] was the case of a gift and devise of real estate—an executory limitation, and a direction for the residue of the personal estate to be invested in land, to be settled to the same uses. It was held, and very rightly held, that during the period of time in which the estate was in suspense between the death of the testator and the arising of the executory use, the rents and profits of necessity descended to the heir. And that proceeded upon the rule of law which I have mentioned. But with regard to the personal estate, the decree was governed by an error which then prevailed, and that error was of this nature, holding that personal property directed to be converted into realty was converted for all purposes whatsoever, not only the purposes of the will, but the purposes of ownership in every form, and by every title. And accordingly it was held that that conversion would operate for the benefit of the heir, although the heir claims in default of disposition in consequence of there being no direction given by the will, and cannot by any possibility be made to claim under the will. My lords, that prevalent error was not corrected until the decision of *Ackroyd v. Smithson*, which decided a point, that of necessity involved this as its consequence, that conversion must be considered in all cases to be directed for the purpose of the will, and is limited by the purposes and exigencies of the will. If therefore the real estate be directed to be sold, with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, that is the title of the heir; although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property; but the property, even in the shape of land, retains its pristine and original

quality of personal estate, for the purpose of determining the ownership. These are simple cardinal principles with which we are all familiar. That last principle to which I have adverted had not been followed at the time of the decision of *Hopkins v. Hopkins*, in 1739, nor was it distinctly recognised until, I think, the year 1780, when *Ackroyd v. Smithson* was decided. *Hopkins v. Hopkins* therefore belongs to a period of time when a notion prevailed, the fallacy of which has since been ascertained. And, therefore, *Hopkins v. Hopkins* could not be cited with any effect in order to influence the determination of the case now at the bar.—p. 666. LORDS CRANWORTH and CHELMSFORD concurred.

Ackroyd v. Smithson, *principle applied*.
Cameron, In re, Nixon v. Cameron (1884) 53 L. J. Ch. 1139; 26 Ch. D. 19; 50 L. T. 339; 32 W. R. 884.—C.A. SELBORNE, L.C., COLERIDGE, C.J. and COTTON, L.J.

Phillips v. Phillips (col. 678), *explained*.
Custance v. Bradshaw (1845) 14 L. J. Ch. 358; 4 Hare 315; 9 Jur. 486.—WIGRAM, V.-C.

Bristol (Countess) v. Hungerford (1697) 2 Vern. 645; Pre. Ch. 81; 3 P. Wms. 194, n.—TREVOR, M.R., *explained*.
Gordon v. Atkinson (1847) 1 De G. & Sm. 478.—KNIGHT BRUCE, V.-C. *And see post*.

Bristol (Countess) v. Hungerford; Rogers v. Rogers (1733) 3 P. Wms. 193.—L.C.; and **Phillips v. Phillips**, *commented on*.

Jessopp v. Watson (col. 678); **Amphlett v. Parke** (col. 678); **Collins v. Wakeman** (1795) 2 Ves. 683.—L.C.; **Cogan v. Stephens** (col. 678); **Williams v. Williams** (1835) 5 L. J. Ch. 84.—M.R.; **Johnson v. Woods**, 9 L. J. Ch. 244; 2 Beav. 409.—M.R.; and **Flint v. Warren** (1845) 14 Sim. 554; 12 Jur. 810.—V.-C., *discussed*.
Fitch v. Weber (1848) 17 L. J. Ch. 361; 6 Hare 145; 12 Jur. 648.—WIGRAM, V.-C.

Amphlett v. Parke, *applied*.
McGwire v. McGwire [1900] 1 Ir. R. 200.—CHATTERTON, V.-C.

Fitch v. Weber; Thornton v. Hawley (1804) 10 Ves. 129; 7 R. R. 359.—GRANT, M.R.; **Robinson v. Taylor** (1789) 2 Bro. C. C. 589.—THURLOW, L.C.; **Van v. Barnett** (1812) 19 Ves. 102.—ELDON, L.C.; and **Biggs v. Andrews** (1832) 5 Sim. 424.—SHADWELL, V.-C., *explained and applied*.
Griffith v. Ricketts (1849) 19 L. J. Ch. 100; 7 Hare 299; 14 Jur. 166.—WIGRAM, V.-C.

Fitch v. Weber, *referred to*.
Att.-Gen. v. Ailesbury (Marquis) (*supra*), col. 675.

Phillips v. Phillips (*supra*), *overruled*.
Taylor v. Taylor (1853) 3 De G. M. & G. 190; 22 L. J. Ch. 742; 17 Jur. 583; 1 W. R. 398.
CRANWORTH, L.C.—If, then, *Phillips v. Phillips* had come before me on appeal the day after it was decided by Sir J. Leach, I should have felt it my duty to overrule it; and, if such would have been my duty then, what course ought I to take now? Every branch of the Court has in some way or other expressed an opinion upon that decision. What Lord Cottenham thought of it is quite clear, though he was not, in *Cogan v. Stephens*, called

upon to overrule it. . . . *Gordon v. Atkinson* (*supra*) was wrongly decided if *Phillips v. Phillips* is right.—p. 197.

Cogan v. Stephens (*supra*, col. 678), *approved and followed*.

Head v. Godlee, Reynolds v. Godlee (1859) 29 L. J. Ch. 333; 6 Jur. (N.S.) 195; Johns, 536; 8 W. R. 147.—WOOD, V.-C.

Cogan v. Stephens, referred to.

Reynolds v. Godlee, not followed.

Curteis v. Wormald (1878) 10 Ch. D. 172; 40 L. T. 108; 27 W. R. 419.—M.R.; *affirmed*, O.A. JAMES, BAGGALLAY and THESIGER, L.JJ.

JESSEL, M.R.—If the next-of-kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death: it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate. As to that, there is no question, no doubt, no difficulty. No one has suggested any other principle, and even in the case cited—*Reynolds v. Godlee*—it was admitted that that was the principle, and the only point of difference or distinction suggested was that which appears to me to be opposed to the whole law on this subject, namely, that there was an ultimate trust for the executors, and not for the next-of-kin. As that does not seem to me to have any foundation, and as it appears to me to be opposed to both principle and authority, I do not consider myself bound to follow that decision, and I may say that I am very glad to find I can invoke the very same judgment of the very same judge for the purpose of showing that I am not bound to follow it; for, being referred to a decision [*Cogan v. Stephens*] of another judge—the M.R.—given several years before, he said that that decision was not obligatory upon him; but that as he thought it consonant with sense and reason and sound law, he chose to follow it. Unfortunately I do not entertain the same view as regards this authority, and therefore I am unable to follow it.—p. 175.

Chitty v. Parker (1793) 2 Ves. 271; 4 Bro. C. C. 411.—LOUGHBOROUGH, L.C., *imprimis*.

SIMMONS v. ROSE (1856) 25 L. J. Ch. 615; 6 De G. M. & G. 411; 2 Jur. (N.S.) 73; *affirming* (1855) 21 Beav. 37.—ROMILLY, M.R.

CRANWORTH, L.C.—His lordship observed that Lord Loughborough's decision in *Chitty v. Parker* was so loosely reported that it could not possibly be relied on.

Chitty v. Parker, observed on.

Att.-Gen. v. Lomas (1878) 43 L. J. Ex. 32; L. R. 9 Ex. 29; 29 L. T. 749; 22 W. R. 188.

KELLY, C.B.—*Chitty v. Parker* is so obscurely reported that it is very difficult to collect what were the real terms of the will. Looking at the judgment of the L.C., who had the whole will before him, it is obvious that there was no obligation whatever imposed upon the trustees under that will to convert the real estate into money, but that taking the whole will together, it was only in the event of the personal estate being found insufficient that it might have been necessary, under the particular terms of the will, to convert the real estate into money.—p. 36. BRAMWELL, PIGOTT and POLLOCK, BB. concurred.

Att.-Gen. v. Lomas, *approved and distinguished*.

Att.-Gen. v. Hubback (1883) 52 L. J. Q. B. 464; 19 Q. B. D. 488; 48 L. T. 608.—POLLOCK and HADDINGTON, BB. and NORTH, J.; *affirmed*, (1884) 53 L. J. Q. B. 146; 13 Q. B. D. 275; 50 L. T. 374.—C.A. See "REVENUE."

Curteis v. Wormald (*supra*, col. 681); **Jessopp v. Watson** (*supra*, col. 678) and **Att.-Gen. v. Lomas, discussed and approved**.

Richerson, in re, Scales v. Haycho (1891) 61 L. J. Ch. 202; [1892] 1 Ch. 379; 66 L. T. 174; 40 W. R. 233.—CHITTY, J.

RECONVERSION.

Sisson v. Giles (1863) 3 De G. J. & S. 614; 9 Jur. (N.S.) 512, 951; 8 L. T. 730; 11 W. R. 558, 971.—WESTBURY, L.C.; *reversing* 32 L. J. Ch. 606.—STUART, V.-C., *discussed and distinguished*.

Mutlow v. Biggs (1875) 45 L. J. Ch. 282; 1 Ch. D. 385; 34 L. T. 273; 24 W. R. 409.—C.A. JAMES and MELLISH, L.JJ. and BAGGALLAY, J.A.; *reversing* L. R. 18 Eq. 246.—HALL, V.-C., *applied*.

Meek v. Devenish (1877) 6 Ch. D. 566; 47 L. J. Ch. 57; 36 L. T. 911; 25 W. R. 688.

MALINS, V.-C.—The decision [*Sisson v. Giles*] is this: Two persons were absolutely entitled to the product of real estate; they were required to execute a deed poll requiring the estate not to be sold. Nothing would be more clear than that that would stop the sale; but it turned out that one of them was a married woman, and the deed, therefore, went for nothing.—p. 572.

Meek v. Devenish, principle applied.

Potter, in re (1887) 3 Times L. R. 420.—CHITTY, J.

Puitney v. Darlington (Lord) (1786) 7 Bro.

P. C. 530.—H.L. (R); *affirming* (1783) 1 Bro. C. C. 223.—THURLOW, L.C., *explained*.

Wheldale v. Partridge (1803) 8 Ves. 227; 7 R. R. 37.—ELDON, L.C.

Wheldale v. Partridge, discussed and approved.

Thornton v. Hawley (1804) 10 Ves. 129 (*supra*, col. 680).

Crabtree v. Bramble (1747) 3 Atk. 680.—HARDWICKE, L.C., *principle applied*.

Wheldale v. Partridge; Harcourt v. Seymour (1851) 20 L. J. Ch. 606; 2 Sim. (N.S.) 12; 15 Jur. 740.—CRANWORTH, V.-C.; and **Dixon v. Gayfer** (No. 2) (1853) 23 L. J. Ch. 60; 17 Beav. 433.—ROMILLY, M.R., *discussed*.

Gordon, in re, Roberts v. Gordon (1877) 46 L. J. Ch. 694; 6 Ch. D. 551; 37 L. T. 627.—JESSEL, M.R.

Gordon, in re, Roberts v. Gordon, distinguished.

Lewis, in re, Foxwell v. Lewis (1885) 30 Ch. D. 654; 55 L. J. Ch. 252; 53 L. T. 387; 34 W. R. 150.

PEARSON, J.—The rule is this: whenever real estate has been converted into personality, or, according to the doctrine of a Court of equity, is to be treated as having been converted into personality, it must then descend as personality, unless some person who is absolutely entitled to

it has shown in some way that he has elected to take it as real estate. Almost anything will be enough to show such an intention, but there must be something. In *Gordon, In re*, Jessel, M.R. thought that the fact that a person, who was absolutely entitled under the trusts of a will to the proceeds of sale of real estate, had remained in possession and received the rents for nine years, and had taken no steps to have the estate sold, was sufficient evidence of an election to take the property as real estate. In *Holden v. Loffs* (Aug. 3, 1885) I followed that decision. [The learned judge then proceeds to point out one circumstance which distinguished the case before him from *Gordon, In re*, and *Holden v. Loffs*.] The real estate consists of a house which the testator agreed to let for a term of twenty years, expiring in 1887, and the agreement gave the tenant an option to purchase the fee simple of the property at any time before the expiration of the term. The term has not yet expired. There was therefore a very sufficient reason why no sale of the house should take place, either upon the death of the testator, or during the period for which the widow survived the children. I am afraid, therefore, that I cannot, under the circumstances, treat the fact that the widow remained in possession of the property after the death of the children as any evidence one way or the other of an election by her to take the property as real estate.—p. 656.

COPYHOLD.

TRUSTS.

Edwards v. Fidel (1818) 3 Madd. 237.
—LEACH, V.-C., *commented on*.
Lewis v. Lane (1834) 2 Myl. & K. 449.—
PEPPY, M.R.

Edwards v. Fidel, *held overruled*.

Jenks v. Cooke (1857) 27 L. J. Ch. 202; 24 Beav. 313; 4 Jur. (N.S.) 57; 6 W. R. 175.
ROMILEY, M.R.—In *Edwards v. Fidel* the custom of the manor was stated to be that if a tenant for life of a copyhold obtained a grant of a reversion in the name of a third person, such person was entitled beneficially, unless a trust was mentioned on the rolls of the manor; and it was held that the custom was reasonable, and that the persons who were named in the reversionary grants of the copyholds were not trustees, but beneficially entitled. *Lewis v. Lane* overruled that case, and at the same time it questioned the validity of the custom then alleged.—p. 206.

Keats v. Hewer. 10 Jur. (N.S.) 506; 10 L. T. 366.—STUART, V.-C.: *reversed*. (1864) 10 Jur. (N.S.) 1040; 11 L. T. 290; 18 W. R. 34.—
KNIGHT BRUCE and TURNER, L.JJ.

BARRING ENTAIL.

Honywood v. Foster (1861) 30 L. J. Ch. 930; 30 Beav. 1; 7 Jur. (N.S.) 1254; 4 L. T. 755; 9 W. R. 856.—**ROMILEY, M.R.**; and **Gibbons v. Snape** (1863) 33 L. J. Ch. 103; 1 De G. J. & S. 621; 2 N. R. 563; 9 Jur. (N.S.) 1096; 9 L. T. 132; 11 W. R. 1037.
—**KNIGHT BRUCE and TURNER, L.JJ.**, *followed*.

Green v. Paterson (1886) 56 L. J. Ch. 181; 32

Ch. D. 95; 54 L. T. 738; 34 W. R. 724.—**C.A. COTTON, BOWEN and FRY, L.JJ.**

It was held, in concurrence with the above cases, and upon the construction of the Fines and Recoveries Act, that, taking sect. 41 together with sects. 50 and 53, a disentailing assurance by an equitable tenant in tail of copyholds, which is not entered upon the Court rolls of the manor within six months after execution, is void.

Pride v. Bubb (1871) 41 L. J. Ch. 105; L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220.—
HATHERLEY, L.C., *applied*.

Green v. Paterson, *distinguished*.

Carter v. Carter (1896) 65 L. J. Ch. 86; [1896] 1 Ch. 62; 13 R. 824; 73 L. T. 437; 44 W. L. 73.
STIRLING, J.—The question which I have to decide reduces itself to this—whether a married woman, tenant on the rolls of copyholds, can by deed acknowledged under the Fines and Recoveries Act effectually declare herself a trustee of those copyholds. The answer depends on sect. 77 of the Act. . . . The first question which arises on this enactment is whether a declaration of trust is a disposition. . . . A declaration of trust on the part of a *feme sole*, whereby she effectually parts with the entire equitable interest in property of which she remains legal owner, certainly appears to me to be a disposition in equity of that property. That is borne out by the decision of Lord Hatherley in *Pride v. Bubb*. . . . It was said, however, that the contrary was decided in *Green v. Paterson*, which is a decision binding upon me. . . . A mere declaration of trust, of course, could not pass a legal estate, and consequently I entirely agree, if I may be allowed to say so, in the decision of the C. A. in *Green v. Paterson*, that a mere declaration of trust could not bar an estate tail. The language of Fry, L.J. might, no doubt, admit of a wider meaning, and that is what is relied upon. He says: "In the first place, the statute requires that the instrument to bar the estate tail shall be a disposition, and I find in this case nothing like a disposition. It is a mere declaration of trust by the lady." Those words, taken literally, would seem to indicate an opinion that a mere declaration of trust was not a sufficient disposition within the Fines and Recoveries Act; but I think that they ought to be read as applying only to the point then actually calling for decision, and not as intended to affect the construction of sect. 77, which was not then under consideration by the Court, and all the more so as I observe that *Pride v. Bubb* was not cited to the Court in the argument. In sect. 77 I find nothing which requires the disposition to be made by such an assurance as is required by sect. 40.—pp. 88–90.

Parker v. Turner (1885) 1 Vern. 393. 458.—
KING, L.C., *distinguished*.
Challoner v. Marshall (1795) 2 Ves. 524; 3 R. R. 1.—**LOUGHBOROUGH, L.C.**; and **Dunn v. Green** (1724) 3 P. Wms. 9.—
MAGGLESFIELD, L.C., *followed*.

London School Board, *Ex parte*, Hart, *In re*, (1889) 58 L. J. Ch. 752; 41 Ch. D. 547; 60 L. T. 817; 38 W. R. 61.

MORRIS, J.—I think it is clear that when he [*i.e.*, the person to whom the enfranchisement was made] is the tenant in tail in possession the enfranchisement has the effect of barring the entail. *Challoner v. Marshall* and *Dunn v. Green* seem to me clear authorities on the point,

and the criticisms which have been made on them, founded on reports which are not very clear, would not justify me in departing from them, especially as they are of such long standing. The law is clearly laid down in that way in Scriven on Copyholds (4th ed.), p. 555, and also in Watkins on Copyholds, and the only doubt which has been thrown upon it is in the notes by Mr. Coventry to Watkins on Copyholds (4th ed.), p. 236. Mr. Coventry was a conveyancer of great experience; but he only suggests a doubt, and I cannot, upon the authority of those notes, overrule the law laid down in *Challoner v. Marshall* and *Dunn v. Green*. In *Challoner v. Marshall*, though the deed of enfranchisement was to the tenant for life, he did not dispose of the property by his will, but it descended to a person who was both his heir of the freehold interest and also the tenant in tail under the limitations in tail of the copyhold interest; and therefore the effect was in substance the same as if the enfranchisement had been made directly to the tenant in tail. It is said that the note to *Parker v. Turner* shows that the decision there was based upon the operation of a fine; but I think the note only shows that there was another ground besides the merger of the copyhold interest in the freehold on which the decision might have been supported. I must follow the other cases.—p. 754.

HERIOTS.

Parker v. Gage (1688) 1 Shower K. B. 81; Holt 337. *HOULSTON, C.J., delivered.*
Western v. Bailey (1896) 66 L. J. Q. B. 48; [1897] 1 Q. B. 86; 75 L. T. 470; 45 W. R. 115.—C.A.; *affirming on different grounds* 65 L. J. Q. B. 641; [1896] 2 Q. B. 234; 75 L. T. 210.—WILLS, J.

ESHER, M.R.—The only remaining question is whether, assuming the heriot to be a customary heriot, the property in the beast passes so that the lord can seize it wherever it is. It is a question of authority, as it seems to me. We have the proposition laid down in distinct terms in *Parker v. Gage*. . . . We have the same proposition in Watkins on Copyholds (vol. ii. p. 168, 4th ed. 1825), and we have it again equally clearly laid down in the note to *Lanyon v. Verne* [(1667) 2 Wms. Saund. 168 b.]. It is impossible to decide the question contrary to these authorities, when there is no authority for the contrary proposition. I think, therefore, that Wills, J. was in the result right in deciding that the lord of the manor had the right to seize the beast, although it was not within the manor.—p. 51.

LOPES and RIGBY, L.JJ. to the same effect.

FINES.

Bath (Earl) v. Abney (1757) 1 Burr. 206; 1 Ken. 471; Dick 263.—**MANSFIELD, L.C.**: and **Taylor v. Pembroke** (1815) 2 B. & Ad. 354.—*K.B., discussed.*

Wilson v. Hoare (1831) 2 B. & Ad. 350; 9 L. J. (o.s.) K. B. 253.

FENTREDEEN, C.J. (for the Court).—The proper mode of estimating the fine is to take, for the second life, half the sum taken for the first; for the third, half the sum taken for the second; and for the fourth, half that which is taken for the third, and so on. . . . The rule that we have

laid down appears to have been the rule approved of in *Taylor v. Penbrooke*, and is referred in *Bath (Earl) v. Abney*, though it is not very accurately stated either in the margin of the reports or in Watkins's Treatise on Copyholds [vol. i. 2nd ed., p. 483]. There is an inaccurate use of the word "*sequitur*." It is said that the fine for two lives is the *sequitur* of that taken for one, and so far it is correct; and that the fine for three is the *sequitur* of that taken for two, which is incorrect. The meaning is plain enough, that the sum taken for the third life is the *sequitur* of that taken for the second.—p. 361.

Wilson v. Hoare, not applied.

Hoare v. Wilson (1834) 10 A. & E. 245, n.; 2 P. & D. 659.—*EX. CH.*

Wilson v. Hoare, approved.

Hoare v. Wilson, discussed.

Wilson v. Hoare (1839) 10 A. & E. 226; 2 P. & D. 650.—*Q.B.*

ADMITTANCE.

Frosel (or Froswell) v. Welch (1616) 1 Cro. Jac. 403; 1 Rolle's R. 415; Godb. 268; 3 Bulst. 314.—*COKE, C.J., approved and applied.*

Liddard and Jackson's and Broadley's Contract, in re (1889) 58 L. J. Ch. 785; 42 Ch. D. 254; 61 L. T. 322; 37 W. R. 793.—*KAY, J., modified.*

Ecclesiastical Commissioners v. Parr [1891] 2 Q. B. 420; 63 L. J. Q. B. 784; 9 R. 542; 71 L. T. 65; 42 W. R. 561.—*C.A.*

KAY, L.J.—Some reliance has been placed upon words used by me in *Liddard and Jackson's and Broadley's Contract, in re*. In that case a point of this kind arose more than seventy years after the last intimation on the Court Rolls of the property in question being copyhold. During those seventy years it had been dealt with by the persons in possession conveying it as freehold land, with some exceptions that did not seem to me to be material. The case was decided upon the ground that after so long a time, and after the dealings with the property during those seventy years, it must be presumed against the lord that there had been an enfranchisement. Incidentally the other question was raised, and in the report, which I have no doubt is perfectly accurate, the language that I appear to have used is thus stated at p. 257: ". . . Copyholds are within the Act of Will. 4, being expressly mentioned in the interpretation clause (sect. 1), and therefore an entry as to copyholds is one of the things which the Act says must be made within the twenty years. Therefore, if that point arises in the present case, I should be inclined to hold that such an entry could not be made on land after the lapse of seventy years, but that the lord was bound long before that time had elapsed to make proclamation and seize *quousque* if he meant to do so at all." That point has been most ably argued in the case before us, and I have had an opportunity of reconsidering the matter, and I have now come to a different conclusion, and for this reason. The Statute of 8 & 4 Will. 4, which has now to be read with the later Act, that has altered the time from twenty to twelve years, provides

that "land" in the Act shall include copyholds, and the effect of sect. 9 of 37 & 38 Vict. c. 57 is that copyholds are included in the word "land" in that Act as in the previous one. . . . Until such refusal [by the tenant to come in] there is no forfeiture; and therefore, upon further consideration, I have come to the conclusion that until such refusal there is no right of entry or right of action on the part of the lord to seize the land *quovisq*ue in order to compel the tenant to come in to be admitted. . . . It was decided in *Froswell v. Welch*, some 270 years ago, that there may be an implied admittance by the lord of a person who is entitled to be admitted to a copyhold tenement, by treating him as a copyhold tenant in various ways, and amongst others by receiving the quit-rent from him. . . . I take the summary of the law from Rolfe's Abridgment (Copyholds), p. 505, pl. x: "If a copyholder surrenders to the use of another, and the lord having knowledge of that accepts the rent of the *certain que une* out of Court, that is an admittance in law." That statement of the decision in *Froswell v. Welch* has been found in all the principal text-books from that time to the present, and I agree that even if upon a careful consideration of that case it should be found that the statement is not borne out by the authority cited in support of it, still it would be wrong for any Court after such a lapse of time to treat it as otherwise than the true effect of that decision. *Froswell v. Welch* is reported in various reports. The reports do not altogether agree, for some seem to state the doctrine in rather wider terms than others do. I think the report most relied on by those who are contending now that there was an implied admittance is that in Pulstrode; but the summary of them all is in Rolfe's Abridgment in the words I have read, and I accept that as being the law.—pp. 432—435.

See also judgments of *ESHER, M.R.* and *A. L. SMITH, L.J.*

Ecclesiastical Commissioners v. Parr (*supra*), explained and applied.

Doe d. Bovor v. Trueman (1831) 1 B. & Ad. 736; 9 L. J. (o.s.) K. B. 119; 35 R. R. 425.—*BAYLEY, J., approved.*

Beighton v. Beighton (1895) 64 L. J. Ch. 796; 13 R. 743; 73 L. T. 86; 43 W. R. 685.

ROMER, J.—Before *Ecclesiastical Commissioners v. Parr* it was supposed by some that, in a case like the present, the statutes ran from the time when the lord might have perfected the right to seize after he knew of the death of the last admitted tenant; but in that case it was decided by the C. A. that the time ran only from the time when the tenant who ought to take admittance refused to come in after the lord had made the necessary three proclamations, or given notice to the tenant to come in. . . . I think that when *Key, L.J.* spoke of neglect on the part of the tenant in coming in, he meant such a neglect as amounted to a refusal—something that put the lord at arm's length, and fairly gave him notice that the tenant was challenging his right as lord. And, if I may respectfully say so, there are cogent grounds for this. It ought not to be that a lord should be bound to seize, or be bound to bring an action in a case where the tenant in no way challenges the lord's rights, and the lord has no desire to seize or to bring a hostile action against the tenant.—p. 798.

ENFRANCHISEMENT.

Leeds (Duke) v. Strafford (Earl) (1798) 4 Ves. 180; 4 R. R. 186.—*LOUGHBOROUGH, L.C., followed.*

Searle v. Cooke (1890) 43 Ch. D. 519; 59 L. J. Ch. 259; 62 L. T. 221.—*C.A. COTTON, LINDLEY and LOPES, L.JJ.*

LINDLEY, L.J.—It is settled law, and was so laid down in *Leeds (Duke) v. Strafford (Earl)* that it is the duty of a copyhold tenant to preserve the boundaries of his lands. . . . It was incidentally settled in that case that in a suit to ascertain the boundaries, if the rent-charge were in arrear, the Court of Chancery would compel payment; it would enforce the legal rights of the lord.—p. 533.

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BOOKS.

Beckford v. Hood (1798) 7 Term Rep. 620; 4 R. R. 527; *considered*, *Newton v. Cowie* (1827) 4 Bing. 234 (*post*, col. 701); *approved*, *Att.-Gen. v. Aspinall (or Liverpool Corporation)* (1837) 7 L. J. Ch. 51; 2 Myl. & Cr. 613; 1 Jur. 812; 45 R. R. 142.—*COTTENHAM, L.C.*

Beckford v. Hood; Coleman v. Wathen (1798) 5 Term Rep. 245; **Murray v. Elliston** (1822) 5 B. & Ald. 657.—*K.B.*; **Miller v. Taylor** (1769) 4 Burr. 2303.—*H.L. (E.)*; **Donaldson v. Beckett** (1774) 4 Burr. 2408; 2 Bro. P. C. 129; and **Turner v. Robinson** (1860) 10 Ir. Ch. R. 121, 510.—*C.A. BRADY, L.C. and BLACKBURN, J., discussed.*

Reade v. Conquest (No. 1) (1861) 30 L. J. C. P. 209; 9 C. B. (N.S.) 765; 7 Jur. (N.S.) 265; 3 L. T. 888; 9 W. R. 434.—*C.P.*

Miller v. Taylor, discussed.

Jefferys v. Boosey (1854) 24 L. J. Ex. 81; 4 H. L. Cas. 815 (*post*, col. 706).

Reade v. Conquest (No. 1) and **Lee v. Simpson** (1847) 16 L. J. C. P. 105; 3 C. B. 871; 4 D. & L. 666; 11 Jur. 127.—*WILDE, C.J. (for the Court), explained.*

Reade v. Conquest (No. 2) (1862) 31 L. J. C. P. 153; 11 C. B. (N.S.) 479; 8 Jur. (N.S.) 764; 5 L. T. 677; 10 W. R. 271.—*C.P.*

Murray v. Elliston, commented on.

Chappell v. Boosey (1882) 51 L. J. Ch. 625; 21 Ch. D. 232 (*post*, col. 698).

Campbell v. Scott (1842) 11 L. J. Ch. 166; 11 Sim. 31; 6 Jur. 186.—*SHADWELL, V.-C.* and **Whittingham v. Wooler** (1817) 2 Swanst. 428.—*PLUMER, M.R., explained.*

Tinsley v. Lacy (1863) 32 L. J. Ch. 535; 1 H. & M. 747; 2 N. R. 438; 11 W. R. 876.—*WOOD, V.-C.*

Miller v. Taylor, held overruled.

Reade v. Conquest (No. 1) and **Tinsley v. Lacy, dicta in, questioned.**

Reade v. Conquest (No. 2), distinguished.

Toole v. Young (1874) 43 L. J. Q. B. 170; 1 R. 9 Q. B. 523; 30 L. T. 599; 22 W. R. 694.

QUAIN, J.—*Reade v. Conquest*, and some *dicta* of *Erle, C.J.* and *Lord Hatherley [Tinsley v. Lacy]*, have been cited to us to the effect that

it is possible for a man who writes a novel and then dramatises it, although he may keep that drama in his desk and never print it or publish it, to prevent all other persons from dramatising the novel. I am not aware of any authority for that, and those *dicta* were not in the least necessary for the decision of the cases in which they were uttered, especially that of Lord Hatherley, where he had only to decide the question of book copyright, and not of dramatic copyright at all (p. 176). . . . This case differs from the second case of *Read v. Conquest* in the very important fact that here the novel was written first, and in that case it was written second.—p. 177.

COOKBURN, C.J., BLACKBURN and ARCHIBALD, JJ. to the same effect.

Millar v. Taylor, referred to.

Caird v. Sims (1887) 57 L. J. P. C. 2; 12 App. Cas. 320—H.L. (S.C.) (post, col. 696).

Toole v. Young, followed.

Schlesinger v. Bedford (1890) 63 L. T. 762.—KEKEWICH, J.

Read v. Conquest (No. 2), followed.

Toole v. Young, distinguished.

Schlesinger v. Turner (1890) 63 L. T. 764. KEKEWICH, J.—In that case (*Read v. Conquest* (No. 2)) it was held that where the author first composed a drama and then a novel from that drama, he could restrain an infringement of his right of representation, apparently on the ground that, in using the novel for the purpose of dramatising it, the defendant is to be treated as copying directly from the drama. In *Toole v. Young* the distinction was pointed out between such a case as *Read v. Conquest* and the case of a defendant dramatising a novel published by the plaintiff before his, the plaintiff's, dramatic version of it.—p. 765.

Tinsley v. Laey (supra) and Novello v. Ludlow (or Sudlow) (1852) 21 L. J. C. P. 169; 12 C. B. 177; 16 Jur. 689.—C.P., followed.

Coleman v. Wathen, Murray v. Elliston, and Read v. Conquest (No. 2), distinguished. Warne v. Seebohm (1888) 39 Ch. D. 73; 57 L. J. Ch. 689; 58 L. T. 928. 36 W. R. 686.

STIRLING, J.—In the early cases of *Coleman v. Wathen* and *Murray v. Elliston* (which established that the representation in public of a drama previously printed and published was not an infringement of the author's copyright), the point raised in the present action could hardly have arisen, for they were decided at a time when the statutes in force conferred only the exclusive right of printing. It is unlikely that any copies (other than manuscripts) were used for the purpose of the representation of the plays which were the subject of those actions; and such manuscript copies would not have been infringements of the author's rights. . . . That case (*Read v. Conquest*), therefore, seems to me to have been decided on the ground that the plaintiff's statutory right of multiplying copies of his book was not infringed.—pp. 81, 82.

Warne v. Seebohm, followed.

Boosey v. Whight (No. 2) (1889) 81 L. T. 265—STIRLING, J.

Power v. Walker (1814) 3 M. & S. 7; 4 Camp. 8; 15 R. R. 378.—ELLENBOROUGH, C.J.; and Davidson v. Bohn (1848) 18

L. J. C. P. 14; 6 C. B. 456; 12 Jur. 922.

—WILDE, C.J., not followed.

Cumberland v. Copeland (1862) 31 L. J. Ex. 19, 333; 1 H. & C. 194; 7 L. T. 334. 9 Jur. (N.S.) 253; 10 W. R. 581.—EX. CH., reversing 7 H. & N. 118; 7 Jur. (N.S.) 686; 9 W. R. 762.—EX.

Butterworth v. Robinson (1801) 5 Ves. 709.—ELDON, L.C., followed.

Sweet v. Benning (1855) 24 L. J. C. P. 175; 16 C. B. 459; 1 Jur. (N.S.) 543; 3 W. R. 519.—JERVIS, C.J., and CRESWELL, J.; CROWDER, J. doubting, and MAULE, J. dissenting.

Butterworth v. Robinson, discussed.

Walter v. Lane (1899) 68 L. J. Ch. 736 (post, col. 697).

Sweet v. Benning, distinguished, Shepherd v. Conquest (1856) 25 L. J. C. P. 127; 17 C. B.

427; 2 Jur. (N.S.) 236; 4 W. R. 233.—JERVIS, C.J. (for the Court); approved, Lamb v. Evans (post, col. 696).

Shepherd v. Conquest, discussed.

Hutton v. Kean (1859) 29 L. J. C. P. 20; 7 C. B. (N.S.) 268; 6 Jur. (N.S.) 226; 1 L. T. 10; 8 W. R. 7.—C.P.

Shepherd v. Conquest, followed.

Hutton v. Kean, distinguished.

Katon v. Lake (1888) 20 Q. B. D. 378; 57 L. J. Q. B. 227; 59 L. T. 100; 36 W. R. 277.—C.A. ESSHER, M.R., FRY and LOPES, L.JJ.

FRY, L.J.—The finding of the jury seems to render that decision (*Hutton v. Kean*) inapplicable for the sole point relied upon in that case by the counsel for the defendant was that the plaintiff was not an author within the contemplation of the Acts.—p. 385

Cary v. Kearsley (1803) 4 Esp. 168; 6 R. R.

846.—ELLENBOROUGH, C.J.; Longman v. Winchester (1809) 16 Ves. 269.—ELDON, L.C.; Wilkins v. Aikin (1810) 17 Ves. 422; 11 R. R. 118.—ELDON, L.C.; and Bramwell v. Halcumb (1836) 3 Myl. & Cr. 737.—COTTENHAM, L.C.; principle applied.

Spiers v. Brown (1858) 6 W. R. 352.—WOOD, V.-C.

Cary v. Kearsley, discussed.

Spiers v. Brown, explained.

Scott v. Stanford (1857) 36 L. J. Ch. 729; L. R. 3 Eq. 718; 16 L. T. 51; 15 W. R. 757.—WOOD, V.-C.

Spiers v. Brown and Longman v. Winchester, applied.

Moffatt and Paige, Ltd. v. Gill & Sons, Ltd. (1902) 86 L. T. 465; 50 W. R. 523.—C.A. (post, col. 704).

Scott v. Stanford, applied.

Ager v. Peninsular and Oriental Steam Navigation Co. (1884) 53 L. J. Ch. 589; 26 Ch. D. 637; 50 L. T. 477; 33 W. R. 116.—KAY, J.

Ager v. P. & O. S. N. Co., confirmed.

Ager v. Collingridge (1886) 2 Times L. R. 291.—KAY, J.

Scott v. Stanford, applied.

Guggenheim v. Leng (1896) 12 Times L. R. 492.—CAVE and WILLES, JJ.

Spiers v. Brown (*supra*, col. 690), *distinguished*.

Hotten v. Arthur (1863) 32 L. J. Ch. 771; 1 H. & M. 603; 9 L. T. 199; 11 W. R. 934.

WOOD, V.-C.—Certain passages of the plaintiff's work had been copied, but the defendant produced his MS., and it was evident that he had expended very great labour in the compilation of the dictionary complained of. In the present case there was no evidence of anything of the sort.—p. 773.

Cobbett v. Woodward (1872) 41 L. J. Ch. 656; 1 R. 14 Eq. 407; 27 L. T. 27; 20 W. R. 963.—ROMILLY, M.R., *commented on*.

Hotten v. Arthur, *followed*.

Grace v. Newman (1875) L. R. 19 Eq. 623; 44 L. J. Ch. 298; 23 W. R. 517.

HALL, V.-C.—It was also contended that this work is not entitled to any protection having regard to its character; that it is, in fact, a mere advertisement, and that an advertisement is not, on the authority of *Cobbett v. Woodward*, entitled to protection. The decision in that case turned entirely on the circumstances which existed in it. It was a catalogue of articles which were being offered for sale. But it does not appear that *Hotten v. Arthur* was mentioned to the M.R., and whether, if it had been, his lordship's decision would have been different, it is difficult to say; but certainly it was decided in *Hotten v. Arthur* that a catalogue may under certain circumstances be protected by injunction.—p. 626.

Cobbett v. Woodward, *overruled*.

Bogue v. Houlston (1852) 21 L. J. Ch. 470; 5 De G. & Sm. 267; 16 Jur. 372.—PARKER, V.-C.; **Hotten v. Arthur**, and **Grace v. Newman**, *followed*.

Maple & Co. v. Junior Army and Navy Stores (1882) 52 L. J. Ch. 67; 21 Ch. D. 369; 47 L. T. 589; 31 W. R. 70.

JESSEL, M.R.—The case which has done all the mischief is *Cobbett v. Woodward*. The late M.R. there says: "But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy." I think that this is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright gives him the exclusive right of multiplying copies, and he may use them as he pleases. I think, therefore, that *Cobbett v. Woodward* will not bear legal examination. There are two cases tending in the opposite direction to *Cobbett v. Woodward*, namely, *Hotten v. Arthur* and *Grace v. Newman*. It is true that in *Hotten v. Arthur* there was considerable literary work in the ordinary sense of the term—the publication was more than a mere catalogue—still its primary object was that of an advertisement to promote the plaintiff's trade. The weight of authority, then, is against the doctrine that there cannot be copyright in a book issued as an advertisement, and I cannot see any principle in support of that doctrine.—p. 72.

LINDLEY, L.J.—I should have felt no difficulty in this case were it not for the decision in *Cobbett v. Woodward*. If that case were reconcilable with the other cases on the subject I should be

slow to overrule it, but it appears to me difficult to reconcile it with the other cases, especially *Bogue v. Houlston*. [JESSEL, M.R. (having examined the record in *Bogue v. Houlston*, which had been sent for during the argument) said: "I find that the bill did not claim copyright in any letterpress, and did not state that there were any other stories than 'Reynard the Fox' in the plaintiff's book." That case, then, is very strong, for it is a decision that there may be copyright in a set of engravings forming part of a book, though there is none in the letterpress; and that governs this case, for copyright in the engravings could not be obtained by binding them up with something else in which there was no copyright.—*ib.*]

Maple v. Junior Army and Navy Stores, *applied*.

Comyns v. Hyde (1895) 72 L. T. 250.—STIRLING, J.

London Printing and Publishing Alliance

Co. v. Cox (1891) 60 L. J. Ch. 707; [1891] 3 Ch. 291; 65 L. T. 60.—C.A.

FRY and LOPES, L.J.J.; LINDLEY, L.J. *dissenting*; *discussed and followed*.

Grace v. Newman (*supra*), *distinguished*.

Petty v. Taylor (1896) 66 L. J. Ch. 209; [1897] 1 Ch. 465; 75 L. T. 545; 45 W. R. 299.

KEKEWICH, J.—The headline [*Grace v. Newman*], which I have taken care to verify by the V.-C.'s judgment, is: "Plaintiff, a cemetery stone mason, employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letterpress:—Held, that the plaintiff had copyright in the book, and was entitled to an injunction." If my view is right, Mr. Wesley Petty never employed or remunerated any one. He did in his character of agent, but not otherwise; and assuming him therefore to have been the author of the letterpress, the rest of the book—that is to say, the figures—were not done for him, they were done for somebody else; and it seems to me monstrous to suppose—and I am sure *Grace v. Newman* does not support the hypothesis—that a man in protecting his copyright in letterpress, supposing him to be entitled to it, can thereby protect an alleged copyright in works of art which are introduced into the letterpress, they being the works of other persons, the copyright of which is vested in those other persons, or at any rate in strangers to the literary author.—p. 213.

Cooper v. Stephens (1895) 64 L. J. Ch. 408;

[1895] 1 Ch. 567; 13 R. 444; 72 L. T. 390; 48 W. R. 444.—ROMER, J. *considered and approved*.

Maple v. Junior Army and Navy Stores (*supra*), *explained*.

Marshall v. Bull (1901) 85 L. T. 77.—C.A. RIGBY, COLLINS and ROMER, L.J.J.

Lewis v. Fullarton (1889) 8 L. J. Ch. 291;

2 Beav. 6; 3 Jur. 669.—LANGDALE, M.R., *followed*.

Kelly v. Morris (1886) 35 L. J. Ch. 423; L. R. 1 Eq. 697; 14 L. T. 222; 14 W. R. 496.—WOOD, V.-C.; Hogg v. Scott (*post*, col. 693).

Kelly v. Morris and Lewis v. Fullarton,
followed.

Morris v. Ashbee (1868) L. R. 7 Eq. 34; 19 L. T. 550.—GIPFARD, V.-C.

Kelly v. Morris and Morris v. Ashbee, discussed.

Pike v. Nicholas (1869) 39 L. J. Ch. 485; L. R. 5 Ch. 251; 18 W. R. 321.—HATHERLEY, L.C. and GIPFARD, L.J.; *reversing on the facts* 17 W. R. 842.—JAMES, V.-C.

Kelly v. Morris and Morris v. Ashbee, explained.

Pike v. Nicholas, referred to.

Morris v. Wright (1870) L. R. 5 Ch. 279; 22 L. T. 78; 18 W. R. 327

GIPFARD, L.J.—Lord Cranworth, in *Jefferys v. Boosey* (*post*, col. 706), said that the true definition of "copyright" is the sole right of multiplying copies. That, of course, means that you must not copy with or without colourable alterations. That is a general definition of copyright. Then with respect to the latter cases, I may observe that in *Kelly v. Morris*, as well as in *Morris v. Ashbee*, there was direct copying. Not only were the slips used for the purpose of canvassing, but the course pursued was this: when a slip was presented to the person who was canvassed, he was asked whether he authorised that particular entry: they proceeded to get his authority for its insertion, and the entry was copied in the book. In *Kelly v. Morris*, the present L.C. says: "I think there must be an injunction . . . trouble in getting his information." If this passage goes further than what I take it to mean, I cannot doubt that it goes beyond what the law authorises, and beyond the decision of the L.C. and myself in the late case of *Pike v. Nicholas*. It does not mean that he may not look into the book for the purpose of ascertaining where a particular person lived, and for the purpose of ascertaining whether it was worth his while to call upon that person or not, but it means that he may not take that particular slip and show that to the person and get his authority as to putting that particular slip in. Then the L.C. goes on—it does not rest there: "The defendant, from his description of the way . . . the trouble to make a single inquiry." I understand that judgment to rest entirely upon the facts, and I am quite satisfied from what the L.C. said in *Pike v. Nicholas*, that it was never his intention to say a person may not look at the directory for the purpose of directing him where to call; but what he meant was, that he must not take the passage of the directory, and go and see whether it happens to be accurate, and, if it is accurate, bodily copy the passage into his directory. With respect to my own judgment in *Morris v. Ashbee*, what I said was this: "The plaintiff incurred the labour. . . . I say clearly not." Therefore it is quite clear in both those cases the parties had gone very far beyond anything stated in the thirteenth and sixteenth paragraphs of Mr. W.'s affidavit. They had virtually and bodily copied from the book—they had copied from the very slip—and all they had done was to take the slip and verify it, and nothing else.—p. 284.

Kelly v. Morris and Morris v. Wright, applied.

Hogg v. Scott (1874) 43 L. J. Ch. 705; L. R. 18 Eq. 444.—HALL, V.-C.

Kelly v. Morris, applied.

Ager v. P. & O. S. N. Co. (1884) 53 L. J. Ch. 589; 26 Ch. D. 637 (*supra*, col. 690).

Kelly v. Morris, approved and principle applied.

Walter v. Lane (*post*, col. 696).

Maxwell v. Hogg and Hogg v. Maxwell

(1867) 36 L. J. Ch. 483; L. R. 2 Ch. 307; 16 L. T. 130; 15 W. R. 84, 467.—TURNER and CATRNS, L.J.J.; *affirming* 12 Jur. (N.S.) 916; 15 L. T. 204.—STUART, V.-C., *discussed*.

Weldon v. Dicks (1878) 48 L. J. Ch. 201; 10 Ch. D. 247; 39 L. T. 467; 27 W. R. 639.—MALINS, V.-C.

Weldon v. Dicks, considered.

Dicks v. Yates (1881) 18 Ch. D. 76; 50 L. J. Ch. 809; 44 L. T. 660.—C.A. JESSEL, M.R., JAMES and LUSH, L.J.J.; *reversing* 43 L. T. 470; 29 W. R. 135.—BACON, V.-C.

LUSH, L.J.—Before I consider this question I will notice the decision in *Weldon v. Dicks*, which was pressed upon us by the plaintiff's counsel as being precisely in point. In that case a series of books had been published by the plaintiff. One work in that series was intitled "Trial and Triumph." The defendant subsequently published in two magazines, and afterwards in a separate volume, an entirely different book, but with the same title, "Trial and Triumph." The plaintiff brought an action and claimed an injunction, alleging in his statement of claim that the defendant had published and continued to publish his work with the intention of inducing the public to believe, and he had in fact induced persons to believe, that the book so published by him was identical with that published and about to be re-published by the plaintiff. That was an allegation of a common law fraud, and although the learned V.-C. did not explicitly put his judgment on that allegation, I cannot help thinking that it influenced his mind from beginning to end, and that he did not distinguish between a violation of a common law right and an infringement of copyright. But I observe that in the latter part of his judgment he says, "all the witnesses agree that the title of a book is a material part of the book, it is a valuable part of it, and the case is illustrated by a reference to Mr. Thackeray's work of *Vanity Fair*. Would any one be entitled to publish a book called *Vanity Fair*, leaving out the author's name? A person buying the cheap edition would expect to get Thackeray's work, and what a fraud it would be if he had got some spurious thing which was not worth reading." I cannot help thinking that this is the key to the whole judgment, and that what the learned V.-C. has in his mind was that the allegation was proved that the title was adopted for the very purpose of inducing persons to believe that the book was the same book as that which belonged to the plaintiff. If so, the case is no authority whatever on the present point, which, as I said before, turns on the simple question whether there can be copyright in the title "Splendid Misery," and I am clearly of opinion that there cannot.—p. 92.

Weldon v. Dicks, followed.

Coote v. Judd (1883) 23 Ch. D. 727; 48 L. T. 205; 31 W. R. 423.—BACON, V.-C.

Dicks v. Yates (*supra*), *applied*.
Primrose Press Agency Co. v. Mark Knowles
(1886) 2 Times L. R. 404.—KAY, J.

Weldon v. Dicks (*supra*), *commented on*.
Licensel Victuallers' Newspaper Co. v. Bingham (1888) 58 L. J. Ch. 36; 38 Ch. D. 139; 59 L. T. 187; 36 W. R. 433.—C.A. COTTON, LINDLEY AND BOWEN, L.J.J.

Sweet v. Cater (1841) 11 Sim. 572; 5 Jur. 68.—SHADWELL, V.-C., *distinguished*.
Stevens v. Benning (1855) 24 L. J. Ch. 153; 6 De G. M. & G. 223; 3 Eq. R. 457; 1 Jur. (N.S.) 74; 3 W. R. 149.—KNIGHT BRUCE and TURNER, L.J.J.: *affirming* 1 K. & J. 168.—WOOD, V.-C.

Sweet v. Cater and Stevens v. Benning, *discussed*.
Reade v. Bentley (1858) 27 L. J. Ch. 254; 4 K. & J. 656; 4 Jur. (N.S.) 82; 6 W. R. 240.—WOOD, V.-C.

Stevens v. Benning, *followed*.
Hole v. Bradbury (1879) 48 L. J. Ch. 673; 12 Ch. D. 886; 41 L. T. 153, 250; 28 W. R. 39.—FRY, J.

Hole v. Bradbury, *not followed*.
Isaacs v. Fiddemann (1880) 49 L. J. Ch. 412; 42 L. T. 395.—JESSEL, M.R.

Stevens v. Benning, Reade v. Bentley, and Hole v. Bradbury, *principle applied*.
Griffith v. Tower Publishing Co. (1896) 66 L. J. Ch. 12; [1897] 1 Ch. 21; 75 L. T. 330, 45 W. R. 73.—STIRLING, J.

Hole v. Bradbury, *not followed*.
Boosey v. Whight (No. 2) (1899) 81 L. T. 265.—STIRLING, J.

Mayhew (or Murray) v. Maxwell (1860) 1 J. & H. 312; 3 L. T. 466; 8 W. R. 118.—WOOD, V.-C.: **Strachan (or Strahan) v. Graham** (1867) 16 L. T. 87; 15 W. R. 487.—MALINS, V.-C.; *affirmed*, 17 L. T. 457.—C.A.; and **Sweet v. Benning**, *discussed*.
Cox v. Land and Water Journal Co. (1869) 39 L. J. Ch. 152; L. R. 9 Eq. 324; 21 L. T. 548; 18 W. R. 206.—MALINS, V.-C.

Murray v. Maxwell, *referred to*.
Clark v. Bishop (1872) 25 L. T. 908.—C.P.

Cox v. Land and Water Journal Co., *not followed*.
Walter v. Howe (1881) 17 Ch. D. 708; 50 L. J. Ch. 621; 44 L. T. 727; 29 W. R. 776.

JESSEL, M.R.—I have been referred to *Cox v. Land and Water Journal Co.*, in which Malins, V.-C. held that a proprietor of a newspaper can sue without joining the author, and without registration under the Copyright Act; but, with all respect, I must decline to follow that decision, for it appears to me to be opposed to the plain wording of the Act of Parliament.—p. 710.

Walter v. Howe, *followed*.
Cox v. Land and Water Journal Co., *not followed*.
Cate v. Devon and Exeter Constitutional Newspaper Co. (1889) 58 L. J. Ch. 288; 40 Ch. D. 500; 60 L. T. 672; 37 W. R. 487.—NORTE, J.

Walter v. Howe, *approved*.
Trade Auxiliary Co. v. Middlesborough Tradesmen's Protection Association (1889) 58 L. J. Ch. 293; 40 Ch. D. 425.—C.A. (*post*, col. 707).

Walter v. Howe and Cate v. Devon and Exeter Constitutional Newspaper Co., *approved and principle applied*.

Walter v. Lane (1900) 69 L. J. Ch. 699; [1900] A. C. 539; 83 L. T. 289; 39 W. R. 95.—H.L. (E.). HALSBURY, L.C., LORDS DAVEY, JAMES OF HEREFORD and BRAMPTON; LORD ROBERTSON *dissenting*; *reversing* C.A. See *post*, col. 697.

LORD DAVEY.—A sheet of letterpress is a book within the meaning of the [Copyright] Act; and notwithstanding the decision of Malins, V.-C., in *Cox v. Land and Water Journal Co.* (*supra*), I have no doubt that a newspaper is within the Act. In *Walter v. Howe* Sir G. Jessel differed from the V.-C., and his decision has since been followed. . . . Copyright has nothing to do with the originality or literary merits of the author or composer. It may exist in the information given by a street directory, *Kelly v. Morris* (col. 692); or in a list of deeds of arrangements, *Cate v. Devon and Exeter Constitutional Newspaper Co.*; or in a list of advertisements, *Lamb v. Evans* (*post*). I think those cases right, and the principle on which they proceed directly applicable to the present case.—p. 706.

Abernethy v. Hutchinson (1825) 1 H. & T. 28; 3 L. J. (O.S.) Ch. 200.—ELDON, L.C., *discussed*.

Morison v. Moat (1851) 20 L. J. Ch. 513; 9 Hare 241; 15 Jur. 787.—TURNER, V.-C.; *affirmed*, [1852] 21 L. J. Ch. 248; 16 Jur. 321.—KNIGHT BRUCE and CRANWORTH, L.J.J.

Morison v. Moat, *distinguished*.
Reuter's Telegram Co. v. Byron (1874) 43 L. J. Ch. 661.—JESSEL, M.R.

Morison v. Moat, *principle applied*.
Tuck & Sons v. Priestner (1887) 56 L. J. Q. B. 593; 19 Q. B. D. 629.—C.A. (*post*, col. 702).

Abernethy v. Hutchinson, *explained*.
Morison v. Moat, *applied*.
Lamb v. Evans (1892) 62 L. J. Ch. 404; [1893] 1 Ch. 218; 2 R. 189; 68 L. T. 131; 41 W. R. 405; 9 Times L. R. 87.—C.A. LINDLEY, BOWEN and KAY, L.J.J.

Morison v. Moat, *referred to*.
Robb v. Green (1895) 64 L. J. Q. B. 593; [1895] 2 Q. B. 315; 14 R. 580; 73 L. T. 15; 44 W. R. 25; 59 J. P. 695.—C.A. ESHER, M.R., KAY and A. L. SMITH, L.J.J.

Abernethy v. Hutchinson, *discussed and followed*.
Nicols v. Pitman (1884) 53 L. J. Ch. 552; 26 Ch. D. 374; 50 L. T. 254; 32 W. R. 631; 48 J. P. 549.—KAY, J. See judgment.

Abernethy v. Hutchinson, *discussed and approved*.
Caude v. Sime (1887) 57 L. J. P. C. 2; 12 App. Cas. 326; 57 L. T. 634; 36 W. R. 199.—H.L. (SC.). HALSBURY, L.C. and LORD WATSON; LORD FITZGERALD *dissenting*. See judgment.

Sweet v. Maughan (1840) 9 L. J. Ch. 323; 11 Sim. 51; 4 Jur. 479.—SHADWELL, V.-C.; and **Leslie v. Young** (1844) A. C. 335; 6 R. 211.—H.L. (SC.). HERSCHELL, L.C.,

LORDS WATSON, ASHBOURNE and SHAND,
discussed

Walter v. Lane (1899) 68 L. J. Ch. 736; *reversed*, 68 L. J. 760; [1899] 2 Ch. 749, 81 L. T. 395.—C.A. LINDLEY, M.R., SIR P. H. JENNE and ROMER, L.J.; *but restored*, [1900] 69 L. J. Ch. 639, [1900] A. C. 539.—H.L. (R.) (*supra*, col. 696).

NORTH, J.—I take it that these meetings were held under circumstances in which reporters were invited to attend for the purpose of publishing the speeches that they heard. If that is so, they were intended to be made public, and the case is quite different from those of *Abernethy v. Hutchinson*, *Nicola v. Pitman*, and *Caird v. Sims* (*supra*). . . . The speaker himself makes no claim at all. . . . [His lordship referred to *Butterworth v. Robinson* (*supra*, col. 690), and after stating the facts continued.] That clearly was a case in which the report of what the reporter heard in Court was treated as a matter in respect of which he had copyright. No doubt to some extent a legal report might be an abridgment, but it is rather singular that what in particular might be abridged and put very neatly—the speeches and arguments of counsel—seems to have been left out altogether. Again, in *Street v. Mawham* the Legal Observer had printed cases identical with reports in the Jurist. Some of the cases had come from an independent source, and as to those there could be no copyright in the plaintiff, but as to the rest the copyright was claimed, and the V.-C. granted an injunction. [His lordship referred to certain American authorities, and after discussing *Leslie v. Young*, continued.] There the plaintiff had published certain time-tables and so on in connection with Perth, which it was alleged the defendant had copied. The time-tables and the times for the trains to start were, of course, taken both by the plaintiff and the defendant in the action from the tables issued to the public by the railway companies. As to this, it was held that as far as the plaintiff had only taken the contents of the time-tables from the public time-tables, he could not by printing them over again have any copyright in them. But he had done more. He had also collected and given various excursions which were recommended to travellers, and in the report of that case in the House of Lords it is pointed out why the distinction is drawn. . . . That was a case, therefore, where the common material did not itself give a right of copyright, but when it was made the basis of giving to the public something that was not found in the tables themselves it was held it might be so. In the case before me there is, as I say, no copying at all; what is done is the taking down what is spoken, and that seems to me for this purpose to be an original thing and not a copy.—pp. 738–740.

Chilton v. Progress Printing and Publishing

Co. (1894) 71 L. T. 664; 43 W. R. 136.—KEKEWICH, J., distinguished.

Exchange Telegraph Co. v. Gregory (1895) 65 L. J. Q. B. 262; [1896] 1 Q. B. 147; 74 L. T. 83; 60 J. P. 52; 12 Times L. R. 19.—C.A. ESHER, M.R., KAY and RIGBY, L.J.

RIGBY, L.J.—*Chilton v. Progress, &c. Co.* . . . is not applicable here. In that case a piece of information was taken out of a publication of the plaintiff's and used as information in another publication, which had no resemblance, either in form or in the literary part of it, to the other.—p. 266.

Exchange Telegraph Co. v. Gregory, fol-
lowed.

Exchange Telegraph Co. v. Central News (1897) 66 L. J. Ch. 672; [1897] 2 Ch. 48; 76 L. T. 591; 45 W. R. 395.—STIRLING, J.

MUSICAL AND DRAMATIC COPYRIGHT.

Cumberland v. Planché (1834) 3 L. J. K. B. 194. 1 A. & E. 580; 3 N. & M. 537.—

DENMAN, C.J., commented on

Hutchins and Romer, Ex parte (1879) 4 Q. B. D. 90, 483; 48 L. J. Q. B. 29, 505; 41 L. T. 144; 27 W. R. 261, 857.—C.A. BRAMWELL, BRETT and COTTON, L.J.J. : *reversing* 89 L. T. 396.—COCKBURN, C.J. and MELLOR, J.

BRAMWELL, L.J.—I wish to add that owing to 5 & 6 Vict. c. 45, s. 22, perhaps *Cumberland v. Planché* is not now law; but here other words than copyright are used.—p. 488.

Cumberland v. Planché, commented on.

Chappell v. Boosey (1882) 51 L. J. Ch. 625; 21 Ch. D. 232; 46 L. T. 854; 30 W. R. 733.

NORTH, J.—In that case [*Cumberland v. Planché*] the piece had been already printed and published, and therefore, if the contention of the present defendant is sound, the acting right, which was the subject of the decision, had no existence in fact. This fact does not seem to have occurred to Sir F. Pollock or Sir J. Scarlett, who argued the case, or to any of the four judges who decided it. . . . With respect to the statement in the 16th article of the Digest, that a "dramatic piece or musical composition published as a book may (it seems probable) be publicly represented without the consent of the author or his assigns," I confess my inability to agree with it. It is stated in a footnote by the learned author of the Digest, that the only authority he has been able to find on the point is that of *Murray v. Elliston* (*supra*, col. 688), which seems to imply the proposition contained in the article. But that case was decided in 1822, many years before the passing of the Act 3 & 4 Will. 4, c. 15, which Act was the first to create an acting right, and was intended to alter and amend the law which existed when *Murray v. Elliston* was decided. If that case had been decided after the Act instead of before, the decision must have been the other way, unless, indeed, it had been held that the alterations made in adapting the piece for the stage had rendered it a new work, in which case it would not have been any authority for the proposition contained in art. 16.—p. 628.

Macklin v. Richardson (1770) Amb. 694.—
SMYTHE and BATHURST, LORDS COMMRS.,
distinguished.

Boucicault v. Chatterton (1876) 46 L. J. Ch. 305; 5 Ch. D. 267; 35 L. T. 745; 25 W. R. 287.—C.A.; affirming 35 L. T. 541.—MAYES, V.-C.

BAGGALLAY, J.A.—Some authorities have been referred to by Mr Glasse—*Macklin's Case* and the subsequent case of *D'Almeida v. Boosey* (*post*, col. 705)—for the purpose of showing that the mere representation on the stage was not a publication. Both of these cases were decided, one long before, and the other just before, the passing of the Act of Will. 4 [3 & 4 Will. 4, c. 15]; therefore they can give us no

light into the precise sense in which the words *y* have been used in that statute.—p. 398.
JAMES, L.J. to the same effect. BRETT, J.A. concurred.

Russell v. Smith (1848) 17 L. J. Q. B. 225, 12 Q. B. 217; 12 Jur. 723—DENMAN, C.J., for the Court, *referred to*.
Clarke v. Bishop (1872) 25 L. T. 908.—C.P.

Wall v. Taylor (1883) 52 L. J. Q. B. 558; 11 Q. B. D. 102; 31 W. R. 712.—C.A. BRETT, M.R. and BOWEN, L.J.; COTTON, L.J. *dissenting; commented on and dicta disapproved*.

Russell v. Smith, followed.
Duck v. Bates (1883) 12 Q. B. D. 79; 49 T. 507; 32 W. R. 169; *affirmed (post)*.
COLERIDGE, C.J.—I am aware that there are *inter dicta* of the present M.R. which go very far beyond the definition of "a place of dramatic entertainment" proposed in *Russell v. Smith*. The M.R., in *Wall v. Taylor*, certainly does say, I understand him, that performing a dramatic piece for the amusement of other persons makes a place where it is performed a place of dramatic entertainment, which would include the case of song sung for the amusement of friends in a singing room. The M.R., whom I have contended during the argument, thinks that some of his expressions went further than he is now disposed to go, but if his words are taken in their full sense it will follow that this piece was performed under circumstances which bring it within the earlier statute. I have already stated my reasons for taking the opposite view, and I think *Russell v. Smith* is a sufficient authority to support my opinion.—p. 83.
STEPHEN, J. to the same effect.

Wall v. Taylor, explained.
Duck v. Bates (1884) 13 Q. B. D. 843; 53 L. J. Q. B. 338; 50 L. T. 778; 32 W. R. 813; 48 T. 501.—C.A. BRETT, M.R., and BOWEN, L.J.; BY, L.J. *dissenting (affirming last case)*.
BRETT, M.R.—It seems to have been supposed that I said that the representation of a dramatic piece, wherever it may be acted, makes the place where it is performed a place of dramatic entertainment. I believe that I did not say so; but I did, I was wrong.—p. 846.

Wall v. Taylor, commented on.
Adams v. Bailey (1887) 56 L. J. Q. B. 393; 8 Q. B. D. 625; 56 L. T. 770; 35 W. R. 37.—DAY and WILLS, JJ.; *affirmed*, C.A. SHER, M.B., BOWEN and FRY, L.JJ.

Planché v. Braham (1837) 7 L. J. C. P. 25; 4 Bing. (N.O.) 17; 8 Car. & P. 68; 5 Scott 242; 3 Hodges 288; 1 Jur. 823.—TINDAL, C.J., *discussed and approved*.
Chatterton v. Cave (1878) 47 L. J. C. P. 545; 4 App. Cas. 483; 38 L. T. 397; 26 W. R. 498.—H.L. (E.); *affirming* (1876) 46 L. J. C. P. 97; 2 P. D. 42.—C.A.

HATHERLEY, L.C.—*Planché v. Braham* was very much pressed upon the attention of this House, but, though the portion there taken was minute, it must be remembered that it consisted of songs, the words of which were adopted, without licence (in preference to those which had been otherwise published) by a celebrated singer, and probably much of the value of the work might be due to its association with that singer's name. These songs would perhaps be one of the

chief points of the drama's success, and therefore if wrongly introduced in the defendant's piece might materially damage the value of the plaintiff's drama.—p. 549.

LORDS O'HAGAN and BLACKBURN also discussed this case. LORD GORDON concurred.

Planché v. Braham and Chatterton v. Cave, referred to.
Beere v. Ellis (1889) 5 Times L. R. 330.—POLLOCK, B.

Russell v. Briant (1849) 19 L. J. C. P. 33; 8 C. B. 836; 14 Jur. 201.—C.P., *approved*.
Lyon v. Knowles (1863) 32 L. J. Q. B. 71; 3 B. & S. 556; 9 Jur. (N.S.) 774; 7 L. T. 670; 11 W. R. 266.—Q.B.; *affirmed*. 5 B. & S. 751; 10 L. T. 876; 12 W. R. 1083.—EX. CH.

Russell v. Briant and Lyon v. Knowles, principle applied.
Kelly's Directories, Ltd. v. Gavin and Lloyds (1901) 70 L. J. Ch. 237; [1901] 1 Ch. 374; 84 L. T. 581; 49 W. R. 313.—BYRNE, J.; *affirmed*, 71 L. J. Ch. 405, [1902] 1 Ch. 631; 86 L. T. 393; 50 W. R. 385.—C.A. W. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

DESIGNS.

Reg. v. Firmin (1851) 15 J. P. 740; 3 H. & N. 304, n.—CAMPBELL, C.J., *discussed*.
Harrison v. Taylor (1858) 27 L. J. Ex. 315; 3 H. & N. 304.—MARTIN, B.; *reversed*, (1859) 29 L. J. Ex. 3; 4 H. & N. 815; 5 Jur. (N.S.) 1219.—EX. CH.

Reg. v. Firmin, adhered to.
Norton v. Nicholls (1859) 28 L. J. Q. B. 225; 1 El. & El. 761; 5 Jur. (N.S.) 1203; 7 W. R. 420.—CAMPBELL, C.J. (for the Court).

Norton v. Nicholls, approved.
Holdsworth v. M'Crea (1867) 36 L. J. Q. B. 297; L. R. 2 H. L. 380; 16 W. R. 226.—H.L. (E.). CHELMSFORD, L.C., LORDS CRANWORTH, WESTBURY and COLONSAF; *affirming* S. C. *nom.* M'Crea v. Holdsworth (1866) 35 L. J. Q. B. 123.—EX. CH.; *which affirmed* (1864) 33 L. J. Q. B. 329; 5 B. & S. 495.—EX.

Holdsworth v. M'Crea, observations in explained.
M'Crea v. Holdsworth (1870) L. R. 6 Ch. 418; 23 L. T. 444; 19 W. R. 36.

[It was argued that, there being a variation between the defendants' pattern and that of the plaintiff, the defendants had therefore not copied the thing which the plaintiff had chosen to register, and the only thing for which he was entitled to protection; and that this was clearly the opinion of the learned lords who decided the case. (See L. R. 2 H. L. 384, 387, 388, 390)]

HATHERLEY, L.C.—I think this is really a very idle contention. It seems to me an attempt to give a meaning to some words used in the H. L. totally opposite to anything that was intended by the noble lords who used those words. . . . I imagine that the observations made by some of the learned lords, and relied upon by the defendants, were intended to say merely that the design could be protected only as it was represented; and the learned lords considered that the question whether there was any difference in the effect would be left to the jury. Their lordships seem to have meant

that the designer is not bound, as in a patent case, to distinguish the new from the old, and is allowed to register his pattern without distinguishing what is new from what is old; but if he chooses to put it in that way, it will not be protected as against the public in case they choose to use any portion in any manner substantially differing from the registered design.—p. 419.

McCrear v. Holdsworth, discussed.

Hothersall v. Moore (1891) 9 Rep. Pat. Cas. 27.—BRISTOWE, V.-C. See judgment, where the cases are discussed.

ENGRAVINGS, &C.

Blackwell v. Harper (1740) 2 Atk. 92; 1 Barnard. 210.—HARDWICKE, L.C., *considered*.

Newton v. Cowie (1827) 4 Bing. 234; 12 Moore 457; 5 L. J. (O.S.) C. P. 159; 29 R. R. 541.

BEST, C.J.—The first case is *Blackwell v. Harper*, 2 Atkyns 92, better reported in 1 Barnardiston 210. In that case the time was not mentioned when the plaintiff first published. The chancellor was of opinion, "that the words of the Act requiring the insertion of the dates were directory *only*, and not *descriptive*, and, therefore, the day is only necessary to be inserted on prints where the *penalty of the Act is intended to be taken advantage of*." But in Barnardiston this important passage is added: "That as the circumstance of inserting the day was not complied with, he would grant an injunction to restrain the defendant from publishing the prints for the future, but *would not direct on account of the profits of those already published*." And then, at the close of his judgment, he is represented to say, "it is matter of doubt whether the clause ought to be construed directory or descriptive." If his lordship was right that the plaintiff was not entitled to an account for by-gone profits, why is this plaintiff entitled to recover damages for a by-gone injury? The authority, therefore, is rather in favour of the objection taken against it. The chancellor, indeed, seems influenced by the decision of *Baldard v. Walker* [1739], which, as cited in *Blackwell v. Harper*, and it is not to be found elsewhere, was a decision on the 8 Anne, c. 19, and related to a book which had not been entered at Stationers' Hall. But the words of that Act are different from those of the Acts relating to prints. The words of the statute of Anne are, "that nothing in this Act shall be construed to subject any bookseller to forfeitures by reason of the printing any book, unless the title of the copy shall be registered with the Stationers' Company." Consequently, no forfeitures could be incurred unless where a proper entry had been made at Stationers' Hall. But in the 8 Geo 2, the same clause which gives the proprietor the monopoly, requires him to engrave on his plate the date of publication: . . . *Beckford v. Hood* (*supra*, col. 688) was an action on the case for pirating a book. The work was not entered at Stationers' Hall, and the question was whether an action on the case could be maintained for the injury to the plaintiff's right, or whether he must sue for the penalties given by the statute? That was the only question that Lord Kenyon and the other judges appear to have considered. Lord Kenyon

said the entry at Stationers' Hall was to be a warning not to incur penalties. The decision, however, was on a different statute, and calling on another not to injure rights is a different thing from suing for forfeitures.—pp. 241—243.

Newton v. Cowie, approved.

Brooks v. Cook (1835) 4 L. J. K. B. 144; 4 N. & M. 652; 3 A. & E. 138; 1 H. & W. 129.—DENMAN, C.J.

Gambart v. Ball (1863) 32 L. J. C. P. 166; 14 C. B. (N.S.) 306; 9 Jur. (N.S.) 1059; 8 L. T. 426; 11 W. R. 699, *approved*.

Graves v. Ashford (1867) 36 L. J. C. P. 139; L. R. 2 C. P. 410; 16 L. T. 98; 15 W. R. 498.—EX. CH. KELLY, C.B. (for the Court)

Newton v. Cowie, principle applied.

Graves v. Ashford, discussed.

Rock v. Lazarus (1872) 42 L. J. Ch. 105; L. R. 15 Eq. 104; 27 L. T. 744, 21 W. R. 215.—MALINS, L.C.

Gambart v. Ball, referred to.

Dicks v. Brooks (1880) 49 L. J. Ch. 812; 15 Ch. D. 22; 43 L. T. 71; 29 W. R. 87.—C.A. JAMES, BAGGALLAY and BRAMWELL, L.JJ.

Rock v. Lazarus, applied.

Kenrick v. Lawrence (*post*).

PICTURES AND PHOTOGRAPHS.

Walker, Ex parte, Graves, In re (1869) 39 L. J. Q. B. 31; L. R. 4 Q. B. 715; 20 L. T. 877; 17 W. R. 1018.—BLACKBURN, MELLOR and HANNEN, JJ., *approved*.

Tuck & Sons v. Priestler (1887) 56 L. J. Q. B. 553; 19 Q. B. D. 48, 629; 36 W. R. 93; 52 J. P. 213.—CA. ESHER, M.R. and LINDLEY, L.J.; LOPES, L.J. *dissenting; reversing* 57 L. T. 110.—GROVE and DENMAN, JJ.

Tuck & Sons v. Priestler, applied.

Graves' Case, distinguished.

Trottsch v. Ices (1887) 3 Times L. R. 773.—STIRLING, J.

Tuck & Sons v. Priestler, followed.

Nicholls v. Parker (1901) 17 Times L. R. 482.—WRIGHT, J. See *post*, col. 705.

Murray v. Heath (1831) 1 B. & Ad. 804; 9 L. J. (O.S.) K. B. 111; 35 R. R. 460.—K. B.; and *Tuck v. Priestler, discussed*.

Pollard v. Photographic Co. (1888) 58 L. J. Ch. 251; 40 Ch. D. 345; 60 L. T. 418; 37 W. R. 266.—NORTH, J.

Murray v. Heath, distinguished.

Marshall v. Bull (1901) 85 L. T. 77.—C.A. (*supra*, col. 692).

Pollard v. Photographic Co., discussed.

Merryweather v. Moore (1892) 61 L. J. Ch. 505; [1892] 2 Ch. 518; 66 L. T. 719; 40 W. R. 540.—KEKEWICH, J.

Nottage v. Jackson (1883) 52 L. J. Q. B. 760; 11 Q. B. D. 627; 49 L. T. 339; 32 W. R. 106.—C.A. BRETT, M.R., COTTON and BOWEN, L.JJ., *commented on*.

Kenrick v. Lawrence (1890) 25 Q. B. D. 99; 38 W. R. 779.—WILLS, J.

Nottage v. Jackson (*supra*), *considered*.
Woodson v. Raphael Tuck & Sons (1887)
Times L. R. 57.—STIRLING, J.

Nottage v. Jackson, *distinguished*.
Melville 1. "Mirror of Life" Co. (1895) 65
J. Ch. 41; [1895] 2 Ch. 581; 13 R. 852; 73
J. T. 334.

KEKEWICH, J.—I have no doubt on the evidence that the son, though according to his own account perfectly competent to take a photograph himself, as regards this particular portrait, acted as his father's agent, the father being the director and the principal agent throughout. It seems to me that that makes him the author of the portrait directly within such definition as is to be found in *Nottage v. Jackson*, which relates to the photograph of the team of Australian cricketers taken at Kennington Oval in 1882; and the father appears to be outside the criticism of the M.R. and the L.J.J. there, which went to show that an agent is not an author within sect. 1 of the Copyright Act, 1862 (25 & 26 Vict. c. 68), and that a principal cannot be an author unless he is the active principal. I have also looked at . . . *Kenrick v. Lawrence*, in which *Nottage v. Jackson* has been commented upon. I think, having in view those cases, the right conclusion is that Mr. Melville, senior, is the author of the photograph.—p. 42.

Melville v. "Mirror of Life" Co., *applied*.
Green v. Irish Independent Co. [1899] 1 Ir. R. 386.—C.A. (*post*, col. 705).

Gahagan v. Cooper (1811) 3 Camp. 111.—
ELLENBOROUGH, C.J., *distinguished*.
West v. Francis (1822) 5 B. & Ald. 737; 1
D. & R. 400; 24 R. R. 541.—K.B.

West v. Francis, *discussed*.
Hanfstaengl v. Baines & Co. (1894) 64 L. J. Ch. 81; [1895] A. C. 20; 11 R. 88; 72 L. T. 1.—H.L. (E.). HERSCHELL, L.C., LORDS WATSON, ASHBOURNE, MACNAGHTEN and SHAND; *affirming* S. C. *nom.* Hanfstaengl v. Empire Palace Co. (No. 2); 63 L. J. Ch. 681; [1894] 3 Ch. 109; 7 R. 385; 70 L. T. 854; 42 W. R. 681.—C.A. LINDLEY, LOPES and DAVEY, L.J.J. (*see* judgments); *which reversed* 63 L. J. Ch. 452.—STIRLING, J.

LORD WATSON.—The language of Bayley, J. in *West v. Francis* comes nearer to a definition of what constitutes copying than anything which is to be found in the books. It runs thus: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." The learned judge was construing for the purposes of the case before him, the provisions of 17 Geo. 3, c. 57, which differ in expression from the enactments of 26 & 27 Vict. c. 68, and contain no reference to reproducing the design of the protected work. As I read the later statute, with which we have to deal in this case, the idea created by a picture or drawing does not necessarily form an element in the original work or its design which is protected by copyright. . . . In all cases where the alleged invasion is not a mere copy, the statute makes it imperative to consider how far there is an identity of design.—p. 84.

West v. Francis and Hollinrake v. Truswell (1894) 63 L. J. Ch. 719; [1894] 3 Ch. 420; 7 R. 568; 71 L. T. 419.—C.A.

HERSCHELL, L.C., LINDLEY and DAVEY, L.J.J., *applied*.

Boosey v. Whight (1899) 69 L. J. Ch. 66; [1900] 1 Ch. 122; 81 L. T. 571; 48 W. R. 228.—C.A. LINDLEY, M.R., SIR V. JEUNE and ROMER, L.J.; *varying on one point* (1899) 68 L. J. Ch. 379; [1899] 1 Ch. 836; 80 L. T. 561; 47 W. R. 551.—STIRLING, J.

LINDLEY, M.R.—I cannot think or bring myself to decide that the perforated sheet is a copy of a sheet of music within the meaning of the Copyright Act. . . . Music appeals to the ear, but a sheet of music appeals to the eye, and the observation of Bayley, J. in *West v. Francis* is applicable not only to engravings but to all kinds of books, and the Copyright Act treats a sheet of music as it treats a book.—p. 69.

Hollinrake v. Truswell, *referred to*.
Walter v. Lane (1899) 68 L. J. Ch. 736 (*supra*, col. 697).

REMEDIES.

Albert (Prince) v. Strange (1849) 18 L. J. Ch. 120; 1 Mac. & G. 25; 1 H. & T. 1; 13 Jur. 109.—COTTENHAM, L.C.; *affirming* 2 De G. & Sm. 652; 13 Jur. 507.—KNIGHT BRUCE, V.-C., *discussed*.

Delfe v. Delamotte (1857) 3 K. & J. 581; 3 Jur. (N.S.) 933.—WOOD, V.-C., and **Stannard v. Harrison** (1871) 24 L. T. 570; 19 W. R. 811.—BACON, V.-C., *not followed*.

Hole v. Bradbury (*supra*, col. 695).

Albert (Prince) v. Strange, *referred to*, Pollard v. Photographic Co. (*supra*, col. 702); Gilbert v. Star Newspaper Co. (1894) 14 Times L. R. 5.—CHITTY, J.; *applied*, Merryweather v. Moore (*supra*, col. 702).

Mawman v. Tegg (1826) 2 Russ. 385; 26 R. R. 112.—ELDON, L.C., *discussed*.

Bell v. Whitehead (1840) 8 L. J. Ch. 141; 5 Jur. 68.—COTTENHAM, L.C., *not followed*.

Jarrold v. Houlston (1857) 3 K. & J. 708; 3 Jur. (N.S.) 1051.—WOOD, V.-C.

Bell v. Whitehead, *discussed*.

Scott v. Stanford (*supra*, col. 690).

M'Neill v. Williams (1848) 11 Jur. 344.—KNIGHT BRUCE, V.-C., *approved*.

Bradbury v. Beeton (1869) 38 L. J. Ch. 57; 21 L. T. 323; 18 W. R. 83.—MALINS, V.-C.

Murray v. Bogue (1852) 22 L. J. Ch. 457; 1 Drew. 353; 17 Jur. 219; 1 W. R. 109.—KINDERSLEY, V.-C., *discussed*.

Jarrold v. Houlston; **Bell v. Whitehead**, and **M'Neill v. Williams**, *distinguished*.

Moffatt and Paige, Ltd. v. Gill & Sons, Ltd. (1901) 84 L. T. 452; 49 W. R. 438.—KEKEWICH, J.; *reversed* (*post*).

Jarrold v. Houlston, *applied*.

Moffatt and Paige, Ltd. v. Gill & Sons, Ltd. (1902) 86 L. T. 465; 50 W. R. 528.—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.J.J.; *reversing* S. C. (*supra*).

Cary v. Longman (1801) 1 East 358; 3 Esp. 273; 6 R. R. 285, *referred to*.

Wyatt v. Barnard (1814) 3 V. & B. 77; 13 R. R. 141.—ELDON, L.C.: and **Maxwell v. Somerton** (1874) 22 W. R. 313.—BACON, V.-C., *applied*.

Walter v. Steinkopff (1892) 61 L. J. Ch. 521;

[1892] 3 Ch. 489; 67 L. T. 184; 40 W. R. 599.—NORTH, J.

Wyatt v. Bernard, *principle applied.*

Marshall v. Bull (1901) 85 L. T. 77.—C.A. (*supra*, col. 692).

PENALTIES.

Fowell v. Head (1879) 48 L. J. Ch. 731; 12 Ch. D. 686; 41 L. T. 70.—JESSEL, M.R.; *referred to*, Adams v. Batley (1887) 56 L. J. Q. B. 393; 18 Q. B. D. 625 (*supra*, col. 699). *approved*, Lauri v. Renad (1892) 61 L. J. Ch. 580; [1892] 3 Ch. 402 (*post*, col. 710).

Brooke v. Milliken (1789) 3 Term Rep. 509. KENYON, C.J., *referred to*.

Beal, *Ex parte*, Graves v. Beal (1868) 37 L. J. Q. B. 161; 1 L. R. 3 Q. B. 387; 9 B. & S. 395; 18 L. T. 285; 16 W. R. 852.—BLACKBURN, J. (for the Court).

Beal, *Ex parte*, and Ellis v. Marshall & Son (1895) 64 L. J. Q. B. 757; 15 R. 561; 11 Times L. R. 522.—CHARLES, J., *followed*.

Green v. Irish Independent Co. [1899] 1 Ir. R. 47, 386.—C.A. WALKER and JAMES, L.J.J. FITZGERALD, L.J. *dissenting*; *reversing* PORTER, M.R.; *Baschet v. London Illustrated Standard Co.* (1899) 69 L. J. Ch. 35; [1900] 1 Ch. 73; 81 L. T. 509; 48 W. R. 56.—KEREWHICH, J.

Beal, *Ex parte*, *followed*.

Nicholls v. Parker (1901) 17 Times L. R. 482.—WRIGHT, J.

Green v. Irish Independent Co., *dissented from*.

Beal, *Ex parte*, *approved*.

Ellis v. Marshall & Son; *Baschet v. London Illustrated Standard Co.* and *Nicholls v. Parker*, *overruled on one point*. Hildesheimer v. Faulkner (1901) 70 L. J. Ch. 800; [1901] 2 Ch. 552; 85 L. T. 322; 49 W. R. 708.—C.A. RIGBY, COLLINS and ROMER, L.J.J.; *reversing* 83 L. T. 144; 48 W. R. 682.—KEREWHICH, J.

INTERNATIONAL COPYRIGHT.

Bach v. Longman (1777) Cowp. 623.—MANSFIELD, C.J.; and *Hime* (or *Hine*) v. Dale (1803) 11 East 244, n.; 2 Camp. 27, n.—ELLENBOROUGH, C.J., *dissented*.

D'Almaine v. Boosey (1835) 4 L. J. Ex. Eq. 21; 1 Y. & C. 288.—ABINGER, C.B. (for the Court).

D'Almaine v. Boosey, *distinguished*.

Boucicault v. Chatterton (1876) 46 L. J. Ch. 305; 5 Ch. D. 267.—C.A. (*supra*, col. 698).

Tonson v. Collins (1760) 1 W. Bl. 301.

Bach v. Longman; Delondre v. Shaw (1828)

2 Sim. 237.—SHADWELL, V.-C.

Page v. Townsend (1832) 5 Sim. 395.—

SHADWELL, V.-C.

D'Almaine v. Boosey.

Bentley v. Foster (1839) 10 Sim. 329.—

SHADWELL, V.-C.

O.C.

Chappell v. Purday (1845) 14 L. J. Ex. 258; 14 M. & W. 303; 9 Jur. 495.—POLLOCK, C.B. (for the Court).

Cooks v. Purday (1848) 17 L. J. C. P. 373; 5 C. B. 800; 12 Jur. 677.—WILDE, C.J. (for the Court).

Boosey v. Davidson (1849) 18 L. J. Q. B. 174; 13 Q. B. 257; 13 Jur. 678.—DENMAN, C.J. (for the Court).

Boosey v. Purday (1849) 18 L. J. Ex. 378; 4 Ex. 145; 13 Jur. 918.—POLLOCK, C.B. (for the Court).

discussed.

Clementi v. Walker (1824) 2 B. & C. 861; 4 D. & R. 598; 2 L. J. (o.s.) K. B. 176; 26 R. R. 596.—K.B., *approved*.

Jefferys v. Boosey (1854) 24 L. J. Ex. 81; 4 H. L. Cas. 815; 3 C. L. R. 625; 1 Jur. (N.S.) 613.—H.L. (E.). CRANWORTH, L.C., LORDS BROUGHAM and ST. LEONARDS, assisted by the JUDGES; *reversing* S. C. *nom.* Boosey v. Jefferys (1851) 20 L. J. Ex. 354; 6 Ex. 580; 15 Jur. 540.—EX. CH.; and *affirming* ROLPH, B.

Jefferys v. Boosey, *approved*.

Kyle v. Jefferys (1859) 3 Macq. H. L. Cas. 611.—H.L. (SC). CAMPBELL, L.C., LORDS BROUGHAM, WENSLEYDALE and CHELMSFORD. LORD WENSLEYDALE—I think that the opinion of the six judges in this case [*Jefferys v. Boosey*] was correct; that since 54 Geo. 3, c. 156, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses.—p. 617.

Jefferys v. Boosey, *observed on*.

Austria (Emperor) v. Day (1861) 30 L. J. Ch. 690; 3 De G. F. & J. 217; 7 Jur. (N.S.) 642; 4 L. T. 494; 9 W. R. 712.—CAMPBELL, L.C., KNIGHT BRUCE and TURNER, L.J.J.; *affirming* S. C. *nom.* Austria (Emperor) v. Kossuth, 3 Giff. 628.—STUART, V.-C. *And see* "INJUNCTION."

CAMPBELL, L.C.—Great reliance was placed by the appellants' counsel on the decision of the H. L. in *Jefferys v. Boosey*, reversing a unanimous decision of the Court of Ex. Ch., in which I had concurred. That high tribunal must, of course, be considered as having decided rightly; but the *ratio decidendi* was merely that an absolute assignment, executed abroad, of all an author's copyright in a musical composition, gave no title to the assignee beyond the territory or the state in which the assignment was executed; and this is no authority for saying that the assignee could not have maintained an action in England for an injury to the copyright within the limits of that territory.—p. 707.

See judgments at length.

Jefferys v. Boosey, *discussed*, Cumberland v. Copeland (1862) 31 L. J. Ex. 353; 1 H. & C. 194.—EX. CH. (*supra*, col. 690); *explained*, Boucicault v. Delafeld (1863) 33 L. J. Ch. 39; 1 H. & N. 597; 9 Jur. (N.S.) 1282; 9 L. T. 707; 12 W. R. 101.—WOOD, V.-C.

Boucicault v. Delafeld, *followed*.

Boucicault v. Chatterton (*supra*, col. 698).

Jefferys v. Boosey, *distinguished*.

Routledge v. Low (1868) 37 L. J. Ch. 454; L. R. 3 H. L. 100; 18 L. T. 874; 16 W. R. 1081.—H.L. (E.); *affirming* S. C. *nom.* Low v.

Routledge (1865) 35 L. J. Ch. 114, L. R. 1 Ch. 42; 11 Jur. (N.S.) 989; 18 L. T. 421; 14 W. R. 90.—KNIGHT BRUCE and TURNER, L.JJ.

CAIRNS, L.C.—That case [*Jefferys v. Boosey*] was decided, not upon the present Copyright Act, but upon the old Copyright Act of Queen Anne. On the construction of that Act six of the learned judges who advised your lordships were of opinion that a foreigner living at Milan, and composing a literary work there, could convey a title of copyright by assignment, under which his assignee, publishing here, was entitled to protection. Four of the learned judges were of a different opinion; and your lordships unanimously held, that the foreigner in that case could not give a title of copyright; and this must be taken to be the construction and effect of the statute of Anne. But it is impossible not to see that the *ratio decidendi* in that case proceeded mainly, if not exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the legislature of Great Britain at that period. The present statute has repealed that Act, and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world; and accepting the decision of this House as to the construction of the statute of Anne, it is, I think impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of Anne.—p. 458.

LORDS CRAWFORTH, OHELMESFORD and WESTBURY also discussed *Jefferys v. Boosey*, the two former differing from the L.C. as to the extent of the protection given to an alien author

Jefferys v. Boosey (*supra*), discussed.

Morris v. Wright (1870) L. R. 5 Ch. 279 (*supra*, col. 693).

Routledge v. Low, followed.

Matheson v. Harrod (1868) 38 L. J. Ch. 139; L. R. 7 Eq. 270; 19 L. T. 639; 17 W. R. 99.—MALINS, V.-C.

Matheson v. Harrod, explained, Page v. Wisden (1869) 20 L. T. 435.—MALINS, V.-C.; followed. Collingridge v. Emmott (1887) 57 L. T. 864.—KAY, J.

Jefferys v. Boosey, referred to.

Caird v. Sime (1887) 57 L. J. P. C. 2; 12 App. Cas. 326.—H.L. (SC.) (*supra*, col. 696).

Jefferys v. Boosey, distinguished.

Trade Auxiliary Co. v. Middlesborough Traders' Protection Association (1889) 40 Ch. D. 425; 58 L. J. Ch. 293; 60 L. T. 681; 37 W. R. 337; 5 Times L.R. 354.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

COTTON, L.J.—In that case [*Jefferys v. Boosey*] there was an attempt to assign a copyright so far only as it related to one particular portion of the Queen's dominions and not to the rest, and what Lord St. Leonards says is that that cannot be done. The only copyright there which could be assigned was a copyright effectual over all the Queen's dominions, and not simply over a limited portion of them, and it could not be split up in the way there attempted. That is quite different from the present case. Section 18 [of 5 & 6 Vict. c. 45] points out that there may be two separate copyrights on the same work, a copyright in respect of publication of the articles in the paper, and

copyright in respect of their publication in a separate book. Here what is sought to be protected is only this article in the paper, and all that is required by the Act, in my opinion, is, that before the proprietor of the newspaper can sue he shall register his newspaper, not the copyright in this particular article.—p. 434.

Jefferys v. Boosey, observations applied.

Adam v. British and Foreign Steamship Co. (1898) 67 L. J. Q. B. 844; [1898] 2 Q. B. 430; 79 L. T. 81.—DARLING, J.

Jefferys v. Boosey and *Routledge v. Low*, referred to.

Davidson v. Hill (1901) 70 L. J. K. B. 788; [1901] 2 K. B. 606; 85 L. T. 118; 49 W. R. 630; 9 Asp. M. C. 223.—KENNEDY and PHILLIMORE, JJ.

Wood v. Boosey (1867) 36 L. J. Q. B. 103; L. R. 2 Q. B. 340; 7 B. & S. 869; 15 L. T. 539; 15 W. R. 309.—Q.B.; affirmed, (1868) 37 L. J. Q. B. 84; 9 B. & S. 175; L. R. 3 Q. B. 223; 18 L. T. 105; 16 W. R. 485.—EX. CH., followed.

Matheson v. Harrod (*supra*, col. 707).

Wood v. Boosey, explained.

Fairlie v. Boosey (1879) 48 L. J. Ch. 697; 4 App. Cas. 711; 41 L. T. 78; 28 W. R. 4.—H.L. (E.). CAIRNS, L.C., LORDS HATHERLEY, O'HAGAN, BLACKBURN and GORDON; affirming S. C. *nom* Boosey v. Fairlie (1877) 47 L. J. Ch. 186; 7 Ch. D. 301; 37 L. T. 590; 26 W. R. 178. C.A. JAMES, BAGGALLAY and THESIGER, L.JJ.; which reversed 46 L. J. Ch. 726; 36 L. T. 918; 25 W. R. 745.—BACON, V.-C.

LORD BLACKBURN.—It is as well to state what really was the question in *Wood v. Boosey*, for the case seems to me to have been misunderstood. Otto Nicolai had composed an opera and caused it to be performed at Berlin on the 9th of March, 1849. His inchoate rights to a monopoly in this country were exactly the same as those of Offenbach in the present case. The time prescribed by the Order in Council with regard to Prussia is twelve months, that prescribed by the Order in Council with regard to France is three months, that was the only difference. Otto Nicolai died within the twelve months, and neither he nor his representatives did anything to render his rights in this country perfect before the end of the twelve months, and consequently by 7 & 8 Vict. c. 12, s. 19, neither he nor his assigns could after that acquire in this country any rights as to the music first represented in Berlin. But on the 1st of September, 1851, more than twelve months after Nicolai's death, his personal representatives published in Berlin the music of the opera arranged for the pianoforte, and on the 4th October made an entry in the registry of the opera pianoforte score, stating the composer to be Otto Nicolai. The action was for infringing the right to multiply copies of this pianoforte score. The plaintiffs had to maintain two positions, first, that the pianoforte score contained an original composition not published at Berlin till within twelve months before the 4th October, 1851; and secondly, that the composer of that original composition was Nicolai, who had been dead more than twelve months before the 4th October, 1851, and had in March, 1849, represented at Berlin the whole opera

as he composed it. It was certainly very difficult to maintain both positions; and unless he could maintain both the plaintiff was rightly non-suited. The nonsuit was upheld on the ground that, though he had made out his first position, he had failed in making out his second. What I understand to have been proved in that case was that in an opera the tunes and the harmonies and accompaniments are the composition of the original composer, in that case Nicolai, in this Offenbach, but that to bring out these tunes and harmonies and the effect as far as possible of the accompaniment on any particular instrument or instruments, further work is required. The person who prepares the original score for the performance on the stage by many instruments and by the voices of many singers writes down what notes are to be played on each of the instruments and what notes are to be sung by the different voices; and by that means it is shown what instruments or voices are to play or sing the tune and what are to produce the harmony and play the accompaniment in a full orchestra and singers. But if the same tunes and harmonies are to be performed on the pianoforte, or sung by voices accompanied by the pianoforte alone, something more is required. It must be indicated what notes are to be played on the pianoforte so as to give the harmony and tune and effect—not precisely the accompaniment as it would be brought out by the full orchestra, for that, as I understand my brother Bramwell, is impossible—but to give the harmony and tune as near to that effect as the arranger for the piano can contrive. And that arrangement, though it adopts the harmony and tune, is an original composition, or at least a new work.—p. 704.

Wood v. Boosey, *dictum of* COCKBURN, C.J. *not followed*.

Tuck v. Canton (1882) 51 L. J. Q. B. 363, *discovered*.

Liverpool General Brokers' Association v. Commercial Press Telegram Bureau (1897) 66 L. J. Q. B. 405; [1897] 2 Q. B. 1; 76 L. T. 292.

KENNEDY, J.—What he [Cockburn, C.J.] there said was: "I must say that the result of the discussion has been to cause me very strongly to incline to the opinion that sect. 24 of 5 & 6 Vict. c. 45, which requires that the proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned." Later on in his judgment the C.J. states his reasons, the principal of which appears to be the chance of an injustice to the assignee, who, in the words of the judgment, has "no power under the statute, either through the means of this Court or any other means that I can see, to enforce the registration of an entry by way of assignment under sect. 13." As the assignee, who by virtue of the assignment has got the proprietorship, if the entry of the assignment is not made under sect. 13, is not prevented, as I understand the Act, from registering himself as proprietor, I am unable to perceive the reality of the suggested danger of injustice. The other members of the Court decided not to express any opinion on the subject. Blackburn, J. says that he had at first thought the objection fatal to the plaintiff's case, "but after hearing the argument my opinion is much shaken, and I would not support the nonsuit on

that ground without further time for consideration." Mellor and Lush, J.J. preferred to express no opinion on the point. In the later case of *Tuck v. Canton*, which was not, I think, referred to in the argument, a similar point was raised under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68). There again the point was not decided, and Mathew, J. said, "I do not think it necessary to deal with the other questions that have been suggested, whether or not there is a necessity for registering any assignment, assuming that there was a registration of the original copyright. That is a difficult question, and one that I should take further time to consider, if I thought it necessary to decide it for the purposes of this case." It seems to me that I am now called upon, to the best of my judgment, to decide the point. I have come to the conclusion, although—in the face of judicial doubt, and of the opinion of Cockburn, C.J.—with considerable hesitation, which I have already stated—namely, that, to maintain an action for infringement, an assignee of a copyright must be registered.—p. 407.

Cassell v. Stiff (1856) 2 K. & J. 279.—WOOD, V.-C., *approved*.

Fishburn v. Hollingshead (1891) 60 L. J. Ch. 768; [1891] 2 Ch. 371; 64 L. T. 647.—STIRLING, J.

Wood v. Chart (1870) 39 L. J. Ch. 641; L. R. 10 Eq. 198; 23 L. T. 432; 18 W. R. 822.—JAMES, V.-C., *applied*.

Lauri v. Renad (1892) 61 L. J. Ch. 580; [1892] 3 Ch. 402; 67 L. T. 275; 40 W. R. 679.—KEENE-WICH, J.; *affirmed*, C.A. LINDLEY and BOWEN, L.JJ.

Moul v. Groenings (1891) 60 L. J. Q. B. 715; [1891] 2 Q. B. 443; 65 L. T. 327; 39 W. R. 691.—C.A. LINDLEY, FRY and LOPES, L.JJ., *explained and applied*.

Schauer v. Field (1892) 62 L. J. Ch. 72; [1893] 1 Ch. 35; 3 R. 78; 68 L. T. 81; 41 W. R. 201.

CHITTY, J.—The decision in *Moul v. Groenings*, if authority be wanted, shows that "interests" in the proviso [in sect. 6 of the International Copyright Act, 1886] has a more extended meaning than "rights." Some attempt was made by one of the plaintiff's counsel to use the judgment in that case for the purpose of cutting down the meaning of the word "interests" to "capital embarked," or in some other way. But the judgment did nothing of the kind. What was decided was that the bandmaster had an interest, and was protected.—p. 73.

Lauri v. Renad, *explained*.

Moul v. Groenings, *followed*.

Fishburn v. Hollingshead, *discovered from*. *Handsteengl (or Handsteengl)* Art. Publishing Co. v. Holloway (1893) 62 L. J. Q. B. 847; [1893] 2 Q. B. 1; 5 R. 358; 68 L. T. 676; 67 J. P. 407.

CHARLES, J.—That case [*Lauri v. Renad*], however, merely decides that the language of sect. 6 [Copyright Act, 1886] does not revive an already extinguished right. It does not recreate an expired copyright—copyright in a translation which had come to an end before the Act of 1886 came into operation. There is not, either in the language of the judgments or in the decision itself, anything inconsistent with the

sion at which I have arrived. . . . I find the learned judge [Stirling, J. in *Fishburn v. Hollingshead*] prefaces his elaborate examination of the Copyright Acts by observing first from the point of view he took of the case, but he is unnecessary to decide the question of registration under the [English Copyright Act of 1862 was required, and, secondly, he reserves to himself full liberty to reconsider his opinion at the trial of the action—a which, in fact, never took place, the contrary injunction having been made perpetual assent.—p. 350.

[austfaengl (or Hanfstaengl) Art Publishing Co. v. Holloway (supra), approved.
Fishburn v. Hollingshead, disapproved.
afstaengl v. American Tobacco Co. (1894) J. Q. B. 277; [1895] 1 Q. B. 347; 14 R. 71 L. T. 864; 43 W. R. 261.—C.A. ESSER, LOPES and RIGBY, L.JJ.

CORONER.

Reg. v. G. W. Ry. Directors (1888) 57 L. J. M. C. 31; 20 Q. B. D. 410; 58 L. T. 765; 36 W. R. 506; 16 Cox C. C. 410; 52 J. P. 772.—MATHEW and SMITH, JJ., *applied*.
Reg. v. Oxford Circuit Assize Clerk (1897) 66 Q. B. 271; [1897] 1 Q. B. 370; 76 L. T. 45 W. R. 543; 18 Cox C. C. 518; 61 J. P. —WRIGHT and BRUCE, JJ.

CORPORATION.

BOROUGH FUND.

Arnold v. Ridge (or *Rigge*) (1853) 22 L. J. C. P. 235; 13 C. B. 745; 1 C. L. R. 309; 17 Jur. 896; 1 W. R. 389.—JERVIS, C.J., *observed on*.

Arnold v. Gravesend Corporation (1856) 25 Ch. 530. 776; 2 K. & J. 574; 2 Jur. (N.S.) 4 W. R. 478.

ARNOLD, V.-C.—I should have felt great difficulty in terminating the matter before me [a question of execution against corporation property decided after the statute 5 & 6 Will. 4, c. 76, and subsequent Acts], having regard to the judgment in *Arnold v. Ridge*, had it not appeared to me that even if I had entirely concurred in that judgment, assuming it to have proceeded on a correct footing, still in the case before me a very different view of the matter arises out of the statute . . . which was passed after the usually called the Municipal Corporations (6 & 7 Will. 4, c. 104).—p. 531.

Bright (or *Brighton*) *v. North* (1847) 16 L. J. Ch. 255; 2 Ph. 216 —COTTENHAM, L.C., *distinguished*.

Att.-Gen. v. Andrews (1850) 20 L. J. Ch. 467; 40 C. G. 225; 2 Hall & Tw. 431; 14 Jur. —LANGDALE and ROLFE, LORDS COMMRS.

Bright v. North, *applied*.

Att.-Gen. v. Andrews, *discussed*.

Att.-Gen. v. Wigan Corporation (1854) Kay —WOOD, V.-C.; *affirmed*, 23 L. J. Ch. 429;

5 De G. M. & G. 52; 18 Jur. 299; 2 W. R. 303. —KNIGHT BRUCE and TURNER, L.JJ.

Att.-Gen. v. Wigan Corporation, *commented on and distinguished*.

Reg. v. Sheffield Corporation (1871) 40 L. J. Q. B. 247; L. R. 6 Q. B. 652; 24 L. T. 659; 19 W. R. 1159.—Q.B.

Att.-Gen. v. Wigan Corporation; Bright v. North; and *Reg. v. Sheffield Corporation*, *considered*.

Att.-Gen. v. Brecon Corporation (1878) 48 L. J. Ch. 153; 10 Ch. D. 204; 40 L. T. 52; 27 W. R. 332.

JESSEL, M.R.—Now first of all, as regards authority, the strongest case in favour of the plaintiffs is certainly *Reg. v. Sheffield (Mayor)*. I by no means say that that case is not, in my opinion, rightly decided, or that I have any cause for criticising it adversely; but it does not go to the extent contended for on behalf of the plaintiffs. Now I come to a case which does not appear to have been cited (and I am sorry it was not) in *Reg. v. Sheffield (Mayor)*. It is a case which of course, as far as I am concerned, is of higher authority than the judgment of the Q. B., because it is a judgment of the L.C. It is the well-known case of *Bright v. North*. It is, therefore, a decision that a proposed interference by Act of Parliament with the powers of the commissioners, and with their duties, is such an interference as fairly entitles them to appear before a committee of either House to oppose the bill. When we come to look at the case which was very much commented on in *Reg. v. Sheffield (Mayor)*, namely, *Att.-Gen. v. Wigan Corporation*, whatever view we may take of the construction put by Wood, V.-C. upon the Act of Parliament, we shall see that he simply founds his decision on *Bright v. North*, and nothing else; he does not decide at all on the notion of injury to property, he reasons in a way which has not been satisfactory to the judges of the Q. B., and, if I may humbly say so, is not altogether satisfactory to me. He held that the Act gives the corporation power to restrain nuisances generally, and having found that power and the duty to stop nuisances generally, he says they have a plain duty of taking care there shall be no nuisance in the town. Now, assuming he is right so far, then I think there is no possible fault to be found with his judgment; the real difficulty in the judgment is that you cannot find the power in the Act without giving to the restricted words of the section which he commented on a very much larger meaning than they fairly bear; that really is the criticism on the judgment by the Court of Q. B. or at least by three of the judges of that Court. But if you once arrive at the same conclusion as the V.-C. did as to the true construction of the section, namely, that there was the power to abate nuisance generally and the duty to prevent it, I think his reasoning is, as he says it is, exactly in accordance with *Bright v. North*. It seems to me, looking at the authorities, that . . . if there is an attack by proposed private legislation on the rights, privileges and duties of a corporation, that corporation is entitled to defend itself before Parliament.—pp. 157—160.

Reg. v. Sheffield Corporation, *referred to*.

Ward v. Sheffield Corporation (1887) 57 L. J. Q. B. 418; 19 Q. B. D. 22.—CAVE, J.

Reg. v. Sheffield Corporation, discussed.

Att.-Gen. v. Brecon Corporation, distinguished.

Att.-Gen. v. Swansan Corporation (1898) 67 L. J. Ch. 356; [1898] 1 Ch. 602; 78 L. T. 412; 46 W. R. 584; 62 J. P. 408.—NORTH, J.

Att.-Gen. v. Brecon Corporation, distinguished.

Leith Corporation v. Leith Harbour and Dock Commissioners (1899) 68 L. J. P. C. 109; [1899] A. C. 508; 81 L. T. 98; 64 J. P. 180.—H.L. (SC.), HALSBURY, L.C., LORDS WATSON, SHAND and DAVEY.

LORD DAVEY.—This case, in my opinion, differs in essential particulars from the *Brecon Case*. In that case the question was whether the corporation could pay the expenses of resisting an attack upon their corporate privileges and duties out of the borough fund. In this case it is not disputed that the corporation of Leith might lawfully defend themselves against any attack upon their existence out of their proper funds. . . . Therefore, the question is whether the corporation of Leith can lawfully charge the expenses of resisting the bill of the corporation of Edinburgh on the rates leviable by them under the Public Health Act, which they administer for the purposes of the Act independently of their ordinary rights, privileges, and duties. I am of opinion that they cannot, and therefore I concur in the judgment which has been proposed.—p. 114.

Att.-Gen. v. Brecon Corporation and Att.-Gen. v. Swansan Corporation, followed.

Att.-Gen. v. Rickmansworth Urban Council (1902) 86 L. T. 521; 66 J. P. 410.—KEENEWICH, J.

Leith Corporation v. Leith Harbour and Docks Commissioners, referred to.

Brooks, Jenkins & Co. v. Torquay Corporation (1901) 71 L. J. K. B. 109; [1902] 1 K. B. 601; 85 L. T. 785; 66 J. P. 293.—WALTON, J.

Reg. v. Ledgar (1841) 1 Q. B. 616; **S. C. nom. Reg. v. Poole Corporation**, 1 G. & D. 728.—Q.B.

BY-LAWS.

Reg. v. Rose (1855) 24 L. J. M. C. 130; 1 Jur. (N.S.) 802; **S. C. nom. Reg. v. Wood**, 5 El. & Bl. 49; 3 W. R. 419.—Q.B.

Hopkins v. Swansan Corporation (1839) 8 L. J. Ex. 21; 4 M. & W. 621.—ABINGER, C.B.; *affirmed, nom. Swansan Corporation v. Hopkins* (1841) 8 M. & W. 901.—EX. CH., *distinguished*.

Addison v. Preston Corporation (1852) 21 L. J. C. P. 146; 12 C. B. 108; 16 Jur. 643.—WILLIAMS, J.

Rex v. Richardson (1758) 1 Burr. 517; 2 Ld. Ken. 85.—MANSFIELD, C.J., *followed*.

Att.-Gen. v. Clarendon (Earl) (1810) 17 Ves. 491.—GRANT, M.R., *explained*.

O'Grady v. Mercers' Hospital (1887) 19 L. R. Ir. 350.—CHATTERTON, V.-C.

Oxford (Mayor) v. Wildgoose (1690) 3 Lev. 298, *overruled*.

Tobacco-Makers' Co. v. Woodroffe (1826) 7 B. & C. 888; 5 D. & R. 530; 4 L. J. (O.S.) K. B. 301.—TENTERDEN, C.J.

Tobacco-Makers' Co. v. Woodroffe, principle applied.

Poulterers' Co. v. Phillips (1840) 9 L. J. C. P.

190; 6 Bing. (N.C.) 314; 8 Scott 593; 4 Jur. 124.—TINDAL, C.J.

Poulterers' Co. v. Phillips, applied.

Reg. v. Sadlers' Co. (1863) 32 L. J. Q. B. 337; 10 H. L. Cas. 404; 9 Jur. (N.S.) 1081; 9 L. T. 60; 11 W. R. 1004.—H.L. (C.). **WESTBURY, L.C., LORDS CRANWORTH, BROUGHAM, WENSLEYDALE and CHELMSFORD with the JUDGES: reversing** 30 L. J. Q. B. 194; 7 Jur. (N.S.) 138.—EX. CH.; and *affirming* (1860) 30 L. J. Q. B. 186; 3 El. & Bl. 42; 6 Jur. (N.S.) 1113.—Q.B.

CONTRACTS.

Beverly v. Lincoln Gas Light and Coke Co. (1837) 7 L. J. Q. B. 113; 6 A. & E. 829; W. W. & D. 519; 2 N. & P. 283, *discussed*.

East London Waterworks Co. v. Bailey (1827) 4 Bing. 283; 12 Moore 583; 5 L. J. (O.S.) C. P. 175.—BEST, C.J., *commented on*.

Church v. Imperial Gas Light and Coke Co. (1838) 7 L. J. Q. B. 118; 6 A. & E. 846; 3 N. & P. 35; 1 W. W. & H. 137.—Q.B. *And see post*, col. 716.

East London Waterworks Co. v. Bailey, overruled.

South of Ireland Colliery Co. v. Waddle (1865) 37 L. J. C. P. 211; L. R. 3 C. P. 463 (col. 718).

Beverly v. Lincoln Gas Light and Coke Co. and Church v. Imperial Gas Light and Coke Co., approved.

Ludlow Corporation v. Charlton (1840) 10 L. J. Ex. 75; 6 M. & W. 815; 3 Car. & P. 242; 4 Jur. 657.—ABINGER, C.B. (for the Court).

Thetford's (Mayor) Case (1701) 1 Salk. 192; 2 Ld. Raym. 848.—BOLT, C.J., *distinguished*. *And see* col. 719.

Ludlow Corporation v. Charlton, followed.

Arnold v. Poole Corporation (1842) 12 L. J. C. P. 97; 4 Man. & G. 860; 5 Scott (N.R.) 741; 2 D. (N.S.) 574; 7 Jur. 653.—TINDAL, C.J. (for the Court).

Arnold v. Poole Corporation, followed.

Ecclesiastical Commissioners v. Murrill (1869) 38 L. J. Ex. 93; L. R. 4 Ex. 162 (col. 719).

Ludlow Corporation v. Charlton, followed.

Faure v. Strand Union (1846) 15 L. J. M. C. 89; 8 Q. B. 826; 10 Jur. 308.—DENMAN, C.J. (for the Court).

Church v. Imperial Gas Light Co. and

Ludlow Corporation v. Charlton, approved.

Austin v. Bethnal Green Guardians (1874) L. R. 9 C. P. 91; 43 L. J. C. P. 100; 29 L. T. 807; 22 W. R. 406.

COLERIDGE, C.J.—The rule of law is clear that *prima facie* and for general purposes a corporation can only contract under seal, for the proper legal mode of authenticating the act of a corporation is by means of its seal. On this rule, however, certain exceptions have been engrafted. The principle that governs these exceptions is conveniently stated in *Church v. Imperial Gas Light Co.* . . . which statement is adopted . . . in *Ludlow Corporation v. Charlton*.—p. 94.

KEATINGE and DENMAN, JJ. to the same effect.

Lucas v. Godwin (1837) 6 L. J. C. P. 205; 3 Bing. (N.C.) 737; 4 Scott 502; 3 Hodges 114.—TINDAL, L.J., *distinguished*.

Ludlow Corporation v. Charlton, *adhered to*, **Lamprell v. Billericay Union** (1849) 18 J. Ex. 282; 3 Ex. 282.

OLLOCK, G.B. (for the Court).—There [*Lucas v. Godwin*] the defendant was an individual able of making a new contract by parol. as might think fit, whereas here the defendants a corporate body, incapable of contracting erwise than by deed.—p. 286.

Beverley v. Lincoln Gas Light and Coke Co. (col. 714). *explained and distinguished*.

Diggle v. London and Blackwall Ry. (1850) L. J. Ex. 308; 5 Ex. 442; 6 Railw. Cas. 590; Jur. 937.—PLATT, B.

Diggle v. London and Blackwall Ry., *not followed*.

Henderson v. Australian Royal Mail, &c. Co. (col. 716).

Lamprell v. Billericay Union and Diggle v. London and Blackwall Ry., *applied*.

Beverley v. Lincoln Gas Light and Coke Co., *commented on*.

Finlay v. Bristol and Exeter Ry. (1852) 21 J. Ex. 117; 7 Ex. 409; 7 Railw. Cas. 449.—ERLE and PLATT, BB.

Sanders v. St. Neot's Union (1846) 15 L. J. M. C. 104; 8 Q. B. 810; 10 Jur. 566.—DENMAN, C.J. (for the Court), *discussed*.

Lamprell v. Billericay Union, *questioned*.

Clarke v. Cuckfield Union (1852) 21 L. J. B. 349; 16 Jur. 686; 1 B. C. C. 81.—WIGHTMAN, J.

Clarke v. Cuckfield Union, *commented on*.

Sanders v. St. Neot's Union, *corrected*.

Smart v. West Ham Union Guardians (1855) Ex. 867; 24 L. J. Ex. 201.

PARKE, B.—In *Sanders v. St. Neot's Union*, am reported to have overruled the objection, at the defendants could not contract except under seal; but that is not so. I allowed the case to proceed, because I thought the objection as apparent on the record.—p. 875.

Sanders v. St. Neot's Union and Clarke v. Cuckfield Union, *followed*.

Haigh v. North Bierley Union (1858) 28 L. J. B. 62; 1 El. Bl. & El. 873; 5 Jur. (N.S.) 511; W. R. 679.—ERLE and CROMPTON, JJ.

Clarke v. Cuckfield Union, *followed*.

Nicholson v. Bradfield Union (1866) L. R. Q. B. 620; 35 L. J. M. C. 176; 7 B. & S. 747; 1 L. T. 830; 14 W. R. 731.

BLACKBURN, J.—*Clarke v. Cuckfield Union* is its facts undistinguishable from the present case. We are aware that very high authorities are questioned the soundness of that decision, and, as pointed out in the judgment in that case, there are prior decisions in the Court of Ex. which are difficult to reconcile with it. We think, however, that, as far as it extends to such a case as the present at least, the case was rightly decided; there may be cases in which the circumstances are different from those in *Clarke v. Cuckfield Union* and the present case, and which would still be governed by the principles laid down in the decisions in the Ex.; those we

leave to be decided when they arise; but, so far as those prior decisions are inconsistent with the decision in *Clarke v. Cuckfield Union*, we prefer to follow the authority of *Clarke v. Cuckfield Union*, which we think founded on justice and convenience.—p. 627.

Nicholson v. Bradfield Union; Clarke v. Cuckfield Union; and Haigh v. North Bierley Union, *discussed and distinguished*.

Hunt v. Wimbledon Local Board (1878) 4 C. P. D. 48; 48 L. J. C. P. 207; 40 L. T. 115; 27 W. R. 123.—C.A. And see "LOCAL GOVERNMENT."

BRAMWELL, L.J.—In *Nicholson v. Bradfield Union*, *Blackburn, J.* entertained great doubt, but followed the decision in *Clarke v. Cuckfield Union*. The amount, it must be recollected, which it was sought to recover against the defendants was small, only 26l. 10s. I doubt, therefore, whether that case would come within the rule that orders for things of small amount may be given by corporations, if they are used for matters of urgency or necessity, without the contract being under seal. The action was for coals sold and delivered, to which the defendants set up as their defence that the contract with the defendants, a corporation, was not under seal. . . . Again, in *Clarke v. Cuckfield Union*. I may point out that the contract was executed and the amount sued for small—it was only 14l. 16s. I would make a remark on *Haigh v. North Bierley Union*. I think that *Erle, J.* does not rest his decision on the ground merely that the work had been done, but he considered that the retainer of the plaintiff to investigate the accounts of the union and to do the work would have been a binding engagement.—p. 54. **BRETT and COTTON, L.JJ.** concurred.

Church v. Imperial Gas Co. (*supra*, col. 714);

Ludlow Corporation v. Charlton; Clarke v. Cuckfield Union; Smart v. West Ham Union Guardians; and Nicholson v. Bradfield Union, *discussed*.

Young v. Royal Leamington Spa Corporation (1883) 52 L. J. Q. B. 713; 8 App. Cas 517; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660.—H.L. (E.). **LORDS BLACKBURN, BRAMWELL and FITZGERALD.**

Copper Miners' Co. v. Fox (1851) 20 L. J. Q. B. 174; 16 Q. B. 229; 15 Jur. 703.—**CAMPBELL, C.J.** (for the Court); and **Broughton v. Manchester Waterworks Co.** (1819) 3 B. & Ald. 1; 22 R. R. 278.—**ABBOTT, C.J.**, *discussed and approved*.

Henderson v. Australian Royal Mail Steam Navigation Co. (1855) 5 El. & Bl. 409; 24 L. J. Q. B. 322; 1 Jur. (N.S.) 830; 3 W. R. 571.

WIGHTMAN, J. adhered to the opinion he expressed in *Clarke v. Cuckfield Union*.

ERLE, J.—There is more difficulty in reconciling some of the other decisions in the Ex. with this principle [that the contract was made for a purpose directly connected with the object of the incorporation]; and *Diggle v. London and Blackwall Ry.* [*supra*, col. 715] may, perhaps, be in direct conflict with it. Perhaps it may be distinguished on the ground that the contract there was for the purpose of changing the railway from a line worked by stationary engines to a line for locomotives, and therefore in its nature unique, and such as could occur only

once in the lifetime of the corporation; unless it can be distinguished on that ground the case is in conflict with other authorities. I do not pretend to overrule the decision of a Court of co-ordinate jurisdiction; but, if *Diggle v. London and Blackwall Ry.* is in conflict with the authorities laying down this principle, I adhere to them, and not to it.—p. 416.

CROMPTON, J. thought the Court was bound by the decision in the Ex.

Copper Miners' Co. v. Fox and Henderson v. Australian Royal Mail, & Co., *adhered to.*
 Reuter v. Electric Telegraph Co. (1856) 26 L. J. Q. B. 46; 6 El. & Bl. 341; 2 Jur. (N.S.) 1245; 4 W. R. 564.—CAMPBELL, C.J. (for the Court).

Henderson v. Australian Royal Mail, & Co. (*supra*), *commented on.*
 Ernest v. Nicholls (1857) 6 H. L. Cas. 401; 3 Jur. (N.S.) 919; 6 W. R. 24.—H.L. (E.) CRANWORTH, L.C. and LORD WENSLEYDALE: *reversing* S. C. *nom.* Sea, Fire and Life Insurance Society, In re (1851) 24 L. J. Ch. 707; 5 De G. M. & G. 465.—KNIGHT BRUCE and TURNER, L.J.

LORD WENSLEYDALE.—A corporation, by common law, could only bind itself by contract under the common seal (a necessary incident by the common law to all such corporations), except in some slight matters of service. The Court of Q. B. has lately given effect to contracts by companies having a royal charter only; but the difference between a corporation at common law and one created by Parliament where it has not all the powers expressly or impliedly given by the Act, does not appear to have been presented to the consideration of the Court.—p. 418.

Henderson v. Australian Royal Mail, & Co., *followed.*
 London Dock Co. v. Sinnott (1857) 27 L. J. Q. B. 129; 8 El. & Bl. 347; 4 Jur. (N.S.) 70; 6 W. R. 165.—CAMPBELL, C.J. (for the Court).

London Dock Co. v. Sinnott, *discussed.*
 Haigh v. North Bierley Union (*supra*, col. 715).

Ernest v. Nicholls, *commented on.*
 Prince of Wales, &c. Assurance Co. v. Harding (1858) 27 L. J. Q. B. 297; El. Bl. & El. 183; 4 Jur. (N.S.) 851.

CAMPBELL, C.J. (for the Court).—The case chiefly relied upon by the defendants' counsel was *Ernest v. Nicholls*. We are, of course, bound by the judgment of the H. L. in that case, and we should have all most heartily concurred in it—the question having been “as to a special contract to do the very unusual thing of purchasing by one company the trade of another.” But we are not bound by the extra-judicial observations of any noble and learned lord delivered in that assembly, although they are, no doubt, entitled to high consideration.—p. 309.

See judgment at length.

Ernest v. Nicholls, *discussed.*
 Norwich Equitable Fire Assurance Society, In re (1857) 58 L. T. 35.—KAY, J.

Dunstan v. Imperial Gas Light and Coke Co. (1832) 1 L. J. K. B. 49; 3 B. & Ad. 125;

37 R. R. 352.—TAUNTON and PATTESON, J., *principle applied.*

South of Ireland Colliery Co. v. Waddle (1868) L. R. 3 C. P. 463; 37 L. J. C. P. 211; 18 L. T. 405; 16 W. R. 756; *affirmed*, (1869) 38 L. J. C. P. 338; L. R. 4 C. P. 617; 17 W. R. 896.—EX. CH.

M. SMITH, J.—In *Henderson v. Royal Mail, &c. Co.* (*supra*, col. 715), all the judges adopt the rule suggested in *Dunstan v. Imperial Gas Light Co.*, and hold it to be law; Wightman, J., who was an extremely cautious judge, saying: “The result of the cases seem to me to be, that, whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced though not under seal.” The rest of the Court lay down the rule in equally plain and simple terms; and I entirely agree with them. Applying the principle of that case to the present—a pumping engine was a thing proper and necessary for the purposes for which this company was incorporated, and therefore the contract for it was enforceable, though not under seal. This decision, no doubt, conflicts with *East London Waterworks Co. v. Bailey* (col. 714). The majority of the Court of Q. B. in effect treat that case as contrary to the current of decision. The results of these decisions and the present is that *East London Waterworks Co. v. Bailey* can no longer be considered to be law.—p. 475.

BOVILL, C.J. and BYLES, J. also discussed the cases. *See judgments.*

Dunstan v. Imperial Gas Light and Coke Co. *discussed.*

Leicester Club and County Racecourse, In re. Cannon, Ex parte (1885) 55 L. J. Ch. 206; 30 Ch. D. 629; 53 L. T. 340; 84 W. R. 14.—PEARSON, J.: Newspaper Proprietary Syndicate, In re, Hopkinson v. The same Co. (1900) 69 L. J. Ch. 578; [1900] 2 Ch. 349; 83 L. T. 341.—COZENS-HARDY, J.

Eastern Union Ry. v. Hart (1853) 22 L. J. Ex. 20; 8 Ex. 116; 17 Jur. 89.—EX. CH.; *affirming* S. C. *nom.* Hart v. Eastern Union Ry 21 L. J. Ex. 97.—EX., *explained and not applied.*

Usborne v. Limerick Market Trustees (1896) [1899] 1 Ir. R. 229.—PORTER, M.R.

Stafford Corporation v. Till (1837) 4 Bing. 75; 12 Moore 260; 5 L. J. (O.S.) C. P. 77.—BEST, C.J., *approved.* *And* see col. 719. London and Birmingham Ry. v. Winter (1840) Cr. & Ph. 57.—COTTENHAM, L.C.

London and Birmingham Ry. v. Winter. *applied.*

Wilson v. West Hartlepool Harbour and Ry. (1864) 34 Beav. 187; 10 Jur. (N.S.) 1064; 11 L. T. 327; 13 W. R. 4.—ROMILLY, M.R.: *affirmed*, (1865) 34 L. J. Ch. 241; 2 De G. J. & S. 475; 11 Jur. (N.S.) 124; 11 L. T. 692; 13 W. R. 351.—TURNER, L.J.; KNIGHT BRUCE, L.J. *dissenting.*

Crook v. Seaford Corporation (1871) L. R. 6 Ch. 551; 25 L. T. 1; 19 W. R. 938.—HATHERLEY, L.C.; *partly reversing* L. R. 10 Eq. 678.—STUART, V.-C.; and *London and Birmingham Ry. v. Winter, applied.*

Hoare v. Lewisham Metropolitan Borough (1901) 85 L. T. 281; 17 Times L. R. 774.—LAWRENCE, J.

Stafford Corporation v. Till (*supra*, col. 718),
discussed.

Fishmongers' Co. v. Robertson (1843) 12 L. J. C. P. 185; 3 Man. & G. 181; 6 Scott (N.R.) 56. TINDAL, C.J. (for the Court). See judgment at length.

Fishmongers' Co. v. Robertson, *discussed*.
Copper Miners' Co. v. Fox (*supra*, col. 716).

Stevens's Hospital v. Dyas (1864) 15 Ir. Ch. R. 405.—CUSACK SMITH, M.R., **Stafford Corporation v. Till**; and **Wood v. Tate** (1806) 2 Bos. & P. (N.R.) 247; 9 R. R. 645.—MANSFIELD, C.J., *followed*.

Eccelesiastical Commissioners for England and Wales v. **Merrall** (1869) 38 L. J. Ex. 93; L. R. 4 Ex. 162; 20 L. T. 573; 17 W. R. 676.—KELLY, C.B. (for the Court).

Wood v. Tate and Ecclesiastical Commissioners v. Merrall, *discussed*.

Fishmongers' Co. v. Robertson, *dictum overruled*.

Kidderminster Corporation v. Hardwick (1878) 22 W. R. 160; L. R. 9 Ex. 13; 43 L. J. Ex. 9; 29 L. T. 612.

KELLY, C.B.—In considering this case, however, we have been obliged to direct our attention to *Fishmongers' Co. v. Robertson*, on account of a *dictum* which forms part of the elaborate judgment of the learned Tindal, C.J. He says (at p. 192): "Even if the contract put in suit by the corporation had been on their part executory only, not executed, we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves, and that such admission on the record would estop them from setting up an objection in a cross action that it was not sealed with their common seal. *The Mayor of Thetford's Case* (*supra*, col. 714) is cited as an authority for this proposition, but it does not support it in any degree whatever. It was a case of *mandamus*, and it was held that the return did not require to be sealed. There is no authority for saying that a record binds a plaintiff in such a manner, and the doctrine has been completely overruled in *Copper Miners' Co. v. Fox* (*supra*, col. 716), although the observations of Tindal, C.J. are entitled to very great respect.—p. 162.

PIGOTT and POLLOCK, BB. to the same effect.

Kidderminster Corporation v. Hardwick, *followed*.

Oxford Corporation v. Crow [1898] 3 Ch. 535, 8 R. R. 279; 69 L. T. 228; 42 W. R. 200.—ROMER, J.

Kidderminster Corporation v. Hardwick and Oxford Corporation v. Crow, *followed*.

Athy Guardians v. Murphy (1895) [1896] 1 Ir. R. 65.—CHATTERFOX, V.-C.

City of London Electric Lighting Co. v. London Corporation (1900) 82 L. T. 530.—FARWELL, J.; *varied*, (1901) 70 L. J. Ch. 334; [1901] 1 Ch. 602; 84 L. T. 170; 49 W. R. 306; 65 J. P. 563.—O.A. RIGBY, V. WILLIAMS and STIRLING, L.JJ.

COSTS.

1. GENERALLY.
2. AFTER TRIAL BY JURY.
3. PARTIES—PAYMENT TO OR BY.
4. SEVERAL ISSUES.
5. TAXATION.
6. EFFECT OF COUNTY COURTS ACT.
7. SET-OFF, OF.
8. APPEAL FOR.

1. GENERALLY.

Hasker v. Wood (1885) 54 L. J. Q. B. 419; 33 W. R. 697.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.JJ., *followed*.
Reeve v. Gibson (1891) 60 L. J. Q. B. 451; [1891] 1 Q. B. 652; 64 L. T. 141; 39 W. R. 420.—C.A. HALSBURY, L.C., ESHER, M.R. and FRY, L.J.

Cree v. St. Pancras Vestry (1899) 68 L. J. Q. B. 359; [1899] 1 Q. B. 693; 80 L. T. 388.—BRUCE, J., *not followed*.

North Metropolitan Tramways Co. v. L.C.C. (1898) 67 L. J. Ch. 449; [1898] 2 Ch. 145; 78 L. T. 711; 46 W. R. 551; 62 J. P. 488.—ROMER, J., *followed*.

Hasker v. Wood (*supra*), *held inapplicable*.
Bostock v. Ramsey Urban Council (1900) 69 L. J. Q. B. 945; [1900] 2 Q. B. 616; 83 L. T. 358; 64 J. P. 680.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.; *affirming* 48 W. R. 254.—RUSSELL, C.J.

SMITH, L.J.—Reading the terms of the section [sect. 1 (b) of the Public Authorities Protection Act, 1893], it seems to me perfectly clear that the meaning is that the defendant shall be entitled to costs as between solicitor and client in such cases as he is entitled to costs. It does not mean that whenever the defendant obtains a judgment he shall, no matter how unreasonable, vexatious, or oppressive his conduct may have been, be entitled to costs as between solicitor and client. I do not think that that is a reasonable reading of the section. I think the meaning is that where the defendant is entitled to costs, he shall be entitled to have them taxed on the scale of costs as between solicitor and client. The only divergent opinion on the point is that of Mr. Justice Bruce, for whose opinion I have the greatest respect, in *Cree v. St. Pancras Vestry*. I cannot, however, agree with his view. On the other hand, there are the opinions of Lord Justice Romer in *North Metropolitan Tramways Co. v. L.C.C.*, of Mr. Justice Bigham in *Westminster (Duke) v. Bedford (Duke)*, and of the Lord Chief Justice in the present case, after further consideration and full argument. As to *Hasker v. Wood*, I only wish to say that as soon as one has arrived at the true construction of the section that case has no application.—p. 949.

Tennant v. Ellis (1880) 50 L. J. Q. B. 143; 6 Q. B. D. 46; 43 L. T. 506; 29 W. R. 121.—FIELD and MANISTY, JJ., *approved*.
Rockett v. Clippindale (*or* Clippindale) (1891) 60 L. J. Q. B. 782; [1891] 2 Q. B. 293; 64 L. T. 641.—C.A. ESHER, M.R. and FRY, L.J.

Parsons v. Tinling (1877) 46 L. J. C. P. 230; 2 C. P. D. 119; 35 L. T. 851; 25 W. R. 255, *approved*.

Bowey v. Bell (1877) 86 L. T. 640.—C.A.;

reversing 36 L. T. 550, *overruled by implication*

Garnett v. Bradley (1878) 48 L. J. Ex. 186; 3 App. Cas. 914; 39 L. T. 261; 26 W. R. 698.—H.L. (C.); *reversing* (1877) 2 Ex. D. 349; 25 W. R. 653.—C.A.

Garnett v. Bradley (*supra*) in H.L., *followed*.
Mercers' Co., Ex parte (1879) 48 L. J. Ch. 381; 10 Ch. D. 481. 27 W. R. 421.—JESSEL, M.R.

Garnett v. Bradley, applied.

Tennant v. Ellis (1880) 50 L. J. Q. B. 113; 6 Q. B. D. 46; 43 L. T. 506; 29 W. R. 121.—FIELD and MANISTY, JJ.

Foster v. G. W. Ry. (1882) 51 L. J. Q. B.

233; 8 Q. B. D. 515; 46 L. T. 71, 30 W. R. 398.—C.A. BRETT and COTTON, L.JJ.; *reversing* (1881) 51 L. J. Q. B. 51; 8 Q. B. D. 25; 45 L. T. 538.—FIELD, MANISTY and BOWEN, JJ., *distinguished*.
Batcher v. Pooler (1889) 52 L. J. Ch. 930; 24 Ch. D. 273; 49 L. T. 573.—C.A. BRETT, M.R. COTTON and BOWEN, L.JJ.

Mercers' Co., Ex parte, followed.

Lee and Hemingway, In re (1883) 21 Ch. D. 669; 49 L. T. 155; 32 W. R. 226.—NORTH, J.

Mercers' Co., Ex parte, questioned.

Garnett v. Bradley, distinguished.

Foster v. G. W. Ry., followed.

Mills' Estate, In re, Commissioners of Works, Ex parte (1886) 56 L. J. Ch. 60; 34 Ch. D. 21; 55 L. T. 465; 35 W. R. 65; 55 J. P. 151.—C.A. COTTON, BOWEN and FRY, L.JJ.
See Fisher, In re, infra.

Foster v. G. W. Ry. and Mills' Estate, In re, rule applied.

L. C. C. v. West Ham Churchwardens (1892) 61 L. J. M. C. 210; [1892] 2 Q. B. 173, 67 L. T. 963; 40 W. R. 662; 56 J. P. 662.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Mercers' Co., Ex parte, commented on.

Mills' Estate, In re, superseded.

Fisher, In re (1894) 63 L. J. Ch. 235; [1894] 1 Ch. 450; 7 R. 97; 70 L. T. 62; 42 W. R. 241.—C.A. LINDLEY, KAY and SMITH, L.JJ.

LINDLEY, L.J. . . . At the time of the Judicature Act, 1873, it had long been the settled practice of the Court not to award such costs. That state of things was very unjust, and in *Mercers' Co., Ex parte*, the late M.R. thought that the difficulty was got over by the rules framed under the Judicature Act, 1873. However in *Mills' Estate, In re*, that case was not followed, and the reason why it was not followed was that the rules made in pursuance of the Judicature Act could not confer upon the Court any greater jurisdiction than the Act itself. That difficulty was felt, and it was felt as one that ought to be got rid of: and sect. 5 of the Judicature Act, 1890, was passed for the purpose, amongst other things, of removing what was admitted to be an unjust anomaly; and now, when money is paid in under an Act of Parliament which contains no express provisions

as to the costs of payment out, and an application is made for payment out, sect. 5 hits the blot and enables the Court to award such costs.—p. 236.

Mills' Estate, In re, considered.

Reg. v. Jones (1894) 63 L. J. Q. B. 656; [1894] 2 Q. B. 382; 10 R. 287; 70 L. T. 845; 42 W. R. 607; 58 J. P. 733.—CAVE and COLLINS, JJ.

Mills' Estate, In re (*supra*), *referred to.*

Reg. v. Wall (1897) [1896] 2 Ir. R. 762.—C.A.

Mills' Estate, In re, referred to.

Madden's Estate, In re (1901) [1902] 1 Ir. R. 66.

Foster v. G. W. Ry.; Mills' Estate, In re

and *Dicks v. Yates* (1881) 50 L. J. Ch. 809; 18 Ch. D. 76; 44 L. T. 660.—C.A. JESSEL, M.R., JAMES and LUSH, L.JJ., *referred to.*
Andrew v. Grove (1902) 71 L. J. K. B. 439; [1902] 1 K. B. 625; 86 L. T. 720; 50 W. R. 524.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Mills' Estate, In re, referred to.

Rex v. Canterbury (Archbishop) (1902) 71 L. J. K. B. 932; [1902] 2 K. B. 508; 86 L. T. 450; 50 W. R. 476; 66 J. P. 455.—ALVERSTONE, C.J., WRIGHT and RIDLEY, JJ.

Fisher, In re, referred to.

Wrexham, Mold and Connah's Quay Ry., In re (1900) 69 L. J. Ch. 291; [1900] 1 Ch. 261; 82 L. T. 33, 48 W. R. 311.—C.A. LINDLEY, M.R., WILLIAMS and ROMER, L.JJ.; *varying* BYRNE, J.

Fisher, In re, applied.

Schmarr, In re (1902) 71 L. J. Ch. 219; [1902] 1 Ch. 326; 86 L. T. 71; 50 W. R. 245.—C.A. WILLIAMS, STIRLING and HARDY, L.JJ.

Brown v. Shaw (1876) 1 Ex. D. 425; and *Peacock v. Reg.* (1858) 4 C. B. (N.S.) 264; 27 L. J. C. P. 224; 6 W. R. 517, *not followed as to costs.*

Great Northern and London and North Western Joint Committee v. Inett (1877) 2 Q. B. D. 284; 46 L. J. M. C. 237; 25 W. R. 584.—Q. B.

[Counsel argued, on the authority of *Brown v. Shaw* and *Peacock v. The Queen*, that inasmuch as the Court had no jurisdiction to hear the case, it had no jurisdiction to give costs.]

COCKBURN, C.J.—It is clear that to some extent there is jurisdiction over the subject, for the Court has jurisdiction to hear and determine whether the appeal will be or not. I am of opinion that, under these circumstances, there is jurisdiction to give costs.—p. 285.

Upmann v. Forester (1883) 52 L. J. Ch. 946; 24 Ch. D. 231; 49 L. T. 122; 32 W. R. 28; 47 J. P. 807.—GHITTY, J., *followed.*

Wittman v. Oppenheim (1884) 54 L. J. Ch. 56; 27 Ch. D. 260; 50 L. T. 713; 32 W. R. 767.—PEARSON, J.

Cooper v. Whittingham (1880) 49 L. J. Ch. 752; 15 Ch. D. 501; 43 L. T. 16; 28 W. R. 720.—JESSEL, M.R., *distinguished*.
Florence v. Mallinson (1891) 65 L. T. 354.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

LINDLEY, L.J.—The costs are in the discretion of the judge, and there is no appeal from a mere matter of discretion. But it is said that that is contrary to the construction which was put upon the law as to costs by Jessel, M.R. in *Cooper v. Whittingham*. All that I can say is that, if the Court intended in that case to lay down what is contended on behalf of the appellant here, the judgment is to that extent erroneous. I do not, however, understand Sir Geo. Jessel to say anything of the kind.—p. 358.

Upmann v. Forester, discussed.

American Tobacco Co. v. Guest (1892) 61 L. J. Ch. 242; [1892] 1 Ch. 630; 66 L. T. 257; 40 W. R. 364.

STIRLING, J.—I cannot think that in every case in which a small retail dealer has innocently (and I think that the defendants in this case have innocently) happened to purchase a small quantity of the spurious goods, he ought to be fixed with the costs of the motion to restrain the infringement. There is no authority to that effect. There is authority to the contrary in the judgment, with which I entirely agree, in *Upmann v. Forester*, where Chitty, J. expressly says: "The result of my decision will not be, as the defendant has suggested, that every purchaser of a small parcel of spurious goods incurs a liability to pay the costs of an action in the Chancery Division for infringing a patent or trade mark. I cannot pass over the fact that there is in the present case a large consignment of goods."—p. 344.

Cooper v. Whittingham, discussed.

Young v. Thomas (1892) 61 L. J. Ch. 496; [1892] 2 Ch. 134; 66 L. T. 375; 40 W. R. 468.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Cooper v. Whittingham and Upmann v. Forester, observed upon.

Walter v. Steinkopf (1892) 61 L. J. Ch. 521; [1892] 3 Ch. 489; 67 L. T. 184. 40 W. R. 599.

NORTH, J.—The plaintiffs claim all the costs, upon the ground that a legal right has been infringed. In *Cooper v. Whittingham* Sir Geo. Jessel laid it down that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part (no omission or neglect which would induce the Court to deprive him of his costs), the Court has no discretion, and cannot take away the plaintiff's right to costs. Chitty, J. seems to have taken much the same view in *Upmann v. Forester*. I never could understand that view. It seems to me going directly in the teeth of the General Orders and Act of Parliament, which say that the judge has a discretion which he is to exercise, and is not bound by any hard and fast rule. And I am glad to see that in the recent case of *The American Tobacco Co. v. Guest*, Stirling, J. has taken the same view.—p. 528.

Cooper v. Whittingham, explained.

Forster v. Farquhar (1893) 62 L. J. Q. B. 296; [1893] 1 Q. B. 564; 4 R. 346; 68 L. T. 308; 41 W. R. 425.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

BOWEN, L.J. (for the Court).—*Cooper v. Whittingham* was not a decision on the meaning of the term "good cause" [in Ord. LXV r. 1]. It was an enunciation of a principle upon which, in the opinion of the M.R., judges should exercise their discretion under the earlier portion of the rule which relates to actions tried before a judge without a jury. Against any attempt on the part of any Court to impose by definition or otherwise a fetter on the discretion which the law has left to a judge in any particular case this Court has always protested. It would be far too narrow a view were we to hold that good cause only exists where there has been misconduct, oppression, or injustice on the part of the successful party.

Cooper v. Whittingham, dicta applied.

Att.-Gen. v. Ashbourne Recreation Co. (1902) 72 L. J. Ch. 67; [1903] 1 Ch. 101; 87 L. T. 561; 51 W. R. 125.—BUCKLEY, J.

Finlay v. Seaton (1808) 1 Taunt. 210; **Forman v. Dawes** (1843) 11 M. & W. 730; 12 L. J. Ex. 437; 1 D. & L. 299; and **Lister v. Leather** (1858) 4 K. & J. 425. *discussed.*

North Metropolitan Tramways Co. v. L. C. C. (1898) 67 L. J. Ch. 449; [1898] 2 Ch. 145; 78 L. T. 711. 46 W. R. 554; 42 J. P. 488.—ROMER, J.

ROMER, J.—No doubt *prima facie* an order to tax costs means taxation between party and party, and it would be better in cases of the kind now before me to insert expressly in the judgment that the costs are to be taxed as between solicitor and client. But the omission would not deprive the defendant entitled to the benefit of the statute [the Public Authorities Protection Act, 1893] of solicitor and client costs, the Court having no discretion in the matter when once it is clear that in substance judgment has been obtained by the defendant. Nor is it necessary that the judgment itself should show on its face that the action was one falling within the Act. See *Finlay v. Seaton*, where a similar question arose under the Act 11 Geo. 2, c. 19; and see also *Edwards v. Davies* with reference to the special Act there referred to. What Wood, V.-C. said in *Lister v. Leather* is not inconsistent with the view I take. There the V.-C. was only deciding what form it would be right his judgment should take in a patent action, having regard to the provisions of sect. 43 of the Patent Law Amendment Act, 1852; and it was especially advisable, whether necessary or not, that his judgment should declare that the costs he was giving were to be taxed as between solicitor and client, seeing that he had a judicial discretion whether he should give solicitor and client costs or not.

Irwine v. Reddish (1822) 5 B. & Ald. 796; 1 D. & R. 413, and **Jamieson v. Trevelyan** (1855) 10 Ex. 748; 3 C. L. R. 702; 24 L. J. Ex. 74; 1 Jur. (N.S.) 384; 3 W. R. 172. *adopted.*

Avery v. Wood (1891) 61 L. J. Ch. 75; [1891] 3 Ch. 115; 65 L. T. 122; 39 W. R. 577.—C.A. LINDLEY and FRY, L.JJ.; *affirming* NORTH, J.

Avery v. Wood, rendered *obsolete* by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61) s. 1 (b).

Avery v. Wood, see

Bostock v. Ramsey Urban Council (1900) 69 L. J. Q. B. 945; [1900] 2 Q. B. 616. 83 L. T. 358; 64 J. P. 660.—C.A.; *affirming* 48 W. R. 254.—RUSSELL, C.J.

2. AFTER TRIAL BY JURY.

Baker v. Oakes (1877) 46 L. J. Q. B. 216; 2 Q. B. D. 171; 35 L. T. 882; 25 W. R. 220.—C.A., *distinguished*.

Turner v. Heyland (1879) 48 L. J. C. P. 535; 4 C. P. D. 432; 41 L. T. 556.

GROVE, J.—I am of opinion that the judgment in *Baker v. Oakes* was not intended to apply to cases where the judge had exercised the power at the trial, although the defendant's counsel had not gone through the form of making an application, and that the words used by the learned judges of the Court of Appeal have reference only to the case itself, in which neither an application nor an order was made at the trial.

Turner v. Heyland, followed.

Collins v. Welch (1879) 49 L. J. C. P. 260; 5 C. P. D. 27; 41 L. T. 785; 28 W. R. 208.—C.A.

Collins v. Welch, approved and followed.

Marsden v. Lancashire and Yorkshire Ry. (1881) 50 L. J. Q. B. 318; 7 Q. B. D. 641; 44 L. T. 239; 29 W. R. 580.—C.A. SELBORNE, L.C., BRAMWELL and BAGGALLAY, L.JJ.; *reversing* 42 L. T. 631

Jones v. Curling (1884) 53 L. J. Q. B. 373; 13 Q. B. D. 262; 50 L. T. 349; 32 W. R. 651.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ., *discussed*.

Huxley v. West London Ry. (1889) 58 L. J. Q. B. 305; 14 App. Cas. 26; 60 L. T. 642; 37 W. R. 625.—H.L. (L.) LORDS HALSBURY, L.C., WATSON, BRAMWELL, FITZGERALD, and MACNAGHTEN; *varying* (1886) 55 L. J. Q. B. 560; 17 Q. B. D. 373.—COLERIDGE, C.J.

LORD FITZGERALD.—The principle on which that case is supposed to rest seems to be, that if there are no facts before the judge which could constitute "good cause," then the judge has no jurisdiction to interfere, and his order would be erroneous. So far I can see no reason to dissent; I concur so far. But, my lords, I do not feel called on to offer any opinion as to whether there were circumstances in that case which might constitute "good cause," and which the judge determined did amount to good cause for his interference; nor am I prepared to adopt the proposition that the Lord Chief Justices in making the order which he did make in that case assumed to have a jurisdiction without there being any facts which gave him that jurisdiction.

Jones v. Curling and Huxley v. West London**Extension Ry. (supra in H.L.), applied.**

Roberts v. Jones (1891) 60 L. J. Q. B. 441; [1891] 2 Q. B. 194.—HAWKINS, J.

Jones v. Curling and Huxley v. West London**Extension Ry., principle applied.**

Forster v. Farquhar (1898) 62 L. J. Q. B. 296; [1893] 1 Q. B. 564; 4 R. 346; 68 L. T. 308; 41 W. R. 426.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

Saner v. Bilton (1879) 48 L. J. Ch. 545; 11 Ch. D. 416; 40 L. T. 314; 27 W. R. 472.

REY, J., approved.

Mason v. Brentani (1880) 15 Ch. D. 287; 43 L. T. 557; 29 W. R. 126.—C.A. JESSET, M.R., JAMES and BRETT, L.JJ.

Saner v. Bilton, applied.

Brown, in re, Ward v. Morse (1883) 52 L. J. Ch. 524; 23 Ch. D. 377; 49 L. T. 68; 31 W. R. 396.—C.A. BAGGALLAY, COTTON and FRY, L.JJ.

Saner v. Bilton, and Brown, in re, Ward v. Morse, considered.

Shrapnel v. Laing (1888) 57 L. J. Q. B. 195; 20 Q. B. D. 334; 58 L. T. 705; 36 W. R. 297.—C.A., *dictum in disapproved from*.

Atlas Metal Co. v. Miller (1898) 67 L. J. Q. B. 815; [1898] 2 Q. B. 500; 79 L. T. 5; 46 W. R. 657.—C.A. LINDLEY, M.R. and CHITTY, L.J.

LINDLEY, M.R. (for the Court).—Counterclaims, although cross-actions for all purposes of procedure and evidence, cost less than actions, and the party who has to pay the costs of the counterclaim gets the benefit of the cheaper procedure. To include in the costs of the counterclaim any costs not occasioned by its being a counterclaim, but saved by being what it is, appears to us wrong in principle and is opposed to *Saner v. Bilton* and *Ward v. Morse*. If Lord Esher really meant to express a contrary opinion [in *Shrapnel v. Laing*] we cannot agree with him. We are satisfied that there is no decision to that effect.

They (the costs of the action) cannot have been increased by the counterclaim, and no part of them can be properly regarded as costs of the counterclaim.—p. 818.

Staples v. Young (1877) 2 Ex. D. 324; 25 W. R. 304; and **Blake v. Appleyard** (1878) 3 Ex. D. 195; 47 L. J. Ex. 407; 26 W. R. 592, *considered*.

Potter v. Chambers (1878) 4 C. P. D. 69; 89 L. T. 350; 27 W. R. 414.

DENMAN, J.—With respect to the cases of *Staples v. Young* and *Blake v. Appleyard*, I find some difficulty in reconciling the principles upon which they seem to have been decided, though I do not say they are irreconcilable.—p. 72.

Potter v. Chambers (1879) 48 L. J. C. P. 274; 4 C. P. D. 457; 27 W. R. 414, *disapproved, but held binding*.

Neale v. Clarke (1879) 4 Ex. D. 286; 41 L. T. 438.

HAWKINS, J.—I am aware that the view I have expressed may be thought not to accord with that taken in *Potter v. Chambers*. I cannot, however, help thinking that that case, which was very little argued, was decided upon the assumption that the plaintiff's claim was reduced below 20l. by counterclaim as distinguished from set-off. Nevertheless, as reported, that case certainly does appear to support the view taken by the plaintiffs, and I feel myself therefore bound by it. The question, however, is of such practical importance that I have thought it right to express my own view upon the subject, though, of course, with great diffidence, seeing that my lord (Kelly, C.B.) entertains an opposite opinion.—p. 300.

Staples v. Young ; Blake v. Appleyard, and Potter v. Chambers, distinguished.

Davidson v. Gray, 40 L. T. 192 ; affirmed, (1879) 5 Ex. D. 189, n. ; 42 L. T. 834.—C.A., followed.

Cole, Marchant & Co. v. Firth (1879) 40 L. T. 851 ; 4 Ex. D. 301.—EX. D.

POLLOCK, B.—The decisions which have gone before, namely, those in *Staples v. Young*, *Blake v. Appleyard* and *Potter v. Chambers* are decisions in cases in which the Court had to consider partly the question which we are considering, but partly also the question of the County Court statutes : and the question then arose as to the distinction between the County Court Acts, which say, when they deprive a plaintiff of costs when he brings his action in a superior Court when he could have brought it in an inferior Court, that the test is to be derived at by the amount recovered. Those are the words used, and upon those words there can be little doubt whatever. On the other hand, when those sections come to be applied to the superior Courts, the Judicature Act of 1873, by sect. 67, expressly provides that those sections shall apply only to those actions pending in the High Court of Justice, in which the relief sought can be given in the County Court. That cannot apply to the present case. In all those cases a real desire has been shown by the judges so to mete out the law as to effect what they believe to be an equitable adjustment of costs. The case of *Davidson v. Gray*, in the Queen's Bench Division, is in substance very like the present one.—p. 858.

Staples v. Young, questioned.

Chatfield v. Sedgwick (1879) 4 C. P. D. 459 ; 27 W. R. 790.—C.A. **JESSEL, M.R., BRETT and COTTON, L.JJ.**, discussed and distinguished.

Stooke v. Taylor (1880) 49 L. J. Q. B. 857 ; 5 Q. B. D. 569 ; 43 L. T. 200 ; 29 W. R. 49 ; 44 J. P. 748.

COCKBURN, C.J.—It was, however, pressed upon us on the discussion of the rule with reference to the question of costs, that the claim of the plaintiff having been reduced by the counterclaim to 15*l.*, and a counterclaim being, as was contended, equivalent to, and standing on the same footing as, a plea of set-off, the plaintiff could not, according to the statutes of set-off, be said to have recovered more than 15*l.*, and therefore was not entitled to costs—a contention upheld by the decision of the Exchequer Division to that effect in *Staples v. Young*, an authority which, if it is to be followed, is decisive of the question before us. But I cannot acquiesce in the view taken in *Staples v. Young*, or abide by and follow the decision in that case. In my opinion, it is altogether a mistake to treat a counterclaim and set-off as standing on the same footing, or a counterclaim as equivalent only to a set-off. Set-off and counterclaim may be, and commonly are, essentially different, and it becomes necessary, therefore, to see in each case whether a counterclaim amounts in effect to no more than a set-off, or whether it is in effect a cross-action (p. 574). It appears to me, therefore, that the contention of the defendant founded on the authority of *Staples v. Young* and the reasoning in that case, that a plaintiff does not recover the amount which he establishes on his own claim, when the amount for which he can have judgment is reduced by the counterclaim,

is unsound and ought not to prevail (p. 578). I am of opinion that the 67th section of the Act of 1873 has not the effect of raising the amount necessary to entitle the plaintiff to costs beyond the amount fixed by the 5th section of the Act of 1867. But it is said that although the view which I have thus expressed would have been the right one had the case been tried out, and the verdict of the jury taken, and judgment given thereupon in the ordinary course, yet that as here the cause was referred to arbitration, and by the terms of the order of reference the costs of the action were to abide the event, the arbitrator having made his award in favour of the plaintiff for 15*l.*, as the balance of the two claims as established, this was the event on which the costs of the action were to depend. This contention is directly at variance with the decision of the Exchequer Division in *Cole v. Firth* (L. R. 4 Ex. D. 301), but it is said to be upheld by that of the Court of Appeal in *Chatfield v. Sedgwick*. But, in my opinion, the judgment in the last-mentioned case, giving the costs to the defendant, is not, when rightly considered, in conflict with my view of the law. The plaintiff in that case sued the defendant for 37*l.* 10*s.*, but, on a reference to a master, established his claim to the extent only of 16*l.* 1*s.* 5*d.* The defendant on his counterclaim established a claim against the plaintiff to the amount of 23*l.*, thus making a balance in his favour of 6*l.* 18*s.* 7*d.* It was held by the Common Pleas Division, that while the plaintiff, having recovered less than 20*l.*, was disentitled to costs by sect. 5 of the County Courts Act of 1867, the defendant not coming under the operation of the County Courts Acts, was, though he recovered only 6*l.* 18*s.* 7*d.*, entitled to the costs of his counterclaim. This decision was in my opinion perfectly correct. Claim and counterclaim being for liquidated damages, to the extent to which the amount established by the defendant was co-extensive with, and so operated to extinguish, the plaintiff's claim, the counterclaim operated as a set-off : in reference to the amount by which it exceeded the plaintiff's claim it operated as a cross-action, recovering in which the defendant would be entitled to his costs. *A fortiori* would this be the case if the counterclaim is to be treated as a cross-action to the full extent of the defendant's demand. It is true that the Court of Appeal, while upholding the judgment of the Common Pleas Division, appear to have done so on a different ground, namely, that by the terms of the order of reference the costs were to abide the event, and that the decision of the master, that on the balance of account the plaintiff owed the defendant 6*l.* 18*s.* 7*d.* was the event. I am not at all sure that I rightly appreciate the meaning or effect of this decision. In one sense, indeed, but in one sense only, the decision of the master that the plaintiff owed the defendant 6*l.* 18*s.* 7*d.* may be said to have been the event on which the costs would depend. The counterclaim being, so far as it was co-extensive with the plaintiff's demand, a plea of set-off would, on being established, defeat the plaintiff's right of action, and so entitle the defendant to costs. *A fortiori* was this the case when, after thus extinguishing the plaintiff's claim, the counterclaim, operating, as it did, as a cross-action, established a cause of action against the plaintiff. If, however, the *ratio decidendi* in *Chatfield v. Sedgwick* is to be taken to be, as from the

language of the judgment would seem to be the case, that the provision in the order of reference makes the right to costs depend absolutely on whether the balance is on the side of plaintiff or defendant, I must respectfully dissent from such a position, and can only hold myself bound by the decision, where the facts with which I have to deal are precisely the same as those in *Chaffield v. Sedgwick*, which certainly is not the case here.—p. 579. MANISTY, J. concurred.
FIELD, J. dissented.

3. PARTIES—PAYMENT TO OR BY.

Gort (Viscount) v. Rowney, 55 L. J. Q. B. 319.—COLERIDGE, C.J. and FRY, L.J.: *reversed*, (1886) 55 L. J. Q. B. 541; 17 Q. B. D. 625; 64 L. T. 817; 34 W. R. 696.—C.A. ESHER, M.R. and BOWEN, L.JJ.

Gort (Viscount) v. Rowney, *discussed*.
Sandes v. Wildsmith (1893) 62 L. J. Q. B. 404; [1893] 1 Q. B. 771; 69 L. T. 387.—WILLS and LAWRENCE, JJ.

Bagshaw v. Pimm (1890) 80 L. T. 360.—GORRELL BARNES, J.; *reversed*, (1900) 69 L. J. P. 45; [1900] F. 148; 82 L. T. 175; 48 W. R. 422.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.

Att.-Gen. v. Compton (1842) 1 Y. & C. C. C. 417, *distinguished*.

Att.-Gen. v. Bermondsey Vestry (1882) 51 L. J. Ch. 848; 23 Ch. D. 60; 46 L. T. 852; 30 W. R. 872.—FRY, J.; *affirmed*, (1883) 52 L. J. Ch. 567; 23 Ch. D. 60; 43 L. T. 445; 31 W. R. 463; 47 J. P. 453.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.

4. SEVERAL ISSUES.

Sparrow v. Hill (1881) 50 L. J. Q. B. 410; 7 Q. B. D. 362; 44 L. T. 140; 29 W. R. 490.—GROVE and LINDLEY, L.JJ.: *reversed*, [1881] 50 L. J. Q. B. 675; 8 Q. B. D. 479; 44 L. T. 917; 29 W. R. 705.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Sparrow v. Hill, *followed*.

Castle, in re (1887) 56 L. J. Ch. 753; 36 Ch. D. 194; 75 L. T. 76; 35 W. R. 621.—KAY, J.

Knight v. Pussell (1879) 49 L. J. Ch. 120; 41 L. T. 581; 28 W. R. 90, *distinguished*.

Sparrow v. Hill (1881) 50 L. J. Q. B. 675; 8 Q. B. D. 479; 44 L. T. 917; 29 W. R. 705.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

COTTON, L.J.—The judges of the Divisional Court seem to have thought that this case was the same in principle as that of *Knight v. Pussell*, but that assumes that the order in this case is the same as was the order there, which it is not. It differs entirely from it.

Knight v. Pussell, *form of order held applicable*.

Jenkins v. Jackson (1890) 60 L. J. Ch. 206; [1891] 1 Ch. 89; 63 L. T. 688; 39 W. R. 242.—C.A. LINDLEY, BOWEN and FRY, L.JJ.
—BOWEN, L.J.—I think . . . that here the wrong form of order has been adopted. It seems to me that the judge really intended to give the plaintiff the general costs of the action. That is

the form to which on my side we are most accustomed. Of course the Chancery Division has its own forms, which are more appropriate to the business prevailing in Chancery. Again, I also think on the common law side of the Court we should probably have construed this order as giving the plaintiff the general costs of the action; but it seems to me that in Chancery it has been construed in a different way, and that *Knight v. Pussell* really cannot be overruled or set aside and treated as of no effect. That case really settles the practice.—p. 208.

Baines v. Bromley (1881) 50 L. J. Q. B. 465; 6 Q. B. D. 691; 44 L. T. 915; 29 W. R. 706.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.: *reversing* 50 L. J. Q. B. 129; 6 Q. B. D. 197; 43 L. T. 785; 29 W. R. 245.—POLLOCK, B., *explained*.

Lund v. Campbell (1885) 54 L. J. Q. B. 281; 14 Q. B. D. 821; 53 L. T. 900; 33 W. R. 510.—C.A.

COLERIDGE, C.J.—It was contended that in *Baines v. Bromley*, decided in this Court, it had been held that where a plaintiff brings an action in contract, and the defendant, instead of contesting himself with pleading a set-off and succeeding upon it, goes on to counterclaim in contract to a greater extent than would be necessary to sustain the set-off, and succeeds upon the counterclaim, although in the first case he would have been entitled to the costs of the cause, in the second he would be disentitled to them, and the plaintiff would get them all. Of course, if that had been decided in this Court, we should have been bound to submit to the decision, but the law would certainly have been in a singular state. And it appears, upon closely looking into *Baines v. Bromley*, that nothing of the sort has been decided. It is true that the judgment in that case is, *mutatis mutandis*, in the same words and form as this, but the Court in *Baines v. Bromley* pointed out that they were not asked to set aside or re-form the judgment, but to say whether a taxation had under the words of the judgment was proper. . . . Here the form of the judgment is challenged, and we are asked to re-form the judgment.—p. 825.

Lund v. Campbell, *distinguished*.

Ahrbecker (or Ahrbecket) v. Frost (1886) 55 L. J. Q. B. 477; 17 Q. B. D. 606; 55 L. T. 264; 34 W. R. 789.

COLERIDGE, C.J.—The question is, whether in this case the provisions of the County Courts Act, 1867, applies, and takes the case out of that decision, and whether an amount, not exceeding 20*l.*, having been recovered by the plaintiff upon his claim he is not entitled to the costs of the issues with regard to such amount. It does not seem to me that *Lund v. Campbell* in any way interferes with the pre-existing authorities on that point. This point did not arise and was not considered in that case. Apart from the authorities, if this case had to be considered now for the first time, I should say that the rational conclusion would be that a plaintiff, who would not be entitled to the costs of the action if the claim had stood alone and there had been no counterclaim, and he had succeeded to the extent of 18*l.* 12*s.* 6*d.* only, cannot be entitled to costs merely because the defendant having counterclaimed against him and succeeded in recovering a larger sum, he has failed

so far as the general result of the action is concerned. DENMAN, J. concurred.

Prudhomme v. Fraser (1885) 4 L. J. K. B. 87; 2 A. & E. 645; 4 N. & M. 512; 1 H. & W. 5, *questioned*.
 Anderson v. Chapman (1839) 5 M. & W. 483; 9 L. J. Ex. 9; 7 D. P. C. 822; 3 Jur. 1154.
PARKER, B.—The first case on the construction of the rule (H. T. 2 Will. 4, s. 74) was *Che v. Thomas* (2 Cr. & J. 498) where it was held on not guilty pleaded to a declaration containing several counts in case, that the defendant was entitled to the costs of the counts found for him. The next step was taken in *Prudhomme v. Fraser*, where, upon one count for libel, the defendant was held entitled to the costs incurred by disproving the innuendoes negatived by the jury. I am not prepared to say that decision was wrong, though I entertain some little doubt about it.—p. 490

Prudhomme v. Fraser, approved.
 Delisser v. Towne (1841) 1 Q. B. 333; 4 P. & D. 644.—Q. B.

Anderson v. Chapman, considered.
 Paterson v. Harris (1862) 2 B. & S. 814; 31 L. J. Q. B. 277; 9 Jur. (N.S.) 173; 6 L. T. 576; 10 W. R. 757.
COCKBURN, C. J.—It is true that in *Anderson v. Chapman* a contrary doctrine seems to have been maintained; but the decision of the Court there, on the special circumstances of that case, has been considerably shaken by *Truherne v. Gardner* (8 E. & B. 161), which is much more like the present.—p. 820

Cooke v. Sayer (1759) 2 Burr. 753, *overruled*.
 Bird (*ex Bond*) v. Higginson (1836) 5 A. & E. 83; 6 N. & M. 791; 2 H. & W. 278; 6 L. J. K. B. 282.—K. B.

Bird v. Higginson, supra.
Clarke v. Allatt (1847) 4 C. B. 835. *Approved.*
Partridge v. Gardner (1849) 4 Ex. 308; 18 L. J. Ex. 415; *affirmed*, 6 E. 621; 20 L. J. Ex. 307; 2 L. M. & P. 371.
Howell v. Rodbard (1849) 4 Ex. 309. *Overruled.*
 Callander v. Howard (1850) 10 C. B. 290; 20 L. J. C. P. 66; 15 Jur. 130; 1 L. M. & P. 755.
JERVIS, C.J.—It is impossible to arrive at the conclusion we arrive at in this case without seeing that we do in fact distinctly—so far, at least, as this Court is concerned—overrule *Partridge v. Gardner* and *Howell v. Rodbard*; it will be necessary, therefore, to examine the authorities as well as the statute itself upon which they profess to be founded, in order to see that we arrive at a right conclusion.—p. 313.

5. TAXATION.

Sheppard v. Sheppard (1863) 33 Beav. 129. —*M.R., considered.*
 Roper, In re; Taylor v. Bland (1890) 45 Ch. D. 126; 63 L. T. 484; 39 W. R. 101.—C.A.
COTTON and BOWEN, L.JJ. v. FRY, L.J. dissenting.
COTTON, L.J.—We have looked at the petition which was presented there, and I should say that Lord Romilly was making too wide a statement in laying down that an order for payment

of costs out of a particular fund is not to be taken as deciding the rights as between persons entitled to the fund when it comes ultimately to be divided.

FRY, L.J.—In *Sheppard v. Sheppard* there does not appear to have been any order on further consideration.

COTTON, L.J.—It does not appear that there had.

Smith, In re (1844) 13 M. & W. 477; 2 D. & L. 376, *followed*.

Blyth and Fanshawe. In re, Wells, Ex parte (1882) 32 L. J. Q. B. 186; 10 Q. B. D. 207; 47 L. T. 610; 31 W. R. 283.—C.A. BAGGALLAY and LINDLEY, L.JJ.

Pearce v. Lindsay (1860) 1 D. F. & J. 573; 8 W. R. 383.—L. G. and L.JJ., *applied*.
 Kirkwood v. Webster (1878) 47 L. J. Ch. 880; 9 Ch. D. 239, 26 W. R. 812.—**FRY, J.**

Kirkwood v. Webster (supra), explained.
 Glamorgan County Council v. G. W. Ry. (1894) 64 L. J. Q. B. 138; [1895] 1 Q. B. 21; 71 L. T. 736; 9 Ry. & Can. Traff. Cas. 1; 59 J. P. 182.

COLLINS, J.—In delivering his judgment [in *Kirkwood v. Webster*] Fry, J. said, "I think that the case falls within the rule laid down by Turner, L.J. in *Pearce v. Lindsay* and that it was essentially necessary for the purpose of doing justice that three counsel should be employed. I do not speak of a physical or a mathematical necessity, but I think that the case was one in which a reasonable and prudent man acting with ordinary prudence would not have ventured to come into Court without three counsel. . . ." I do not think it is necessary to take into consideration whether all three counsel attend in Court during the hearing of the case. . . .—p. 140.

Betts v. Cleaver, 26 L. T. 655; *reversed*, (1872) 41 L. J. Ch. 663; L. R. 7 Ch. 513; 27 L. T. 85; 20 W. R. 732.—L.JJ.

Cousens v. Cousens (1871) 41 L. J. Ch. 166; L. R. 7 Ch. 48; 25 L. T. 719; 20 W. R. 48.—L.JJ., *observed upon*.
 Betts v. Cleaver (1872) 41 L. J. Ch. 663; L. R. 7 Ch. 513; 27 L. T. 85; 20 W. R. 732.—L.JJ.

Hawkins v. Rigby (1860) 8 C. B. (N.S.) 271; 29 L. J. C. P. 228; 6 Jur. (N.S.) 1208; 2 L. T. 243, *explained*.
 Sinclair v. G. E. Ry. (1870) 39 L. J. C. P. 165; L. R. 5 C. P. 135; 21 L. T. 752; 18 W. R. 491.—C. P.

Oppenshaw v. Whitehead (1854) 23 L. J. Ex. 97; 9 Ex. 384; 2 C. L. R. 553; 2 W. R. 172, *followed*.

Metropolitan Coal Consumers' Association, In re, Grieb's Case (1890) 59 L. J. Ch. 532; 45 Ch. D. 606; 62 L. T. 561; 38 W. R. 462.—KEKEWICH, J.

Walker v. Crystal Palace Gas Co. (1891) 60 L. J. Q. B. 781; [1891] 2 Q. B. 300; 65 L. T. 86; 39 W. R. 716.—DENMAN and WILLS, JJ., *dissented from*.

The Courier (1891) 61 L. J. P. 11; [1891] P. 855; 66 L. T. 386; 40 W. R. 336; 55 J. P. 793; 7 Asp. M. C. 157.

BUTT, P.—Although I have very considerable difficulty in agreeing with the reasons given by

the learned judges of the Q. B. D. in *Walker v. Crystal Palace Gas Co.*, I certainly should have felt bound to differ, and should have deferred, to that authority had there been no cases conflicting with it. But there is manifestly a conflict of authority upon the point. Besides the equity cases cited, a case said to conflict, and which I think does conflict, with that authority, was decided in chambers by Grantham, J. after consulting, I am told, some other judge; but that is disposed of by the learned judges of the Q. B. D. who decided *Walker v. Crystal Palace Gas Co.* They say that the decision of Grantham, J. was a decision in chambers, and no doubt decisions in chambers are apt to be given in a greater hurry than in matters which are fully discussed in Court. But I cannot also fail to observe that it would appear from the report of *Walker v. Crystal Palace Gas Co.*, that the attention of the learned judges was not directed to a most important part of the rule under consideration [Ord. LXV. r. 27, sub-r. 48]. I mean the second paragraph, which runs: "The like allowances . . . have been used."

Walker v. Crystal Palace Gas Co., not followed.

The Courier and Collins v. Worley (1899) 60 L. T. 748.—CHITTY, J., approved.

O'Hara v. Elliott (1898) 62 L. J. Q. B. 317; [1898] 1 Q. B. 862; 5 R. 205; 68 L. T. 166; 41 W. R. 248.—DAY and COLLINS, JJ.

COLLINS, J.—Although the decision of the Court in this case does not follow *Walker v. The Crystal Palace Gas Co.*, it is supported by the judgment of Sir Charles Butt in *The Courier*, and the decision of Mr. Justice Grantham, after consultation with another judge, in *Gibbs v. Barrow* (30 Sol. J. 538), and another decision by Mr. Justice Chitty (*Collins v. Worley*). The weight of authority, therefore, and of common sense are in favour of allowing the appeal.—pp. 318, 319.

Svensden v. Wallace (1885) 55 L. J. Q. B. 65; 16 Q. B. D. 27; 53 L. T. 565; 34 W. R. 151.—DAY and SMITH, JJ., explained.

Easton v. London Joint Stock Bank (1888) 57 L. J. Ch. 329; 38 Ch. D. 26; 58 L. T. 364; 36 W. R. 375.—O.A. COTTON and BOWEN, L.JJ.

COTTON, C.J.—That really is the decision in *Svensden v. Wallace*. The Court there did not decide that daily refreshers are to be allowed, but only that the master has a discretion as to allowing what they do call refreshers, which perhaps is an unfortunate term. They had better have said if one may entice in any way the language used by one's brethren in the common law division, an addressee to the fees marked originally on the brief of counsel. They made that order having regard to the amount allowed for refreshers under the ordinary rule, but it is not allowing refreshers in the sense in which refreshers are dealt with in the rules as to taxation. That case was decided having regard to [Ord. LXV. r. 27], sub-division 30. . . . That decision only amounted to this, "We think the master is not bound to disregard any suggested addition to the fees of counsel. He must take into consideration the matter, and as in the Exchequer Chamber and, as we now know in the C. A. in Chancery, the master has a discretion to consider whether the original fee marked

was from an accidental circumstance or otherwise insufficient, he may allow an addition to be made to that." That was called a refresher, but really it was not a refresher in the sense in which that word is used when we consider the sum fixed as the proper amount to be allowed for a daily refresher in witness cases. In my opinion here, all that North, J. intended to decide was this: that the master not allowing, as a fixed and definite sum, having regard to the time occupied, daily refreshers, is at liberty to consider whether in his discretion it would be right to make any addition to the fees marked on the brief of counsel.—pp. 331, 332.

Smith v. Buller (1875) 45 L. J. Ch. 69; L. R. 19 Eq. 473; 31 L. T. 873; 23 W. R. 332.—V.C. disallowed from.

Harrison v. Wearing (1879) 48 L. J. Ch. 385; 11 Ch. D. 206; 41 L. T. 376; 27 W. R. 526.—JESSEL, M.R.

Bell v. Aitkin (1868) 37 L. J. C. P. 163; L. R. 3 C. P. 320; 18 L. T. 865; 16 W. R. 704.—G.P. considered.
Potter v. Rankin (1868) 38 L. J. C. P. 130; L. R. 4 C. P. 76; 19 L. T. 383.—G.P.

Bell v. Aitkin and Potter v. Rankin, principles applied.
The Soto (1898) 62 L. J. P. 17; [1898] P. 73; 1 R. 879; 69 L. T. 231; 41 W. R. 479; 7 Asp. M. C. 555.—BARNES, J.

Bell v. Aitkin, applied.
The Soto, followed.
Dixon, In re, *Touney v. Sheffield* (1898) 67 L. J. Ch. 537; [1898] 2 Ch. 443; 78 L. T. 810; 46 W. R. 677.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.JJ.

Mounsey v. Burnham (1841) 1 Hare 22, not followed.
Finch v. Westrope (1871) 40 L. J. Ch. 441; L. R. 12 Eq. 24; 24 L. T. 412; 19 W. R. 672.—ROMILLY, M.R.

Ellington v. Clark (1887) 58 L. T. 40.—KAY, J.; reversed, (1888) 57 L. J. Ch. 958; 58 Ch. D. 332; 58 L. T. 818; 36 W. R. 873.—C.A. COTTON, FRY and LOPES, L.JJ.

Williamson v. North Staffordshire Ry. (1886) 55 L. J. Ch. 938; 32 Ch. D. 399; 55 L. T. 452.—C.A. COTTON, BOWEN and FRY, L.JJ., followed.
Paine v. Chisholm (1891) 60 L. J. Q. B. 413; [1891] 1 Q. B. 531; 39 W. R. 553.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Williamson v. North Staffordshire Ry. and Paine v. Chisholm, followed.
Assets Development Co. v. Close (1900) 67 L. J. Ch. 715; [1900] 2 Ch. 717; 83 L. T. 162; 48 W. R. 699.—BUCKLEY, J.

Williamson v. North Staffordshire Ry., followed.
Davies Brothers v. Davies (1887) 56 L. J. Ch. 481; 36 Ch. D. 359; 56 L. T. 401; 35 W. R. 697.—KEKEWICH, J.; and *Marriott v. Cobbett* (1894) 38 Sol. J. 620, not followed.
Rivington v. Garden (1901) 70 L. J. Ch. 282;

[1901] 1 Ch. 561; 84 L. T. 197; 49 W. R. 279.
—BUCKLEY, J.

Chapman v. Midland Ry. (1880) 49 L. J. Q. B. 245, 449; 5 Q. B. D. 167, 431; 42 L. T. 612; 38 W. R. 413, 592.—*C.A., discussed.*
Goodhand v. Ayscough (1882) 10 Q. B. D. 71; 52 L. J. Q. B. 97; 47 L. T. 701; 31 W. R. 114.
FRY, J.—Then it is said that in *Chapman v. Midland Railway Co.* the Queen's Bench Division seem to have taken a somewhat different view, and to have thought that the assertion of a title by the defendant would make some difference. But that case was afterwards taken to the Court of Appeal, and I do not find that any of the judges of that Court adopted the view of the Divisional Court. This being so, I suggest to the judges of the Divisional Court that the present case is not within the rule, and consequently that the higher scale of costs does not apply, and with that expression of my opinion I leave the matter to them.—p. 74.

Cockburn v. Edwards (1881) 61 L. J. Ch. 46; 18 Ch. D. 449; 45 L. T. 500; 30 W. R. 446.—*C.A.* JESSEL, M.R. BRETT and COTTON, L.JJ.; *affirming* 29 W. R. 136, *questioned*.

Andrews v. Barnes (1888) 57 L. J. Ch. 694; 39 Ch. D. 133; 58 L. T. 748; 36 W. R. 705; 53 J. P. 4.—*C.A.* COTTON, FRY and LOPES, L.JJ.
FRY, L.J. (for the Court).—The general jurisdiction of the Court of Chancery in this respect is stated with great clearness by the lords justices in *Mordue v. Palmer*. In the course of a Chancery suit a reference was made to arbitration, which ordered that the costs should be in the determination of the arbitrator. He awarded them as between solicitor and client, and the *C.A.* held that as the reference was in Chancery the arbitrator had power so to do. "The common law Courts," said Mellish, L.J., "have no power to give costs as between solicitor and client, and therefore when there is a reference, the arbitrator cannot give any other than costs between party and party. But it is otherwise with Courts of equity; and I therefore think that when a reference as to costs is made by a Court of equity, the Court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit." It was argued that in *Cockburn v. Edwards* a different view was taken by the *C.A.*, but the question then only arose indirectly, and the point does not appear to have been argued. If therefore there is any discrepancy between this case and *Mordue v. Palmer*, we think that the decision in the latter case must prevail, not only as more express, but as being in accordance with the earlier authorities.—p. 697.

6. EFFECT OF COUNTY COURTS ACT.

Gray v. West (1869) 38 L. J. Q. B. 78; 1 L. R. 4 Q. B. 175; 20 L. T. 221; 17 W. R. 497; 9 B. & S. 496, *commented on and limited*.

Craven v. Smith (1869) L. R. 4 Ex. 146; 38 L. J. Ex. 90; 20 L. T. 400; 17 W. R. 710.

BRAXWELL, B.—The case of *Gray v. West* appears at first sight to lay down that in all cases which must be brought in a superior Court, an order or rule for costs ought to be granted. I

do not, however, desire—and I do not think my brother Hayes, in delivering the judgment of the Court of Queen's Bench desired—to lay down so wide a rule. For the action might be vexatious, and I should be very sorry to be obliged to regard the verdict of a jury as absolutely conclusive.—p. 151.

Gray v. West and Craven v. Smith, discussed.

Sampson v. Mackay (1869) 38 L. J. Q. B. 245; L. R. 4 Q. B. 643; 20 L. T. 807; 17 W. R. 889; 10 B. & S. 694.

BLACKBURN, J.—*Gray v. West and Craven v. Smith* decide that, in exercising their discretion, the Court may take as one element for consideration the fact that an action of slander cannot be brought in the County Court.

Craven v. Smith and Taylor v. Cass (1869) L. R. 4 C. P. 614; 20 L. T. 667; 17 W. R. 860, *overruled*.

Cox v. Hill (1892) 67 L. T. 26.—**MATHEW and SMITH, JJ.** Overruled as to power of undersheriff to certify for costs.
See County Courts Act, 1888, s. 116.

Harris v. Judge (1892) 61 L. J. Q. B. 577; [1892] 2 Q. B. 565, 67 L. T. 19; 41 W. R. 9.—**LINDLEY, BOWEN and KAY, L.JJ., discussed.**

White v. Cohen (1893) 62 L. J. Q. B. 274; [1893] 1 Q. B. 389; 4 R. 352; 68 L. T. 305; 41 W. R. 396.—*C.A.* ESHER, M.R., LINDLEY and BOWEN, L.JJ.

LINDLEY, L.J. (for the Court).—This appeal raises the point left undetermined by *Harris v. Judge*. But that case turned on the same sections of the County Courts Act, 1888, as have to be considered on the present occasion, and throws considerable light on their true construction. The sections are 65 and 116 of 51 & 52 Vict. c. 43. Section 65 applies in terms to actions commenced in the High Court and sent for trial in the County Court. Section 116 applies in terms to all actions brought in the High Court which might have been brought in the County Court. The two sections, therefore, are not mutually exclusive; they may both stand together so far as their subject-matter is concerned; and so far as they are not inconsistent they ought to be read together. This was the view taken in *Harris v. Judge*. Upon the particular point which had then to be decided, the two sections could not be construed together, and sect. 65 was held to prevail over sect. 116; but it does not follow that the result ought to be the same in the present case. The last part of sect. 65 says in terms what scale of costs is to be allowed in the cases to which it relates. It applies as well to plaintiffs as to defendants; but it does not say or mean that the costs which, if allowed, are to be taxed according to the scale mentioned, are in all cases to be allowed either to the plaintiff or to the defendant. Whether they are to be allowed or not, and to whom, depends on other sections. The section which enables the County Court judge to give costs is sect. 118; but as regards actions brought in the High Court, but which might have been brought in the County Court, there are specific directions or rules contained in sect. 116, and these specific directions or rules must be applied by the judge of the County Court to whom an action brought

in the High Court, but which might have been brought in the County Court, is sent for trial. This is what I said in *Harris v. Judge*, and which on consideration we are still of opinion is correct. The language, however, which I used in *Harris v. Judge*, was too wide, and was understood by Cave, J. to mean that the County Court judge could give the certificate referred to in sect. 116. We agree with him that the County Court judge cannot do that, and my language to that extent ought to be corrected. The clause in sect. 116 relating to the certificate or order allowing costs can only come into operation where the action is tried in the High Court. . . . We are of opinion (1) that the rules laid down in clauses 1 and 2 of sect. 116, depriving a plaintiff of costs wholly or partially, are applicable to all actions brought in the High Court which might have been brought in the County Court, whether tried in the High Court or ordered to be tried in the County Court under sect. 65; and (2) that those rules apply to all the costs of such actions, and not only to so much of them as, in a case ordered to be tried in the County Court, have been incurred antecedently to such order.

Harris v. Judge and White v. Cohen, followed.

Dunn v. Appleton (1898) 67 L. J. Q. B. 428; [1898] 1 Q. B. 564; 78 L. T. 246.—C.A. SMITH, HIGBY and COLLINS, L.JJ.

Chambers v. Wiles (1855) 24 L. J. Q. B. 267, overruled.

Parr v. Lillierap (1862) 1 H. & C. 615; 32 L. J. Ex. 150; 9 Jur. (N.S.) 80; 7 L. T. 425; 11 W. R. 94.—EX.

Parr v. Lillierap (*supra*), approved.

Bonding v. Tyler (1863) 32 L. J. Q. B. 85; 9 Jur. (N.S.) 794; 11 W. R. 307; 3 B. & S. 473.—Q.B.

Tonge v. Chadwick (1856) 5 E. & B. 950; 25 L. J. Q. B. 128; 2 Jur. (N.S.) 232; 4 W. R. 266, overruled.

Ascroft v. Foulkes (1856) 18 C. B. 261; 25 L. J. C. P. 202; 2 Jur. (N.S.) 449; 4 W. R. 457, followed.

Beard v. Perry (1862) 2 B. & S. 493; 31 L. J. Q. B. 180; 8 Jur. (N.S.) 914; 6 L. T. 332; 10 W. R. 619.

Goldhill v. Clarke (1892) 68 L. T. 414; 5 R. 75.—CHARLES, J., disapproved.

Lovejoy v. Cole (1894) 64 L. J. Q. B. 120; [1894] 2 Q. B. 861; 30 R. 452; 71 L. T. 374; 43 W. R. 48.—HAWKINS and LAW-RANCE, JJ., followed.

Chatfield v. Sedgwick (1879) 4 C. P. D. 459; 27 W. R. 790.—C.A., referred to.

Solomon v. Mulliner (1900) [1901] 1 Q. B. 76, 70 L. J. K. B. 165; 83 L. T. 493; 49 W. R. 864.—C.A. A. L. SMITH, M.R. and COLLINS, L.J.

A. L. SMITH, M.R.—“The words used in sect. 116 [of the County Courts Act, 1888] are, ‘which could have been commenced in a County Court,’ instead of ‘in which any relief is sought which can be given in a County Court.’ The question is whether the words used in sect. 116 do not really mean the same thing as those used in the former enactment. I read them as meaning ‘which could ‘properly’ have been commenced

in the County Court,” both as regards the character of the action and the amount really involved. At what time it is to be ascertained whether the action is, as regards amount, properly within the jurisdiction of the County Court? Not, in my opinion, at the time when the plaintiff is stating what amount he thinks fit to claim on the writ or statement of claim, but at the time when the amount recoverable is adjudicated on by the proper tribunal or otherwise ascertained by the result. It cannot depend on the amount which the plaintiff chooses to claim. . . . With regard to the cases cited, there has been some confusion on the subject, and I do not think the decisions can all of them be reconciled with one another. If it be necessary to decide between them, I prefer the decision of Hawkins and Lawrence, JJ. in *Lovejoy v. Cole*, to that of Charles, J. in *Goldhill v. Clarke*, which I have great difficulty in following. I think that—as Brett, L.J. said in *Chatfield v. Sedgwick*, which was an express decision of the C. A. with regard to words which, though not identical with those we have to construe, are in my opinion to the same effect—the amount the plaintiff claims has nothing to do with the matter. It is the amount which is in the result recovered that is material.—pp. 82, 83.

Dixon v. Walker (1840) 7 M. & W. 214; 10 L. J. Ex. 43; 8 D. P. C. 87, approved.

Copeh v. Malthy (1854) 23 L. J. Q. B. 803; 2 W. R. 557, disapproved.

James v. Vane (Lord) (1860) 2 El. & El. 883; 29 L. J. Q. B. 169; 6 Jur. (N.S.) 731; 2 L. T. 281; 8 W. R. 446.

CROMPTON, J.—Mr. Hindmarch, on moving for the rule, satisfied me that the prior decision (*Dixon v. Walker*) is more correct than the later, though I was at first inclined to think otherwise.—p. 888.

Tatton v. G. W. Ry. (1860) 2 El. & El. 844; 29 L. J. Q. B. 184; 6 Jur. (N.S.) 800; 8 W. R. 608, discussed.

Baylis v. Lintott (1873) L. R. 8 C. P. 345; 42 L. J. C. P. 119; 28 L. T. 666.

BOVILL, C.J.—In the case of *Tatton v. G. W. Ry.* which was cited, the Q. B. treated the cause of action as one founded on tort; but the L.C.J. expressed his regret at the anomalous state of the law, by which an option being given to the plaintiff to sue in either form, the right of costs depended merely upon the form of the declaration. It is sufficient to say with regard to that case, that the Court considered the form of declaration to amount to case and not contract. There was no statement there of any promise or consideration as in this case; but the cause of action was founded wholly on the breach of duty. The case is, therefore, clearly distinguishable from the present, inasmuch as it proceeds on the precise character of the cause of action as alleged in the declaration, which was wholly different from that in the present case (p. 847). Looking at those authorities, *Legge v. Tucker* (1 H. & N. 500; 26 L. J. Ex. 71) and *Morgan v. Ravey* (6 H. & N. 265; 30 L. J. Ex. 131), if it were now necessary to consider the case of *Tatton v. G. W. Ry.*, and to decide upon what seems to amount to a conflict of authority, I should be disposed to adopt the decisions of the Court of Exchequer and the principles on which they are based; but it is not necessary to do so in this

case, inasmuch as it is distinguishable from *Tutton v. G. W. Ry.* in the form of the declaration.—p. 348.

Pontifex v. Midland Ry. (1876) 35 L. T. 706; 25 W. R. 215.—Q.B., *reversed* in C.A., but see **S. C.** (1877) 47 L. J. Q. B. 28; 3 Q. B. D. 23; 37 L. T. 403; 26 W. R. 209.—Q.B.

Tutton v. G. W. Ry., *disapproved*.

Pontifex v. Midland Ry. (1877) 47 L. J. Q. B. 28; 3 Q. B. D. 23; 37 L. T. 403; 26 W. R. 209.—Q.B., *distinguished*.

Fleming v. M. S. & L. Ry. (1878) 4 Q. B. D. 81; 39 L. T. 655; 27 W. R. 481.—C.A.

BRAMWELL, L.J. (for himself, **BAGGALLAY** and **TRESIGER, L.J.J.**)—It is unnecessary for us to determine whether *Tutton v. G. W. Ry.* was rightly decided; for it came before the Court of Q. B. before the passing of the County Courts Act (30 & 31 Vict. c. 142), s. 5; but we may say that we are not satisfied with the decision in that case. . . . It is manifest that *Pontifex v. Midland Ry.* is very distinguishable from the present case. Hence the real ground of complaint was the breach of the contract to deliver.

Pontifex v. Midland Ry. and Fleming v. M. S. & L. Ry., *applied*.

Taylor v. M. S. & L. Ry. (1894) 64 L. J. Q. B. 6; [1895] 1 Q. B. 134; 14 B. 34; 71 L. T. 596; 43 W. R. 120; 59 J. P. 100.—C.A. **LINDLEY** and **SMITH, L.J.J.**

Taylor v. M. S. & L. Ry., *explained*.

Kelly v. Metropolitan Ry. (1895) 64 L. J. Q. B. 568; [1895] 1 Q. B. 944; 14 B. 34; 71 L. T. 596; 43 W. R. 497; 59 J. P. 437.—C.A. **ESHER, M.R.**, **SMITH** and **RIGBY, L.J.J.**

Danby v. Lamb (1861) 81 L. J. C. P. 17; 11 C. B. (N.S.) 423; 5 L. T. 353; 10 W. R. 43, *followed*.

St. John's College, Cambridge v. Pierrepont (1891) 61 L. J. Q. B. 19; 66 L. T. 88.—**DAY** and **GRANTHAM, J.J.**, *overruled*.

Keates v. Woodward (1902) 71 L. J. K. B. 325; [1902] 1 K. B. 532; 86 L. T. 869; 50 W. R. 258.—C.A. **COLLINS, M.R.**, **ROMER** and **MATHEW, L.J.J.**

COLLINS, M.R.—There is the case of *St. John's College, Cambridge v. Pierrepont*, to which I have already referred, in which the opposite view has been taken; but it is remarkable that the earlier case of *Danby v. Lamb* does not appear to have been cited, and I cannot say what the opinion of the Court would have been had that case been brought to their attention. It seems to me that there is a preponderating authority for the view that I have indicated—that the fair meaning of the words "action founded on tort" in sect. 116, sub-sect. 2, is that a tort should be the gist of the action, and that the section is not applicable to an action which, though nominally to recover damages for a tort, includes, as the main relief sought, a claim for an injunction.

ROMER, L.J.—It seems to me that the view taken of this matter by the C. A. in Ireland, and by the Q. B. D. in *Bradley v. Archibald* (1894) 2 L. R. 108, is a sound view, and that *St. John's College, Cambridge v. Pierrepont* was wrongly decided.

Keates v. Woodward, *applied*.

Du Pasquier v. Cadbury (1902) 72 L. J. K. B. 78.—C.A. **COLLINS, M.R.** and **MATHEW, L.J.**

Hayter v. Fish (1848) 6 C. B. 568; 6 D. & L. 355; 18 L. J. C. P. 68; 12 Jur. 1004, *held overruled*.

Room v. Cottam (1850) 5 Ex. 820.

PARKE, B.—I much doubt the propriety of the decision in *Hayter v. Fish*. It has, however, since been considered by the Court of Common Pleas in the case of *Kirby v. Mickson*, and expressly overruled.—p. 821.

Neaves v. Spooner (1887) 57 L. T. 879; 36 W. R. 62.—**STEPHEN** and **CHARLES, J.J.**, *reversed*, (1887) 58 L. T. 164; 36 W. R. 257.—C.A. **BOWEN** and **FRY, L.J.J.**

Hatch v. Lewis (1831) 7 H. & N. 367; 31 L. J. Ex. 26; 7 Jur. (N.S.) 1085; 5 L. T. 254; 10 W. R. 53, *distinguished*.

Hinde v. Sheppard (1871) L. R. 7 Ex. 21; 41 L. J. Ex. 25; 25 L. T. 500; 20 W. R. 99.—EX.

KELLY, C.B.—It was contended that the case of *Hatch v. Lewis* was an authority that the Court would not interfere with the discretion of the judge at Nisi Prius (as to costs); but that case was wholly different. It was an action brought for the recovery of damages merely, but the present action is brought to try a right which, if it existed, would materially affect the value of the plaintiff's land.—p. 23. **BRAMWELL** and **CHANNELL, B.B.** concurred; **CLEASBY, B.** doubting.

Hinde v. Sheppard, *followed*.

Barlow v. Briggs (1872) 27 L. T. 159; 20 W. R. 866.

Hinde v. Sheppard, *observed upon*.

Strachey v. Osborne (Lord) (1874) L. R. 10 C. P. 92; 44 L. J. C. P. 6; 31 L. T. 374; 23 W. R. 75.—C.P.

COLERIDGE, C.J.—*Hinde v. Sheppard* is an authority for saying not only that the Court may, but that they ought to, review the discretion of the judge if satisfied that he has exercised it erroneously. There a right to land was in issue. Willes, J. refused to certify at the trial; and a judge at chambers also refused, under the latter part of this section (sect. 5 of 30 & 31 Vict. c. 142), to make an order for costs. The Court of Ex. were divided on this question. The L.C.B. and Bramwell and Channell, B.B., were in favour of a review of the judge's discretion. Cleasby, B. not differing from the rest of the Court, thought the plaintiff ought not to be allowed to question the jurisdiction of the judge, save under very exceptional circumstances. If that case be taken as deciding that, where a title or right comes in issue, the presiding judge is bound to certify, as the language of Bramwell, B. might seem to import, it is a pity that the legislature should have passed two or three Acts to so little purpose, seeing that some right is nearly always in issue. The section in question, as it seems to me, implies a discretion in the judge to grant or withhold his certificate, according to the impression made upon his mind by the facts appearing before him. The L.C.B., in *Hinde v. Sheppard*, though he differed from the exercise of discretion by Willes, J., and overruled it, does not in his judgment in reality

go further than the Courts had gone before; and it is clearly too late now to dispute their right to do so. All that that case must be taken to decide is that, in certain cases, the Court will overrule the discretion of the judge. It decides no principle, but merely that the judge was wrong in that case, which in this case I do not think he was.—p. 95.

Burdon v. Flower (1839) 7 D. P. C. 786, *approved*.

Bentley v. Dawes (1854) 10 Ex. 347; 23 L. J. Ex. 279; 18 Jur. 337, *not followed*.
Dunston v. Paterson (1858) 5 C. B. (N.S.) 279; 28 L. J. C. P. 185.

WILLES, J.—It appears to me that the costs under the 3 & 4 Will. 4, c. 42, s. 34, are the same as those under the 8 & 9 Will. 3, c. 11, s. 3; and not, as has been contended on the part of the plaintiff, interlocutory costs, but costs which are to be taxed on the final results of the cause. If so, the decision of the Court in *Burdon v. Flower* was right, and that of the Court of Ex. in *Bentley v. Dawes* is not to be sustained.—p. 285.

7. SET-OFF, OP.

Holby v. Hodgson (1889) 59 L. J. Q. B. 46; 24 Q. B. D. 103; 62 L. T. 154; 38 W. R. 68.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.J.J.**, *followed*.

Pelton v. Harrison (1891) 61 L. J. Q. B. 144; [1892] 1 Q. B. 118; 65 L. T. 845.—C.A. **LOPES and KAY, L.J.J.**

Adams, In re, Griffin, Ex parte (1880) 49 L. J. Bk. 28; 14 Ch. D. 37; 42 L. T. 704; 28 W. R. 714.—C.A. **JAMES, BRETT and COTTON, L.J.J.**, *followed*.

Bassett, In re, Lewis, Ex parte (1895) 65 L. J. Q. B. 144; [1896] 1 Q. B. 219; 73 L. T. 736; 44 W. R. 240.—*v. WILLIAMS, J.*

Wright v. Chard (1859) 4 Drew. 702; 1 L. T. 182; 8 W. R. 122, *limited*.

Keran v. Crawford (1877) 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 26 W. R. 49.—C.A. **JESSEL, M.R.**—Instead of dismissing the whole of the rest of the bill with costs, the Vice-Chancellor gave no costs, and the ground on which he gave no costs to Mr. and Mrs. C. was this; not that he was of opinion they were not entitled to costs, but he thought himself bound by a decision of Kindersley, V.-C., in *Wright v. Chard*, to give no costs in a case relating to separate estate of the wife where the husband and wife joined as co-defendants. When the case comes to be examined it will be found not to be an authority for any such general proposition. It was a very peculiar case. I am far from saying the particular order in that case was not right, but the general rule is not touched by it.—p. 40.

Edwards v. Hope (1885) 54 L. J. Q. B. 379; 14 Q. B. D. 922; 53 L. T. 69; 33 W. R. 672.—C.A. **BRETT, M.R., BAGGALLAY and BOWEN, L.J.J.**, *followed*.

Blakey v. Latham (1889) 41 Ch. D. 518; 60 L. T. 624; 37 W. R. 569.—*KAY, J.*

Edwards v. Hope, applied.

Hassell v. Stanley (1896) 65 L. J. Ch. 494; [1896] 1 Ch. 607; 74 L. T. 375; 44 W. R. 405.—*CHITTY, J.*

S. APPEAL FOR.

Gilbert, In re, Gilbert v. Hudleston (1885) 54 L. J. Ch. 751; 28 Ch. D. 549; 52 L. T. 8; 33 W. R. 832.—C.A. **BAGGALLAY, BOWEN and FRY, L.J.J.**; and **Smith v. Buchan** (1888) 58 L. T. 710; 36 W. R. 631.
—*KAY, J., approved.*

Young v. Thomas (1892) 61 L. J. Ch. 496; [1892] 2 Ch. 134; 66 L. T. 575; 40 W. R. 468.—C.A. **LINDLEY, BOWEN and KAY, L.J.J.**

Farrow v. Austin (1881) 18 Ch. D. 58; 45 L. T. 227; 30 W. R. 50.—C.A. **JESSEL, M.R., BAGGALLAY and LUSH, L.J.J.**, *followed*.

Hoskins, In re (1877) 46 L. J. Ch. 817; 6 Ch. D. 281; 25 W. R. 779, *disapproved*.

Turner v. Hancock (1882) 29 Ch. D. 303; 51 L. J. Ch. 517; 46 L. T. 750; 30 W. R. 480.

JESSEL, M.R.—It is clear, in my opinion, that this is a case in which an appeal as to costs is allowable. The only excuse for the objection to the appeal is the recent case of *In re Hoskins*. In *Cutler v. Stratton* [42 L. J. Ch. 417; L. R. 8 Ch. 295. See "MORTGAGE"], the claim of trustees for costs is rightly put on the same footing as that of mortgagees (p. 304). . . . But it is said that *In re Hoskins* is to a different effect. In that case Lord Justice James is reported to have said, "The present case is not a case where the appellant is *ex debito iustitie* entitled to costs; the costs of a trustee being subject to the discretion of the Court." If I have to choose between the authority of Lord Selborne in *Cutler v. Stratton* and Lord Justice James, I should be inclined to follow Lord Selborne's decision. But I go farther. I think it was not in the power of the Court, in *In re Hoskins*, to overrule the previous authorities; therefore I must take the decision in that case to have been founded on a mistaken view of the law, and to be subject to review.—p. 305.

Farrow v. Austin is directly in point.—p. 306.

Farrow v. Austin, observed upon but followed.

McClellan, In re, McClellan v. McClellan (1885) 29 Ch. D. 495; 54 L. J. Ch. 659; 62 L. T. 741; 33 W. R. 888.—C.A.

COTTON, L.J.—I should myself have had some doubt whether a residuary legatee, either absolutely or for life in the whole residue, is in the position of a person who has a right to the costs of an administration action out of the estate, unless he has been guilty of some misconduct. But the decision of the Court of Appeal in *Farrow v. Austin* is, that a residuary legatee or executor filing a bill for administration has a right to have his costs out of the estate unless that right is displaced by showing some special grounds for depriving him of them.—p. 498.

McClellan, In re, McClellan v. McClellan, explained.

Quarrell v. Beckford (1816) 1 Madd. 269; and **Wilson v. Metcalfe**, (1826) 1 Russ. 530.—*M.R., distinguished.*

Brown v. Burdett (1887) 37 Ch. D. 207; 58 L. T. 571; 36 W. R. 225.—C.A. **COTTON and LINDLEY, L.J.J.**

Charles v. Jones (1886) 56 L. J. Ch. 161; 33 Ch. D. 80; 55 L. T. 381; 35 W. R. 88.—C.A. COTTON, LINDLEY and LOPES, L.J.J., *explained*.

Chennell, In re, Jones v. Chennell (1878) 47 L. J. Ch. 80; 8 Ch. D. 492; 38 L. T. 494; 26 W. R. 595.—C.A., *approved*.
Beldoe, In re, Downes v. Cottam (1892) 62 L. J. Ch. 233; [1893] 1 Ch. 547; 2 R. 223, 68 L. T. 595; 41 W. R. 177.—C.A. LINDLEY, BOWEN and SMITH, L.J.J.

LINDLEY, L.J.—The rule (Ord. LXV. r. 1) provides that the costs of all proceedings in the S. C. are to be in the discretion of the Court or judge. . . . It does not mean in a case where an estate is being administered by the Court, that the costs of an independent proceeding which is only incidentally connected with the administration are to be in the discretion of the judge who is administering the estate. Although such costs are costs in relation to the action in which they are incurred, the moment a trustee comes to the Court of administration, and asks that such costs shall be allowed out of the trust estate, they cease to be costs, and become charges and expenses. . . . They are no longer costs in the discretion of the Court. I should have thought on principle that this was plain, had it not been for the case of *Charles v. Jones*. The distinction I have taken between costs in the discretion of the Court under sect. 49 [of the Judicature Act, 1873], and charges and expenses was pointed out in *In re Chennell*, where it was held that an appeal lay from an order allowing a trustee certain charges and expenses. . . . *Charles v. Jones* looked at first as though it were a decision the other way; but a closer examination of that case shows that it is not so. . . . It is true that there is a passage in the judgment of Cotton, L.J., which looks as if some question had been raised as to charges and expenses as distinguished from costs; but I think the point before us was not really before the C. A. in that case, and was not involved in the decision of the Court. . . . The ambiguity which that case presented when first looked at has been removed by examining the entry in the registrar's books of the actual orders made by Bacon, V.-C., and the C. A. from which it appears that the orders contain no mention of charges and expenses. . . .—pp. 235, 236.

The City of Manchester (1880) 49 L. J. P. 81; 5 P. D. 221; 42 L. T. 521; 4 Asp. M. C. 412.—C.A., *followed on one point*.

Charles v. Jones, not followed.

Bew v. Bew (1899) 68 L. J. Ch. 657; [1899] 2 Ch. 467; 81 L. T. 284; 48 W. R. 124.—C.A. LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.J.

LINDLEY, M.R. (for the Court).—*The City of Manchester* was not cited in *Charles v. Jones*, and the view expressed by Cotton, L.J. [in the latter case] is this: "Even if the judge did not 'exercise his discretion,' if it is a case in which the Act leaves the costs to the discretion of the judge, it takes away the power of this Court to entertain an appeal from his decision." If *The City of Manchester* had been before the Court he would probably not have expressed himself in quite those terms; but it is obvious that the two views cannot stand together, and the conclusion which we have arrived at is that the interpretation put upon the section in *The City of Manchester* is the right one—that is, if the costs are

in the discretion of the judge, the Court of Appeal will assume that the judge has exercised his discretion, unless it is satisfied that he has not done so, but has applied some rule which in fact excluded his discretion.—p. 659.

Charles v. Jones, *approved*.

Chennell, In re, Jones v. Chennell (1878) 47 L. J. Ch. 583; 8 Ch. D. 492; 38 L. T. 494; 26 W. R. 595.—C.A., *disapproved*.
Bew v. Bew (1899).—C.A. LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.J.

LINDLEY, M.R. (for the Court).—There is a discrepancy between *Charles v. Jones* and *Chennell, In re*. . . . In *Chennell, In re*, the Court, in the language of Sir George Jessel, M.R., laid down that an appeal without leave would lie where the order included trustees' charges and expenses in the costs of the action—that is, if the three things were included in the order together, an appeal would lie as to the costs of the action only, without reference to the question whether there was anything else in the order which was open to objection. That is inconsistent with *Charles v. Jones*, and on that point we think that *Charles v. Jones* ought to be followed. You cannot have an appeal as to costs by invoking in and another part of the order as to which there is no complaint. On that we adopt the view of Cotton, L.J., in *Charles v. Jones*—that is, you cannot appeal as to costs only if there is nothing wrong with the order as to charges and expenses.—p. 659.

Chennell, In re, Jones v. Chennell, *explained*.

Pain v. Bowden (1896) 65 L. J. Q. B. 530; [1896] 2 Q. B. 301; 75 L. T. 102; 45 W. R. 48.—CAVE and WILLS, J.J.

CAVE, J.—It was never intended in *Chennell, In re, Jones v. Chennell*, to lay down that, because certain costs [namely, the costs of a trustee] were not in the discretion of the judge, therefore they should not be taxed at all.

COUNTY COURT.

1. JURISDICTION.

Beard v. Knight (1858) 8 E. & B. 865; 27 L. J. Q. B. 359; 4 Jur. (N.S.) 782; 6 W. R. 226; and **Foulger v. Taylor** (1860) 5 H. & N. 202; 29 L. J. Ex. 154; 1 L. T. 481; 8 W. R. 279, *distinguished*.
Hughes v. Smallwood (1890) 59 L. J. Q. B. 503; 25 Q. B. D. 806; 63 L. T. 198; 85 J. P. 182.—COLERIDGE, C.J. and WILLS, J.

Bailey v. Bryant (1858) 5 Jur. (N.S.) 468; 28 L. J. Q. B. 86; 1 El. & El. 340, *disented from*.

Butler v. Ablewhite (1859) 28 L. J. C. P. 292; 6 C. B. (N.S.) 740; 5 Jur. (N.S.) 1268; 7 W. R. 583.

CROWDER, J. (for the Court).—We regret to say that, after the fullest consideration, and with the greatest deference and respect for the opinion of the Court of Queen's Bench, we find ourselves compelled to arrive at a different conclusion.

Bourne v. S. E. Ry. (1855) 26 L. T. (o.s.) 60, 196, *disapproved*.
Shiels v. G. N. Ry. (1861) 30 L. J. Q. B. 331; 7 Jur. (N.S.) 631; 4 L. T. 479; 9 W. R. 739.
 HTLE, J.—I cannot treat, therefore, the expression of opinion reported in the note referred to as anything more than a mere *obiter dictum*, and not as a judgment of the Court.—p. 632.

Shiels v. G. N. Ry., *affirmed*.
Brown v. L. & N. W. Ry. (1863) 32 L. J. Q. B. 318; 4 B. & S. 326; 10 Jur. (N.S.) 234; 11 W. R. 884.

Buckley v. Hann (1850) 19 L. J. Ex. 151; 5 Ex. 43; 7 D. & L. 183; 14 Jur. 226; and **Sangster v. Kay** (or Cave) (1850) 19 L. J. Ex. 814; 5 Ex. 386; **S. C. nom. Glennie v. Delmar**, 1 L. M. & P. 402, *followed*.
Graham v. Lewis (1888) 58 L. J. Q. B. 117; 22 Q. B. D. 1; 37 W. R. 73; 53 J. P. 116.—C.A.
ESHER, M.R., FRY and LOPES, L.JJ.

Corbett v. General Steam Navigation Co. (1859) 4 H. & N. 482; 28 L. J. Ex. 214; 7 W. R. 498, *distinguished*.
La Bourgoigne (1898) 68 L. J. P. 9; [1899] P. 1; 79 L. T. 331; 8 Asp. M. C. 462.—C.A.
SMITH and COLLINS, L.JJ.; *affirmed*, 98 L. J. P. 104; [1899] A. C. 431; 80 L. T. 845; 8 Asp. M. C. 550.—L. (S). **LORDS HALSBURY, L.C., MAGNAGHTEN, MORRIS and SHAND.**

Walesby v. Gouldstone (1866) 35 L. J. C. P. 302; 1 L. R. 1 C. P. 567; 12 Jur. (N.S.) 873; 14 L. T. 662; 14 W. R. 899, *followed*.
Perceval v. Pedley (1887) 18 Q. B. D. 635; 35 W. R. 566.—**MATHEW and CAVE, JJ.**, *considered and distinguished*.
Hubbard v. Goodley (1890) 59 L. J. Q. B. 285; 25 Q. B. D. 166; 62 L. T. 736; 88 W. R. 639.—**HUDDLESTON, B. and GRANTHAM, J.**

Perceval v. Pedley, *followed*.
Hubbard v. Goodley, *not followed*.
Lovejoy v. Cole (1894) 64 L. J. Q. B. 120; [1894] 2 Q. B. 861; 10 R. 482; 71 L. T. 374; 43 W. R. 48.—**HAWKINS and LAWRENCE, JJ.**

Grimbly v. Aykroyd (1847) 1 Ex. 479; 3 D. & L. 701; 17 L. J. Ex. 157; 12 Jur. 357, *referred to*.
James v. Evans & Co. (1897) 66 L. J. Q. B. 742; [1897] 2 Q. B. 180; 77 L. T. 78; 45 W. R. 654; 61 J. P. 631.—**HAWKINS and WRIGHT, JJ.**

Crowley v. Vitty (1852) 7 Ex. 319; 21 L. J. Ex. 135, *disapproved*.
Harrington (Earl) v. Ramsay (1853) 8 Ex. 879; 22 L. J. Ex. 326; 17 Jur. 1029; 1 W. R. 456; **S. C.** 2 El. & Bl. 669; 22 L. J. Ex. 460; 1 W. R. 470.
CAMPBELL, C.J.—In **Crowley v. Vitty**, Parke, B. is reported to have said (21 L. J. Ex. 136): "The County Court has no jurisdiction if the rent is above 50L." But the question we have to consider was not much discussed there, and the distinction between *rent* and *value* was taken. In **Featon v. Norrell** (an earlier case) (5 D. & L. 445; 13 Jur. 325) Patteson, J. declared himself to be of the contrary opinion; and to this opinion, upon a motion for a prohibition in this very case, the judges of the Court of Exchequer unanimously adhered, after time

taken to consider. I therefore come to the conclusion that the County Court has jurisdiction, and that this rule for a prohibition ought to be discharged. My brother Erle has seen this judgment, and entirely agrees with it.

CROMPTON, J. dissented from the above, preferring to follow the later case of **Crowley v. Vitty**.

Harrington (Earl) v. Ramsay and Friend v. Shaw (1887) 57 L. J. Q. B. 227; 20 Q. B. D. 374; 58 L. T. 89; 36 W. R. 236; 52 J. P. 438.—**WILLS and GRANTHAM, JJ.**
See now County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 138.

Thompson v. Ingham (1850) 19 L. J. Q. B. 189; 14 Q. B. 710; 14 Jur. 429.—Q.B., *explained*.
Baker, Ex parte (1857) 26 L. J. M. C. 155; 2 H. & N. 219; 3 Jur. (N.S.) 514.—**EX.**

Hawkins v. Butcher (1891) 61 L. J. Q. B. 146; [1892] 1 Q. B. 668; 40 W. R. 238.—**COLERIDGE, C.J. and SMITH, J.**, *considered*.
Howarth v. Sutcliffe (1895) 64 L. J. Q. B. 729; [1895] 2 Q. B. 358; 14 R. 722; 73 L. T. 277; 44 W. R. 33; 59 J. P. 678.—C.A. **KAY and SMITH, L.JJ.**

Stolworthy v. Powell (1886) 55 L. J. Q. B. 228; 54 L. T. 795.—**MATHEW and SMITH, JJ.** *doubted*.
Bassano v. Bradley (1896) 65 L. J. Q. B. 479; [1896] 1 Q. B. 645; 74 L. T. 553; 44 W. R. 578.—**RUSSELL, C.J. and WRIGHT, J.**
RUSSELL, C.J.—I should desire very seriously to consider that decision before assenting to it; and I do not pray it in aid in deciding the present case.

2. TRANSFER OF ACTIONS FROM HIGH COURT.

Osborne v. Homburg (1875) 45 L. J. Ex. 65; 1 Ex. D. 48; 33 L. T. 534; 24 W. R. 161, *approved and followed*.
Foster v. Usherwood (1877) 47 L. J. Ex. 30; 3 Ex. D. 1; 37 L. T. 389; 26 W. R. 94.—C.A.

Foster v. Usherwood, *referred to*.
Gray v. Hopper (1888) 57 L. J. Q. B. 505; 21 Q. B. D. 246; 59 L. T. 286; 36 W. R. 746.—C.A.
ESHER, M.R. and LINDLEY, L.J.

Foster v. Usherwood, *followed*.
Gray v. Hopper (1888) 57 L. J. Q. B. 505; 21 Q. B. D. 246; 59 L. T. 286; 36 W. R. 746.—C.A. **ESHER, M.R. and LINDLEY, L.J.**, *referred to*.
Hodgson v. Bell (1890) 59 L. J. Q. B. 231; 24 Q. B. D. 525; 62 L. T. 461; 38 W. R. 325.—C.A.
COLERIDGE, C.J., ESHER, M.R. and FRY, L.J.; *reversing* 24 Q. B. D. 302; 54 J. P. 455.

Jones v. James (1850) 19 L. J. Q. B. 257; 1 L. M. & P. 65, *followed*.
Mackay v. Bannister (1885) 55 L. J. Q. B. 106; 16 Q. B. D. 174; 53 L. T. 567; 34 W. R. 121.—**POLLOCK, B. and MANISTY, J.**, *distinguished*.
Mouliet v. Washburn (1886) 54 L. T. 16.
HANNEN, P.—The case was remitted, upon the order of a master, to the County Court for trial, and to this course it is sworn that

the defendant consented. When the case came on for hearing the defendant took a preliminary objection, on which he failed, and the case was adjourned for hearing on the award. The defendant, some time after, moved for a prohibition forbidding the case to be heard in the County Court, on the ground that some of the items in the counter-claim were of an unliquidated character: and he relied upon the recent case of *Mackay v. Bannister*, in which it was held, that an action, although for a sum not exceeding 50*l.*, cannot be remitted, under 19 & 20 Vict. c. 108, s. 26, to the County Court for trial if there be a counter-claim for unliquidated damages. We are bound by that decision, but in my opinion there are facts in this case which did not exist in that, and which clearly distinguish the two. In this case the order remitting the case for trial to the County Court was made by consent, and the defendant appeared in the County Court, and apparently then took objections other than those now relied upon on his behalf. The case of *Jones v. James* seems to me to be directly in point.

Jones v. James, followed.

Moore v. Gamgee (1890) 59 L. J. Q. B. 505; 25 Q. B. D. 244; 38 W. R. 669.—CAVE and SMITH, JJ.

Mackay v. Bannister, distinguished.

Guilford v. Lambeth (1894) 64 L. J. Q. B. 95; [1895] 1 Q. B. 92; 14 R. 86; 71 L. T. 738; 43 W. R. 97.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

ESHER, M.R.—If that decision had been applicable to the section now before us [sect. 65 of the County Courts Act, 1885] we should have had to consider whether we agreed with it. Even if it had been applicable to this section, it would not have been binding on us, and I am disposed to think I should not have agreed with it. But there is no occasion for us to overrule it. It was a decision on another Act of Parliament, which has been repealed, and it is no authority with regard to the construction of the Act now in question.

Jones v. James and Moufset v. Washburn, referred to.

Farquharson v. Morgan (1894) 63 L. J. Q. B. 474; [1894] 1 Q. B. 592; 9 R. 202; 70 L. T. 152; 42 W. R. 306; 58 J. P. 495.—C.A. LORD HALSBURY, LOPES and DAVEY, L.JJ.

Jones v. James; Moufset v. Washburn, and Moore v. Gamgee, explained.

Alderson v. Palliser (1901) 70 L. J. K. B. 935; [1901] 2 K. B. 883; 85 L. T. 210; 49 W. R. 706.—C.A. WILLIAMS and STIRLING, L.JJ.

Palmer v. Roberts (1873) 29 L. T. 403; 22 W. R. 577, n., followed.

Walsh v. Smith (1874) 80 L. T. 304; 22 W. R. 576.—EX.

Scutt v. Freeman (1877) 46 L. J. Q. B. 173; 2 Q. B. D. 177; 35 L. T. 939; 25 W. R. 251, followed.

Johnson v. Wilson (1882) 46 L. T. 647.—C.A.

Bowles v. Drake (1881) 51 L. J. Q. B. 66; 8 Q. B. D. 325; 45 L. T. 576; 30 W. R. 353.—C.A., distinguished.

Balmforth v. Pledge (1866) 35 L. J. Q. B.

169; L. R. 1 Q. B. 427; 6 B. & S. 425; 12 Jur. (N.S.) 644; 14 L. T. 361, *approved*.
Babbage v. Coubourn (1882) 52 L. J. Q. B. 50; 9 Q. B. D. 235; 46 L. T. 515; 30 W. R. 950.—C.A. BRETT and COTTON, L.JJ.

Keeble v. Bennett (1894) 63 L. J. Q. B. 694; [1894] 2 Q. B. 329; 10 R. 290; 71 L. T. 247; 42 W. R. 539.—CAVE and COLLINS, JJ., *distinguished*.

Bailey v. Watson (1898) 67 L. J. Q. B. 892; [1898] 2 Q. B. 270; 78 L. T. 720.—DAY and LAWRENCE, JJ.

Keeble v. Bennett, approved and followed.

Bailey v. Watson, overruled.

White v. Headland's Patent Electric Storage Battery Co. (1899) 68 L. J. Q. B. 354; [1899] 1 Q. B. 507; 80 L. T. 442; 47 W. R. 273.—C.A. SMITH, CRITTY and COLLINS, L.JJ.

SMITH, L.J.—As to the cases which have been cited to us in my opinion, the decision in *Keeble v. Bennett* was right. In *Bailey v. Watson* the previous case of *Keeble v. Bennett* was distinguished on the ground that in the first-mentioned case there was a judgment in the High Court for a certain amount and also for costs. In my opinion this makes no difference.—p. 356.

White v. Headland's Patent Electric Storage Battery Co., followed.

Wright v. Bull (1900) 69 L. J. Q. B. 529; [1900] 2 Q. B. 124; 82 L. T. 568.—RIDLEY and DARLING, JJ.

Armitage v. Fison (1892) 67 L. T. 415.—DAY and CHARLES, JJ., overruled.

White v. Cohen (1893) 62 L. J. Q. B. 274; [1893] 1 Q. B. 580; 4 R. 352; 68 L. T. 305; 41 W. R. 396.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

LINDLEY, L.J. (for the Court).—Again it was urged that the costs referred to in sect. 116 were not all the costs of the action, but only those incurred in the High Court, and that in a case brought in the High Court and ordered to be tried in the County Court, under sect. 65, the plaintiff might lose the costs incurred by him in the High Court, and yet recover the costs incurred by him in the County Court. For this construction reliance was placed on *Armitage v. Fison & Co.* With deference to the learned judges who decided that case, we think the language of sect. 116, if it applies at all, is too clear and unambiguous to be confined to part only of the plaintiff's costs. In the cases to which the section applies, if the plaintiff recovers less than 20*l.* in an action founded on contract, the section says "he shall not be entitled to any costs of the action," unless he gets such a certificate as is afterwards mentioned, and which in an action ordered to be tried in a County Court, under sect. 65, the plaintiff cannot get. For these reasons, we are of opinion: first, that the rules laid down in clauses 1 and 2 of sect. 116, depriving a plaintiff of costs, wholly or partially, are applicable to all actions brought in the High Court which might have been brought in the County Court, whether tried in the High Court, or ordered to be tried in the County Court under sect. 65; and secondly, that those rules apply to all the costs of such action, and not only to so much of them as in a case, ordered to be tried in the County Court have been incurred antecedently to such order.—p. 277.

Bydell v. Millar (1891) 60 L. J. Q. B. 261; 64 L. T. 299; 39 W. R. 335.—CAVE and WILLIAMS, *Jr.*, *approved*.
Cubson v. Mayo (1896) 65 L. J. Q. B. 267; [1896] 1 Q. B. 246; 74 L. T. 65; 44 W. R. 473; 60 J. P. 212.—C.A. **ESHER, M.R., LOPES and RIGBY, L.JJ.**

Counsel v. Garvie (1871) Ir. R. 5 C. L. T. 74, *commented on*.
Lea v. Parker (1884) 54 L. J. Q. B. 38; 13 Q. B. D. 885; 33 W. R. 101.—C.A. **BRETT, M.R., BOWEN and FRY, L.JJ.**

BRETT, M.R.—I cannot agree with the test suggested by Whiteside, C.J., in *Counsel v. Garvie*, that the term "viable means" means "tangible means," or with the argument that it means "means which can be made available to execution or attachment." That meaning is, in my opinion, too narrow.—p. 840.

BOWEN, L.J. to the same effect.

Welby v. Buhl (1878) 3 Q. B. D. 80; 37 L. T. 640; 26 W. R. 211 (*affirmed infra*), *followed*.
Driscoll v. King (1889) 49 L. T. 599; 32 W. R. 370.

Welby v. Buhl (1878) 47 L. J. Q. B. 151; 3 Q. B. D. 253; 38 L. T. 115; 26 W. R. 300. C.A. **BRAMWELL, BRETT and COTTON, L.JJ.**, *followed*.
De Errico v. Samuel (1896) 65 L. J. Q. B. 197; [1896] 1 Q. B. 163; 73 L. T. 680; 44 W. R. 356.—C.A. **SMITH and RIGBY, L.JJ.**

3. PRACTICE.

Carter v. Rigby (1896) 65 L. J. Q. B. 537; [1896] 2 Q. B. 113; 74 L. T. 744; 44 W. R. 566; 60 J. P. 581.—C.A. **ESHER, M.R., KAY and SMITH, L.JJ.**; *overruled* by County Court Rules, 1889, Ord. III. r. 1a.

Steavenson v. Berwick Corporation (1841) 1 Q. B. 154; 4 P. & D. 546; 1 Arn. & H. 265, *followed*.

Hennell v. Davies (1893) 62 L. J. Q. B. 220; [1893] 1 Q. B. 367; 5 R. 209; 68 L. T. 220; 41 W. R. 284.—COLERIDGE, C.J. and **CHARLES, J.**

Fletcher v. Baker (1874) 43 L. J. Q. B. 112; L. R. 9 Q. B. 370; 30 L. T. 675; 22 W. R. 646, *followed*.

Reg. v. Leeds County Court Registrar (1886) 55 L. J. Q. B. 365; 16 Q. B. D. 691; 54 L. T. 873; 34 W. R. 487.—**MATHEW and SMITH, JJ.**

Reg. v. Harwood (1853) 22 L. J. Q. B. 127; 1 B. C. C. 144; 17 Jur. 87; 1 W. R. 195, *followed*.

Ford v. Taylor (1877) 47 L. J. C. P. 116; 3 C. P. D. 21; 37 L. T. 431; 26 W. R. 170.—D.

Andrews v. Marris (1841) 1 Q. B. 3; 10 L. J. Q. B. 225, *distinguished*.
Dews v. Ryley (1851) 2 L. M. & P. 544; 11 C. B. 434; 20 L. J. C. P. 464; 15 Jur. 1150.

Dews v. Ryley and Reg. v. Rowland (1858) 1 F. & F. 72, *not followed*.
Stonor v. Fowle (1887) 57 L. J. Q. B. 387; 13 App. Cas. 20; 58 L. T. 1; 36 W. R. 742; 52 J. P. 228.—H.L. (E.).

Copeman v. Gladden (1851) 13 Jur. 90.—EX., *overruled*.
Moreton v. Holt (1855) 24 L. J. Ex. 169; 10 Ex. 707; 1 Jur. (N.S.) 215; 3 C. L. R. 348; 3 W. R. 207.—EX.

Rogers v. Whiteley (1892) 61 L. J. Q. B. 612; [1892] A. C. 118; 66 L. T. 303.—H.L. (E.), *held applicable*.

Yates v. Terry (1900) 70 L. J. Q. B. 24; [1891] 1 Q. B. 102; 83 L. T. 415; 49 W. R. 112.—**LAWRANCE and KENNEDY, JJ.**; *reversed*, (1902) 71 L. J. K. B. 282; [1902] 1 K. B. 527; 86 L. T. 133; 50 W. R. 293.—C.A. **COLLINS, M.R., ROMER and MATHEW, L.JJ.**

KENNEDY, J.—It seems to me that there is no substantial distinction in form between the garnishee summons or order of the County Court and the garnishee order of the High Court, upon which a binding interpretation has been placed by *Rogers v. Whiteley*.—p. 25.

Reg. v. Fletcher (or **Reg. v. Surrey County Court Judge**) (1852) 21 L. J. Q. B. 310; 2 E. & B. 279; 17 Jur. 179. *See* *Ann County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 105.

Berkeley v. Elderkin (1853) 1 E. & B. 805; 22 L. J. Q. B. 281; 17 Jur. 1153; 1 W. R. 305, *approved*.

Reg. v. Essex County Court Judge (1887) 56 L. J. Q. B. 315; 18 Q. B. D. 704; 57 L. T. 643; 35 W. R. 511; 51 J. P. 649.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**; *reversing* (1887) 56 L. J. Q. B. 315; 18 Q. B. D. 638.—**MATHEW and CAVE, JJ.**

Reg. v. Shropshire County Court Judge (1887) 57 L. J. Q. B. 143; 20 Q. B. D. 242; 58 L. T. 86; 36 W. R. 476.—**POLLOCK, B. and HAWKINS, J.**; and **Reg. v. Essex County Court Judge, distinguished**.
Watson v. White (1896) 65 L. J. Q. B. 492; [1896] 2 Q. B. 9; 74 L. T. 702; 44 W. R. 525.—**RUSSELL, C.J. and WILLIS, J.**

Dakins Ex parte Swann v. Dakins (1855) 16 C. B. 77; 3 C. L. R. 602; 24 L. J. C. P. 131; 1 Jur. (N.S.) 378, *referred to*.
Bailey v. Plant (1900) 70 L. J. Q. B. 63; [1901] 1 Q. B. 31; 83 L. T. 459; 49 W. R. 103.—C.A. **SMITH, M.R., COLLINS and STIRLING, L.JJ.**

Pitcher v. Bourn (1894) 10 Times L. R. 245.—**MATHEW and COLLINS, JJ.**, *doubted and disapproved*.

Johnstone v. Kiernan (1894) 10 R. 313.—**CAVE and WRIGHT, JJ.**

WRIGHT, J.—As to the case of *Pitcher v. Bourn* . . . there is nothing in the report to show on what ground the judgment really proceeded; and it seems that a fundamental objection to prohibition was never raised at all. A mere error of procedure, where the judge has jurisdiction, is not a ground for prohibition.—p. 316.

Abley v. Dale (1851) 11 C. B. 378; 2 L. M. & P. 433; 15 Jur. 1012, *overruled*.
Copeman v. Rose (1858) 7 EL. & BL. 679; 26 L. J. Q. B. 251; 3 Jur. (N.S.) 866.—Q.B.
[Abley v. Dale—acted upon in Christie, Ex parte (4 EL. & BL. 714); and again, in George

v. Sumers (16 C. B. 539)—although correctly decided on sect. 102 of the 9 & 10 Vict. c. 95, is no longer law, as that section has been repealed.]

McIntosh v. Simpkins (1901) 70 L. J. Q. B. 268; [1901] 1 Q. B. 487; 84 L. T. 21; 49 W. R. 241. —C.A. SMITH, M.R., COLLINS and ROMER, L.J.J.; and **Farguharson v. Morgan** (1891) 63 L. J. Q. B. 474; [1894] 1 Q. B. 552; 9 R. 202; 70 L. T. 152; 42 W. R. 306; 58 J. P. 495. —C.A. LORD HALSBURY, LOPES and DAYEY, L.J.J. applied.

Alderson v. Palliser (1901) 70 L. J. K. B. 935; [1901] 2 K. B. 833; 85 L. T. 210; 49 W. R. 708. —C.A. WILLIAMS and STIRLING, L.J.J.

Durant v. Tomlin (1848) 11 L. T. (o.s.) 267; and **Summers, Ex parte, McKellar v. Summers** (1854) 2 C. L. R. 1284; 48 Jur. 522. See now County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 126.

Tanner, Ex parte, Callum v. Ross, In re (1850) 19 L. J. Q. B. 318; 14 Jur. 696; S. C. nom. **Reg. v. Chilton**, 15 Q. B. 220.

Whitehead v. Procter (1858) 3 H. & N. 532, *disputed from*.

Churchward v. Coleman (1866) L. R. 2 Q. B. 18; 36 L. J. Q. B. 57.

COCKBURN, C.J.—The case of *Whitehead v. Procter* is, no doubt, in point, but the matter was not much considered, no cause having been shown against the rule. I think the Court of Exchequer did not give sufficient weight to the words of the section (sect. 43 of 19 & 20 Vict. c. 108). We have jurisdiction to order the County Court judge to proceed with the hearing, and we have power over the costs of the present application; but we have no jurisdiction to deal with the judge's order relating to the costs in the County Court.—p. 20.

MELLOR and LUSH, JJ. to the same effect.

G. N. Ry. v. Mossop (1855) 17 C. B. 130; 25 L. J. C. P. 22; 2 Jur. (N.S.) 21; 4 W. R. 116, *distinguished*.

Moxon v. London Tramways Co. (or Reg. v. Greenwich County Court Judge) (1888) 60 L. T. 248; 37 W. R. 132.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

LOPES, L.J.—*Mossop v. G. N. Ry.* decided that if a County Court judge has once refused a new trial, he has no power to review his decision. But, in the present case, before the judgment refusing a new trial was drawn up, the application was renewed upon another ground, and the judge then directed that the application should stand over, except as to the grounds upon which he had already decided. There was, therefore, no final determination of the matter upon that occasion. I think that the application upon that ground for a prohibition fails.—p. 250.

Reg. v. Cowper (or Croydon Deputy County Court Judge) (1890) 59 L. J. Q. B. 265; 24 Q. B. D. 533; 62 L. T. 583; 38 W. R. 408.—C.A. FRY, L.J.; ESHER, M.R. *dis-senting; distinguished*.

France v. Dutton (1891) 60 L. J. Q. B. 488; [1891] 2 Q. B. 208; 64 L. T. 799; 39 W. R. 716.

COLERIDGE, C.J.—The circumstances of the

case before us differ widely from those in *Reg. v. Cowper*. We there decided with reluctance that a lithographed signature was insufficient. It is, however, otherwise here, and I am of opinion that the signature of the solicitor by his duly authorised clerk is sufficient.—p. 489.

MATHEW, J. to the same effect.

France v. Dutton (*supra*), *absolute*. See County Court Rules, 1889, Ord. VI. r. 10n.

Lawford v. Partridge (1857) 26 L. J. Ex. 147; 1 H. & N. 621; 3 Jur. (N.S.) 271; 5 W. R. 205. See now County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 114.

Emanuel, In re; Druiff v. Joel (1882) 51 L. J. Q. B. 490; 9 Q. B. D. 408; 30 W. R. 735.—DENMAN, J. and POLLOCK, B., *considered*.

Dool, Longstaffe & Co., In re, Lamond, Ex parte (1888) 57 L. J. Q. B. 503; 21 Q. B. D. 212; 59 L. T. 467.—WILLS and GRANTHAM, JJ.

WILLS, J.—I am clearly of opinion that the County Court Rules, 1886, were intended to meet the difficulty raised by *Druiff & Co. v. Joel, Emanuel & Co.*, and to prevent solicitors engaged in recovering small sums from obtaining from their clients more than the costs allowed as between party and party.—p. 504.

Keighley, In re, Keighley v. Goodman (1850) 19 L. J. C. P. 166; 9 C. B. 338; and **Toby, In re** (1850) 12 Q. B. 694; 19 L. J. Q. B. 508, *overruled in effect*.

Dool, In re, Lamond, Ex parte, *supra*.

Cooper v. Bushbridge (1867) 16 L. T. 5, *discussed*.

Plumb v. Craker (1885) 16 Q. B. D. 40; 55 L. J. Q. B. 116; 55 L. T. 404.

WILLS, J.—I have ascertained, after consulting a high authority, that it is now the practice under Ord. LXV. to exercise an unqualified discretion over costs in administration suits. . . . The case of *Cooper v. Bushbridge* was cited as an authority for the proposition that the old rule in equity must be applied in County Courts. But the attention of Stuart, V.-C. was not called to sect. 88 of 9 & 10 Vict. c. 95. I therefore think that case is not an authority binding upon us.—p. 43.

Worth, In re (1881) 50 L. J. Ch. 262; 18 Ch. D. 521; 44 L. T. 462; 29 W. R. 371.—M.R. See County Courts Act, 1888, s. 118.

4. APPEAL.

Hanmer v. King (1887) 57 L. T. 867; 51 J. P. 804.—SMITH and GRANTHAM, JJ. See now County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120.

Reg. v. Jordan (1888) 36 W. R. 589, *discussed*.

O'Shea v. O'Shea (1890) 59 L. J. P. 47; 15 P. D. 59; 62 L. T. 713; 38 W. R. 874; 17 Cox C. C. 107.—C.A.

Tennant v. Rawlings (1879) 4 C. P. D. 133; 27 W. R. 682, *not followed*.

Mason v. Wirral Highway Board (1879) 48 L. J. Q. B. 679; 4 Q. B. D. 469; 27 W. R. 476.

Barker v. Palmer (1881) 8 Q. B. D. 9; 45 L. T. 480; 30 W. R. 59.—*dictum in followed.*
Sweetland v. Turkish Cigarette Co. (1899) 80 L. T. 472; 47 W. R. 511.—**DARLING** and **CHANNELL, JJ.**

Carr v. Stringer (1858) E. B. & E. 123;
Jacobs v. Dawkes (1887) 56 L. J. Q. B. 446.—**DAY** and **WILLS, JJ.**; **McHardy v. Liprott** (1887) 56 L. J. Q. B. 459; 19 Q. B. D. 151.—**COLERIDGE, C.J.** and **DENMAN, J.**; and **Morris v. Lowe** (1885) 34 W. R. 45.—**COLERIDGE, C.J.** and **MATHEW, J.**, *held overruled as to appeals from interlocutory orders.*
Dingor v. Mathews (1889) 65 L. T. 748, n.—**COLERIDGE, C.J.** and **MATHEW, J.**

Carr v. Stringer, adopted.
The Cashmere (1890) 59 L. J. P. 57; 15 P. D. 121; 62 L. T. 814; 38 W. R. 628; 6 Asp. M. C. 515.—**HANNEN, P.** and **BUTT, J.**

Carr v. Stringer; Jonas v. Long (1888) 57 L. J. Q. B. 298; 20 Q. B. D. 564; 58 L. T. 787; 36 W. R. 315; 52 J. P. 468.—**C.A.**; and **The Cashmires, followed.**
Carruthers v. Fisher, L. J. Notes of Cases (1889) p. 135; **Dingor v. Mathews**; and **Murtagh v. Barry** (1890) 59 L. J. Q. B. 388; 24 Q. B. D. 632; 38 W. R. 526.—**COLERIDGE, C.J.** and **MATHEW, J.**, *not followed*
How v. L. & N. W. Ry. (1891) 61 L. J. Q. B. 368; [1891] 2 Q. B. 496; 66 L. T. 398; 40 W. R. 44; 56 J. P. 56.—**CAVE** and **CHARLES, JJ.**

Carr v. Stringer and Jacobs v. Dawkes (*supra*), *held overruled.*
Dingor v. Mathews, followed.
How v. L. & N. W. Ry., disapproved.
Pole v. Bright (1891) 61 L. J. Q. B. 139; [1892] 1 Q. B. 603; 65 L. T. 748; 40 W. R. 95.—**MATHEW** and **SMITH, JJ.**
SMITH, J.—It cannot be doubted that in **Dingor v. Mathews** (88 L. T. Jo. 139) a Divisional Court held that an appeal lay from the refusal of a County Court judge to grant a new trial . . . but it was said that **Cave, J.** and **Charles, J.**, had given a contrary opinion in **How v. L. & N. W. Ry.** But it was not competent to those learned judges to give a decision contrary to the case I have mentioned which was cited to them; and though it appears that they expressed a doubt whether an appeal lies from the refusal to grant a new trial, that expression was only an *obiter dictum*, which seems to me to have been founded on a misapprehension of what the decision in **Dingor v. Mathews** actually was.—p. 141.

Collis v. Lewis (1887) 57 L. J. Q. B. 167; 20 Q. B. D. 202; 57 L. T. 716; 36 W. R. 472.—**WILLS** and **GRANTHAM, JJ.**; *overruled* by County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120.

Clarkson v. Musgrave (1882) 51 L. J. Q. B. 325; 9 Q. B. D. 386; 31 W. R. 47.—**FIELD** and **CAVE, JJ.**, *approved.*
Smith v. Baker (1891) 60 L. J. Q. B. 683; [1891] A. C. 325; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660.—**H.L. (E.).**

Smith v. Baker (*supra*), *followed.*
Woblgemuth v. Coste (1899) 68 L. J. Q. B.

373; [1899] 1 Q. B. 501; 80 L. T. 529.—**LAWRANCE** and **CHANNELL, JJ.**

Jonas v. Adams (1851) 20 L. J. Q. B. 397, *overruled.*
 County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 122; R. S. C. (1883) Ord. LIX r. 16; *see* **Amos v. Duffy** (1890) 6 Times L. R. 339.—**C.A.**; **Whitley v. Holloway** (1890) 6 Times L. R. 353.—**C.A.**

London v. Roffey (1877) 47 L. J. Q. B. 16; 3 Q. B. D. 6. 26 W. R. 79.—**COCKBURN, O.J.** and **MELLOR, J.**, *approved.*
Davis v. Godbehere (1879) 48 L. J. Ex. 440; 4 Ex. D. 215; 40 L. T. 358; 27 W. R. 485.—**C.A.**
BRETT and **COTTON, L.JJ.**

London v. Roffey, approved.
Shapcott v. Chappell (1883) 53 L. J. Q. B. 77; 12 Q. B. D. 58; 82 W. R. 183.—**COLERIDGE, C.J.**, **STEPHEN** and **MATHEW, JJ.**

Shapcott v. Chappell (*supra*), *questioned.*
Mathews v. Ovey (1884) 53 L. J. Q. B. 439; 13 Q. B. D. 403; 50 L. T. 776.—**C.A.**
BRETT, M.R.—In **Shapcott v. Chappell** it was held that rule 6 of that Ord. XXXIX. applied to appeals from County Courts, and it seems to me that if rule 3 is not applicable it follows that rule 6 does not apply, and the decision in that case was wrong—p. 405. [He then proceeds carefully to analyse the various rules and orders.] . . . It follows that we cannot agree with the decision of the Divisional Court in the present case, nor with the judgment in **Shapcott v. Chappell**. . . . As to **Shapcott v. Chappell**, I will not bind myself to say that in some way or other the principle applied there might not properly be applied, but I am clearly of opinion that the Court could not properly apply Ord. XXXIX. r. 6.—p. 407.
BOWEN, L.J.—I agree with the Master of the Rolls that the decision in **Shapcott v. Chappell** must be shaken; as to whether it could possibly be distinguished in any way I reserve my opinion until the question arises.—p. 408.

Mathews v. Ovey. *See now* R. S. C. (1883) Ord. LIX. r. 7.

Reg. v. Kettle (1886) 55 L. J. Q. B. 470; 17 Q. B. D. 761; 54 L. T. 875; 34 W. R. 776.—**WILLS** and **GRANTHAM, JJ.**, *discussed.*

Wilkinson v. Jagger (1887) 57 L. J. Q. B. 254; 20 Q. B. D. 423; 58 L. T. 487; 36 W. R. 169; 52 J. P. 533.—**WILLS** and **GRANTHAM, JJ.**

Reg. v. Kettle, explained.
Cusack v. L. & N. W. Ry. (1891) 60 L. J. Q. B. 208; [1891] 1 Q. B. 347; 64 L. T. 43; 39 W. R. 244; 55 J. P. 341.—**C.A.** **ESHER, M.R.**, **BOWEN** and **FRY, L.JJ.**

Wilkinson v. Jagger (*supra*). *See* Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6).

Stone v. Dean (1858) E. B. & E. 504; 27 L. J. Q. B. 319; 4 Jur. (N.S.) 534; 6 W. R. 602; **Waterton v. Baker** (1868) 37 L. J. Q. B. 65; L. R. 3 Q. B. 173; 17 L. T. 468; 16 W. R. 358; 9 B. & S. 23; and **Park Gate Iron Co. v. Coates** (1870) 39

L. J. C. P. 817; L. R. 5 C. P. 634; 22 L. T. 658; 18 W. R. 928, *considered and approved*
 Dowdeswell v. Francis (or Francis v. Dowdeswell) (1874) 43 L. J. C. P. 248; L. R. 9 C. P. 423; 30 L. T. 607; 22 W. R. 753.

Griffin v. Coleman (1859) 4 H. & N. 265; 28 L. J. Ex. 134, *followed*.
 Walters v. Coghlan (1872) 42 L. J. Q. B. 20; L. R. 8 Q. B. 61; 27 L. T. 712; 21 W. R. 444.

Gee v. Lancashire and Yorkshire Ry., dis-sented from.
 L. & N. W. Ry. v. Grace (1857) 2 C. B. (N.S.) 555, *explained*.

Schroder v. Ward (1863) 32 L. J. C. P. 150; 13 C. B. (N.S.) 410; 9 Jur. (N.S.) 1056; 7 L. T. 825; 11 W. R. 427.—C.P.

WILLES, J. (for ERLE, C.J., WILLIAMS, J., KEATING, J. and himself).—There is a decision in the Court of Ex. *Gee v. Lancashire and Yorkshire Ry.*, in which the Court of Ex. held, in a similar case, that on an appeal from the decision of a County Court judge, on the ground of misdirection, the appellant, if successful, was not entitled to costs. It is in consequence of this decision that we have taken time to consider this question, but we think that the appellant is entitled to his costs. We do not think that there is, for this purpose, any analogy between the case of a new trial obtained by reason of the misdirection of a judge in an action brought in one of the superior Courts, and an appeal from a County Court on the ground of misdirection. In the former case, no doubt, the party who succeeds in obtaining the rule absolute gets no costs; but that depends entirely on the practice founded on the statutes which give costs to the successful party in actions brought in the superior Courts. It has been held that, where the judgment below is reversed in a Court of error, inasmuch as the judgment is not given for the defendant, but merely that the plaintiff, *nil capiat per breve*, these statutes are not applicable. And when the practice of moving for a new trial on the ground of misdirection was substituted for that of tendering a bill of exceptions, the Courts of Westminster Hall felt bound by analogy to this course of practice not to allow costs to the party who succeeded in obtaining a rule absolute for a new trial. But this in no way applies to appeals from the decision of a County Court judge on the ground of misdirection in which it is entirely in our discretion to make such order with respect to costs as we think proper. Already, in this Court, it has been held that the successful party is entitled to the costs of the appeal. . . . The only exception that appears is *L. & N. W. Ry. v. Grace* (2 C. B. (N.S.) 555), in which there were special circumstances which induced the Court not to grant costs to the successful party. The case as originally sent up was unsatisfactory, and was sent back for amendment. When it came back, it was found that there was no question of law for the opinion of the Court, and therefore it was considered that, though the appeal was dismissed, the respondent was not entitled to costs, the fault being in the judge for so inartificially stating the case in the first instance. This case, therefore, forms no real exception to the general rule.—p. 151.

Gee v. Lancashire and Yorkshire Ry.

(1860) 6 H. & N. 211, 221; 30 L. J. Ex. 11, 18; 6 Jur. (N.S.) 1118; 3 L. T. 328; 9 W. R. 103, *not followed*.
 Conybeare v. Farnes (1859) 39 L. J. Ex. 26; L. R. 5 Ex. 16; 21 L. T. 497.

COURT.

Reg. v. Bolton (1841) 1 Q. B. 66; 4 P. & D. 679; 5 Jur. 1154.—Q.B., *followed*.
Bunbury v. Fuller (1853) 9 Ex. 111; 1 C. L. R. 893; 23 L. J. Ex. 29.—EX. CH., *approved*.

Colonial Bank of Australasia v. Willan (1874) 43 L. J. P. C. 39; L. R. 5 P. C. 417; 30 L. T. 287; 22 W. R. 516.—P.C.

Martin v. Powning (1860) 38 L. J. Ch. 212; L. R. 4 Ch. 356; 20 L. T. 133.—L.J., *approved*.

Riches v. Owen (1868) L. R. 3 Ch. 820; 16 W. R. 1072.—L.J., *distinguished*.

Stone v. Thomas (1870) 39 L. J. Ch. 168; L. R. 5 Ch. 219; 22 L. T. 359; 18 W. R. 385.—L.C.

Fellows v. "Lord Stanley" Owners (1892) [1893] 1 Q. B. 98; 5 R. 115; 67 L. T. 857; 41 W. R. 233; 7 Asp. M. C. 298.—COLLIERIDGE, C.J. and WILLES, J. *See now* Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), ss. 6, 7, 8.

Anon. (1879) 23 Sol. Jour. 404.—C.A., *followed*.

Walker v. Dodds (1887) 57 L. J. Ch. 206; 37 Ch. D. 188; 58 L. T. 291; 36 W. R. 133.—C.A. COTTON, FRY and LOPES, L.JJ.

Wynne v. Hughes (1859) 26 Beav. 377, 383; 28 L. J. Ch. 283; 5 Jur. (N.S.) 163; 7 W. R. 197.—ROMILLY, M.R., *disapproved*.
 Longdendale Cotton Spinning Co. In re (1878) 8 Ch. D. 150; 38 L. T. 776; 26 W. R. 491.—JESSEL, M.R.

Chadwick v. Ball (1885) 54 L. J. Q. B. 396; 14 Q. B. D. 855; 52 L. T. 949.—C.A.

BAGGALLAT and LINDLEY, L.JJ., *followed*.
Whitehead v. Eute (1891) 7 Times L. R. 609.—DENMAN and WILLES, JJ., *approved*.

Payne v. Hogg (1900) 69 L. J. Q. B. 579; [1900] 2 Q. B. 43; 82 L. T. 584; 48 W. R. 417.—C.A. SMITH, COLLINS and ROMER, L.JJ.; *reversing* (1900) 69 L. J. Q. B. 229; 81 L. T. 786.—CHANNELL and BUCKNILL, JJ.

Kutser v. Phillips (1891) 60 L. J. Q. B. 505; [1891] 2 Q. B. 267; 64 L. T. 628; 39 W. R. 526; 56 J. P. 54.—SMITH and GRANTHAM, JJ., *distinguished*.

Reg. v. Croydon County Court Registrar (1894) 11 Times L. R. 19.—MATHEW and CHARLES, JJ., *doubted*.

Felten v. Bower (1900) 69 L. J. Q. B. 351; [1900] 1 Q. B. 598; 82 L. T. 419; 48 W. R. 349.—CHANNELL and BUCKNILL, JJ.

Macnair v. Cathcart (1777) Morr. Dic. pp. 12, 832; **Sanderson v. Geddes** (1874) 1 Court Sess. Cas. 4th series 1198; and **Begg v. Jack** (1875) 3 Court Sess. Cas. 4th series 85, *commented on*.
 Grahame v. Swan (1882) 7 App. Cas. 547.

COVENANT.

Blackwell v. Nash (1735) 1 Strange 335, *questioned*.

Goodison v. Nunn (1792) 4 Term Rep. 761.

KENYON, C.J.—It seems from the case in *Strange* that the judges were surprised at the old decisions, and, in order to get rid of the difficulty, they said that a tender and refusal would amount to a performance; it is true that they went farther, and said that "in consideration of the premises" meant only of the covenant to transfer, and not in consideration of the actual transferring of the stock, but to the latter part of that judgment I cannot accede. It is our duty, when we see that principles of law have been misapplied in any case, to overrule it. The principle is admitted in all the cases alluded to, that, if they be dependent covenants, performance, or the offer to perform, must be pleaded on the one part, in order to found the action against the other. The mistake has been in the misapplication of that principle in the cases cited. And I am glad to find that the old cases have been overruled, and that we are now warranted by precedent as well as by principle to say that this action cannot be maintained.

Boone v. Eyre (1777) 1 H. Bl. 273, n.; 2 R. R. 768, *considered*.

Glazebrook v. Woodrow (1790) 8 Term Rep. 366; 4 R. R. 700.

Furnivall v. Coombes (1843) 5 Man. & G. 786; 6 Scott (N.R.) 522; 12 L. J. C. P. 265; 7 Jur. 309, *approved*.

Williams v. Hathaway (1877) 6 Ch. D. 544.

JESSEL, M.R.—The leading case on the subject is *Furnivall v. Coombes*. There the churchwardens and overseers of a parish covenanted by deed "for themselves and for their successors," with a builder to pay for the repairs of the parish church. Then there was a proviso that nothing in the deed should be taken to extend to any "personal covenant" on the part of several covenantors or their estates in their private capacity, but only on the part of the churchwardens and overseers for the time being. The covenant being a personal covenant, it was held that the effect of the proviso that the covenant should not be a personal covenant was simply to destroy it; the proviso was repugnant to the covenant, and there was no way of reconciling the two things. **TINDAL, C.J.**, in giving judgment, says (at p. 751), "Churchwardens and overseers, though they are by statute a corporate body for some purposes, cannot enter into such a covenant as this in a corporate character; and if not, then the contract must be a personal covenant. If it be, the next question is, what does it bind the defendants to do? At all events it binds them, while they remain in office, to pay." So he contemplates the covenant as a covenant in force while the covenantors remain in office. Then the other judges take the same view, and **CROSSWELL, J.** says (at p. 753), "I am of the same opinion. The defendants first enter into a clear personal covenant, and then they endeavour, by the proviso, to relieve themselves from all personal liability"; not from some liability only, but from all liability. That agrees with what I have already said: a proviso limiting the personal liability under the covenant, that

is, not destroying it, but leaving some personal liability still remaining, is a valid proviso: it is all incorporated into the covenant.—p. 549.

Faulkner v. Lowe (1818) 2 Ex. 595, *questioned*.

Aulton v. Atkins (1856) 18 C. B. 249; 25 L. J. C. P. 229; 2 Jur. (N.S.) 512; 4 W. R. 592.

Raeleigh v. S. E. Ry. (1851) 10 C. B. 612, *commented on*.

Knight v. Gravesend and Milton Waterworks Co. (1858) 27 L. J. Ex. 73; 2 H. & N. 6.

CHANNELL, B.—That case went to error, and the Court entertained great doubt on the point, and recommended the parties to compromise, which they did.—p. 75.

Wakefield v. Brown (1846) 9 Q. B. 209; 15 L. J. Q. B. 373; 10 Jur. 853, *followed*.

Magnay v. Edwards (1853) 13 C. B. 179; 1 C. L. R. 141; 22 L. J. C. P. 170, 17 Jur. 839.

CRIMINAL LAW.

1. PERSONS, LIABILITY OF.
2. OFFENCES AGAINST PROPERTY OF INDIVIDUALS.
3. OFFENCES AGAINST PERSONS OF INDIVIDUALS.
4. CONSPIRACY.
5. OFFENCES AGAINST KING AND GOVERNMENT.
6. OFFENCES AGAINST PUBLIC JUSTICE.
7. OFFENCES AGAINST PUBLIC PEACE.
8. OFFENCES AGAINST PUBLIC MORALS AND POLICE.
9. PROCEDURE AND PRACTICE.

1. PERSONS, LIABILITY OF.

Holman v. Johnson (1775) 1 Cowp. 341, *dictum considered*.

Colburn v. Patmore (1834) 1 C. M. & R. 73; 4 Tyr. 677; 3 L. J. Ex. 317, *distinguished*.

Campbell v. Campbell (1840) 7 Cl. & F. 166; MacL. & R. 387; 12 Shaw 870; **Shackell v. Rosier** (1836) 2 Bing. (N.C.) 634; 2 Hodges 17; 3 Scott 59; 5 L. J. C. P. 193; **Cundy v. Lezoeq** (1884) 53 L. J. M. C. 125; 13 Q. B. D. 207; 51 L. T. 265; 82 W. R. 769.—**STEPHEN** and **MATTHEW, JJ.**; and **Reg. v. Bishop** (1880) 49 L. J. M. C. 45; 5 Q. B. D. 259; 42 L. T. 240; 28 W. R. 475; 14 Cox C. C. 404; 44 J. P. 330.—C.C.R., *referred to*.

Burrows v. Rhodes (1899) 68 L. J. Q. B. 545; [1899] 1 Q. B. 816; 80 L. T. 591; 48 W. R. 13; 63 J. P. 532.—**GRANTHAM** and **KENNEDY, JJ.**

Reg. v. Daniell (1703) 6 Mod. 99, *disapproved*.

Rex v. Higgins (1801) 2 East 5; 6 R. R. 358.

2. OFFENCES AGAINST PROPERTY OF INDIVIDUALS.

Burglary and Housebreaking.

Reg. v. Smith (1888) 2 M. & Rob. 115, *questioned*.

Reg. v. Andrews (1841) Car. & M. 121.

COLERIDGE, J.—[I had occasion to mention this case (*Reg. v. Smith*) to my brother Patterson, and he seemed to think the decision was incorrect. I think the present indictment is sufficient.

Embezzlement.

Rex v. Whittingham (1801) 2 Leach C. C. 912, *dictum questioned*.

Reg. v. Hawkins (1850) 1 Den. C. C. 584; T. & M. 328, 14 Jur. 513; 4 Cox C. C. 224.

[*Dictum*: "If a servant received money either from the master, or from a third person on the master's account, he was guilty of embezzlement."]

WILDE, C.J.—The *dictum* must be associated with some facts which do not appear in the report of the case.—p. 588.

Reg. v. Sampson (1846) 1 Cox C. C. 355; and **Reg. v. Carpenter** (1866) 35 L. J. M. C. 169; L. R. 1 C. C. 29; 12 Jur. (N.S.) 380; 14 L. T. 572; 14 W. R. 773; 10 Cox C. C. 246, *followed*.

Reg. v. Smadiman (1896) 66 L. J. Q. B. 84; [1897] 1 Q. B. 4; 75 L. T. 394; 45 W. R. 249; 18 Cox C. C. 451; 61 J. P. 312.—C.C.R.

Reg. v. Bowers (1866) 35 L. J. M. C. 206; L. R. 1 C. C. 41, 12 Jur. (N.S.) 570, 14 L. T. 671; 14 W. R. 803; 10 Cox C. C. 250.—C.C.R., *discussed*.

Reg. v. Harris (1893) 5 R. 402; 69 L. T. 25; 17 Cox C. C. 656; 87 J. P. 729.—C.C.R.

COLERIDGE, C.J.—It is with some reluctance that I give my judgment in this case, for my common sense is offended by the notion that this man was not a servant. But *Reg. v. Bowers* is a strong authority in favour of the contention raised on behalf of the prisoner. In that case a strong Court of five judges concurred in the judgment, which was delivered by Chief Justice Erle. He says that the cases decide that "a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant within the meaning of the statute." That passage exactly describes the nature of the employment of the prisoner in the present case, and in deference to that decision given as late as 1866 by a Court of co-ordinate jurisdiction with ourselves, I think we are bound to hold that this conviction must be quashed.—p. 403.

Reg. v. Cooper (1874) 43 L. J. M. C. 89; L. R. 2 C. C. 123; 30 L. T. 306; 22 W. R. 555; 12 Cox C. C. 600.—C.C.R., *followed*.

Reg. v. Tatlock (1876) 46 L. J. M. C. 7; 2 Q. B. D. 157; 35 L. T. 520; 13 Cox C. C. 328.—C.C.R.

Reg. v. Portugal (or De Portugal, In re) (1887) 55 L. T. 657; 15 C. C. 100.

MATHEW and SMITH, JJ., *approved and followed*.

Reg. v. Kane (1900) 70 L. J. Q. B. 143; [1901] 1 Q. B. 472; 84 L. T. 240; 65 J. P. 26.—C.C.R.

Reg. v. Glover (1864) 33 L. J. M. C. 169; L. & C. 466; 10 Jur. (N.S.) 710; 10 L. T. 582; 12 W. R. 885; 9 Cox C. C. 590; *an*

Reg. v. Graham (1875) 13 Cox C. C. 67; 32 L. T. 38; 23 W. R. 326.—C.C.R., *disapproved*.

Reg. v. Parsons (1888) 16 Cox C. C. 498.

CAYE, J.—It is clear that the judgment in *Reg. v. Glover* depended upon rule 31 [of the County Court Rules, 1857], as it then stood because the bailiff was then bound to pay the money to the Court; it was not the money *o* the high bailiff, nor was he responsible for it. Now by Ord. II. r. 30 [of the Rules of 1875], the practice is changed, and the high bailiff may order the bailiff to pay the money to him to be paid over to the Court. . . . In the case of *Reg. v. Graham* . . . the prisoner was, with the sanction of the treasury, employed by the inspector of prisons. He was therefore appointed not by the inspector, but by the Secretary of State, and was possessed of such power only as the Secretary of State conferred. . . . Obviously the position of such a person is different from the position of the bailiff in the present case. He is appointed by the high bailiff, who may order him to pay the monies over to the clerk of the Court or to himself direct.—p. 502.

False Pretences.

Reg. v. Woolley (1850) 1 Den. C. C. 559; 5 Car. & K. 98, T. & M. 279; 4 New Nass. Cas. 341, 19 L. J. M. C. 165, 14 Jur. 435; 4 Cox C. C. 193.—C.C.R., *disapproved*.

Reg. v. Oates (1855) Dears. C. C. 459; 3 C. L. R. 661; 24 L. J. M. C. 123; 1 Jur. (N.S.) 429; 3 W. R. 402; 6 Cox C. C. 540.—C.C.R.

Their lordships pointed out that *Reg. v. Woolley* was decided entirely on the facts, and that the form of the indictment was not looked at.—p. 169.

Reg. v. Barnard (1837) 7 Car. & P. 784, *approved*.

Reg. v. Jones (1897) 67 L. J. Q. B. 41; [1898] 1 Q. B. 119; 77 L. T. 503; 46 W. R. 191.—C.C.R.

Reg. v. Larner (1880) 14 Cox C. C. 497, *disapproved*.

Reg. v. Button (1900) 69 L. J. Q. B. 901; [1900] 2 Q. B. 597; 83 L. T. 288; 48 W. R. 708; 64 J. P. 600.—C.C.R.

MATHEW, J.—In my opinion the false pretences were not too remote. The only case cited as an authority against this view is *Reg. v. Larner*, in which the facts were somewhat similar to those in the present case. In that case the common serjeant had to direct the jury what their finding should be on the question of fact whether or not the prisoner had won the prize by false pretences. After consulting Stephen, J., he held that the false pretences were too remote. No reasons are given for this view. The case merely records the impression of the common

Lindley, J. in *Reg. v. Dickenson* (*Times Newspaper*, July 26, 1879), and that opinion is the sound one.—p. 903.

Reg. v. Bell (1871) 12 Cox C. C. 37, *discussed*.

Reg. v. Watkinson (1872) 12 Cox C. C. 271; 26 L. T. 853.—C.C.R., *followed*.

Reg. v. Pierce (1887) 56 L. J. M. C. 85; 56 L. T. 532; 51 J. P. 790; 16 Cox C. C. 213.—C.C.R.

Reg. v. Boulton (1849) 1 Den. C. C. 508; T. & M. 201; 8 New Sess. Cas. 705; 2 Car. & K. 917; 19 L. J. M. C. 67; 13 Jur. 1034; 3 Cox C. C. 576.—C.C.R., *distinguished*.

Reg. v. Kilham (1870) 11 Cox C. C. 561; 39 L. J. M. C. 109; L. R. 1 C. C. 261; 22 L. T. 625; 18 W. R. 957.—C.C.R.

BOVILL, C.J.—In support of the conviction the case of *Reg. v. Boulton* was referred to. There the prisoner was indicted for obtaining by false pretences a railway ticket, with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for the decision do not very clearly appear, but it may be distinguished from the present case in this respect, that the prisoner, by using the ticket for the purpose of travelling on the railway entirely converted it to his own use for the only purpose for which it was capable of being applied.—p. 565.

Reg. v. Reed (1837) 7 Car. & P. 848, *overruled*.

Reg. v. Sherwood (1857) 26 L. J. M. C. 81; 1 Dears. & B. 251; 3 Jur. (N.S.) 547; 5 W. R. 577; 7 Cox C. C. 270.—C.C.R.

CAMPBELL, C.J.—It is true that in the case of *Reg. v. Reed*, under apparently similar facts, a different construction was put upon the Act of Parliament. It was with reference to that decision that the present case was reserved for the consideration of all the judges. I do not know how that case arose; but most likely, if investigated, it would be found to be essentially different from the present. But if it was on all fours with this, I must say I dissent from it, and must consider it overruled.—p. 82.

COCKBURN, C.J.—I think *Reg. v. Reed* cannot now be supported.—p. 83.

Reg. v. Bryan (1857) Dears. & B. 265; 26 L. J. M. C. 84; 3 Jur. (N.S.) 620; 5 W. R. 598; 7 Cox C. C. 312.—C.C.R., *distinguished*.

Reg. v. Ardley (1871) 40 L. J. M. C. 85; L. R. 1 C. C. 301; 24 L. T. 193; 19 W. R. 478; 12 Cox C. C. 23.—C.C.R.

[On the ground that in *Reg. v. Bryan* the representation was as to a mere matter of opinion, whereas in the case under consideration it was as to a matter of fact.]

Reg. v. Johnston (1842) 2 M. C. C. 254.—C.C.R. See Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), s. 3.

Reg. v. Codrington (1825) 1 Car. & P. 661, *questioned*.

Reg. v. Kenrick (1843) 5 Q. B. 49; D. & M. 208; 12 L. J. M. C. 132.

DENMAN, C.J. (for the Court).—The fourth and fifth counts charges directly the obtaining

of the money by false pretences. The evidence was that the defendants, in order to induce the prosecutor to make the contract of purchase, made the false pretences aforesaid respecting the horses sold, and thereby induced him to buy and part with the price. A general question seems here to be raised whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be sustained. Questions approaching this have been raised in the criminal Courts. With some plausibility, the thing obtained through the false pretence may be said to be the contract, and not the money which is obtained in fulfilment of it, and which the party is probably by its terms liable to pay. This was the ground on which my brother Littledale directed an acquittal in *Reg. v. Codrington*. But that decision was lately much doubted by the judges with reference to a case reserved by the recorder of London (*Reg. v. Adamson*, 2 Moo. C. C. 286, seems to be the case referred to). A person who falsely pretended that he was an emigration commissioner thereby induced the prosecutor to enter into a contract with him, and to pay him under it a sum of money. An objection was taken that the verbal representation could not be received in evidence, as the bargain between them was reduced to writing. But the recorder admitted the evidence; and the judges unanimously approved of his decision; and the conviction was held good. Hence it follows that the execution of a contract between the same parties does not secure from punishment the obtaining of money under false pretences in conformity with that contract.—p. 64.

Reg. v. Codrington, *not followed*.

Reg. v. Meakin (1869) 11 Cox C. C. 270.—C.C.R.

Reg. v. Hunter (1867) 10 Cox 642, *form of indictment held bad*.

Reg. v. Douglass (1808) 1 Camp. 212, *followed*.

Reg. v. Sowerby (1894) 63 L. J. M. C. 136; [1894] 2 Q. B. 173; 10 B. 233; 71 L. T. 300; 42 W. R. 608; 58 J. P. 577; 17 Cox C. C. 767.—C.C.R.

Reg. v. Sowerby, *distinguished*.

Reg. v. Silverlock (1894) 63 L. J. M. C. 233; [1894] 2 Q. B. 766; 10 B. 431; 73 L. T. 298; 43 W. R. 14; 18 Cox C. C. 104; 58 J. P. 788.—C.C.R.

MATHEW, J.—*Reg. v. Sowerby* is not in point. There two indispensable averments were absent. It did not appear to whom the representation was made, nor from whom the money was attempted to be obtained. The case is therefore no authority here.—p. 289.

Reg. v. Tulley (1840) 9 Car. & P. 227, *questioned*.

Reg. v. Brown (1847) 2 Cox C. C. 348.

PATTESON, J.—*Tulley's Case* was a peculiar one, and he was not quite sure that case could be supported if carried to a Court of error. There was nothing in the Act of Parliament that made it necessary that the pretence should be made to the same person as the money was obtained from.—p. 352.

Reg. v. Goldsmith (1873) 42 L. J. M. C. 94; L. R. 2 C. C. 74; 28 L. T. 881; 21 W. R.

791; 12 Cox C. C. 479.—C.C.R., *considered*.

Taylor v. Reg. (1894) 64 L. J. M. C. 11; [1895] 1 Q. B. 25; 15 R. 86; 71 L. T. 571; 43 W. R. 24; 18 Cox C. C. 45.—MATHEW and CHARLES, JJ.

Reg. v. Hazzlewood (1888) 48 J. P. 151.—C.C.R., *not followed*.

Reg. v. Sampson (1885) 52 L. T. 772; 49 J. P. 807.—C.C.R.

Reg. v. Francis (1874) 43 L. J. M. C. 97; L. R. 2 C. C. 128; 30 L. T. 503; 22 W. R. 603; 12 Cox C. C. 612.—C.C.R.; and Reg. v. Holt (1860) 30 L. J. M. C. 11; 8 Cox C. C. 411; Bell C. C. 280; 6 Jur. (N.S.) 1121; 3 L. T. 310; 9 W. R. 74.—C.C.R., *considered and applied*.

Reg. v. Rhodes (1898) 68 L. J. Q. B. 83; [1899] 1 Q. B. 77; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774.—C.C.R.

RUSSELL, C.J.—I do not think that our decision conflicts with *Reg. v. Holt*. There the false pretence charged was a distinct and separate transaction, and the fact that the prisoner had subsequently made a similar false pretence had no bearing on his guilt or innocence of the particular charge preferred. *Reg. v. Francis* is nearer to the present case, and, although there it is true that the transaction admitted in evidence was prior to that on which the charge was founded, yet it seems to me that the reasoning of that case will apply here.

Reg. v. Francis (*supra*). See Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (i).

Forgery.

Dunn's Case (1765) 1 Leach C. C. 57, *followed and approved*.

Reg. v. Martin (1879) 49 L. J. M. C. 11; 5 Q. B. D. 34; 41 L. T. 531; 28 W. R. 232; 14 Cox C. C. 375; 44 J. P. 74.—C.C.R.

Reg. v. Vincent (1722) 1 Strange 481, *overruled*.

Rex v. Buttery (1818) R. & R. 342.—C.C.R.

Reg. v. Ritson (1869) 39 L. J. M. C. 10; L. R. 1 C. C. 200; 21 L. T. 437; 18 W. R. 73; 11 Cox C. C. 352.—C.C.R., *referred to*.

Cooper, in re, Cooper v. Vesey (1882) 51 L. J. Ch. 892; 20 Ch. D. 611; 47 L. T. 89. 30 W. R. 618.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ.

Reg. v. Avery (1838) 8 Car. & P. 596, *dictum qualified*.

Reg. v. Tylney (1848) 18 L. J. M. C. 36; 1 Den. C. C. 319; 3 Cox C. C. 160.—C.C.R.

PATTESON, J.—No sentence was passed in *Reg. v. Avery*, because the defendant pleaded guilty to another indictment; but in that case I am reported to have said something too strong about *Reg. v. Smith* (Phil. Evid. 9th ed. p. 171), which is certainly distinguishable from *Reg. v. Avery*.

Reg. v. Cooke (1838) 8 Car. & P. 586, *questioned*.

Reg. v. Brown (1861) 2 Fost. & F. 559.

CROMPTON, J.—I do not see the force of the reasoning upon which *Cooke's Case* was decided;

Reg. v. Page (1837) 8 Car. & P. 122, *held overruled*.

Rex v. Shukard (1811) R. & R. 200.—C.C.R., *distinguished*.

Reg. v. Ion (1852) 2 Den. C. C. 475; 21 L. J. M. C. 166; 16 Jur. 746; 6 Cox C. C. 1.—C.C.R. [Counsel having urged that in *Reg. v. Page* Lord Abinger had decided that, unless there was an attempt to defraud shown, a party could not be convicted.]

ALDERSON, B.—That is overruled. The intent is inferred by law. If a forged instrument is put away in order to get money or credit, that amounts to an uttering.—p. 484.

CAMPBELL, C.J. (for the Court).—*Reg. v. Shukard* is entitled to the highest respect, and upon similar facts we should submit to its authority. But the learned judges there did not proceed upon the distinction that to make the using of a forged negotiable instrument a felonious uttering, the intention of the prisoner must be to gain credit upon it, by making it operate as such. They appear to have thought that there the evidence was not sufficient to show an intention in the prisoner to induce the makekeeper to advance any money, or to give credit upon it to him.—p. 492.

Reg. v. Boulton (1848) 2 Car. & K. 604, *overruled*.

Reg. v. Sharman (1854) Dears. C. C. 285; 23 L. J. M. C. 51; 18 Jur. 157; 2 W. R. 227; 6 Cox C. C. 312.—C.C.R.

JERVIS, C.J.—We think that the view of the law taken in *Reg. v. Boulton* was not a correct one.—p. 288.

Larceny and Receiving.

Cartwright v. Green (1803) 2 Leach C. C. 952; 8 Ves. 405; 7 R. R. 91.—L.C., *followed*.

Merry v. Green (1841) 10 L. J. M. C. 154; 7 M. & W. 623.—EX.

Reg. v. Thurnborn (1849) 1 Den. C. C. 387; T. & M. 67; 2 Car. & K. 831; 18 L. J. M. C. 140; 18 Jur. 499; S. C. *nom.* Reg. v. Wood, 3 Cox C. C. 453; 3 New Sess. Cas. 581.—C.C.R., *followed*.

Reg. v. Christopher (1858) Bell C. C. 27; 28 L. J. M. C. 35; 5 Jur. (N.S.) 24; 7 W. R. 60; 3 Cox C. C. 91.—C.C.R.

[POLLOCK, C.B., WIGHTMAN, WILLIAMS and HILL, JJ., and CHANNELL, B., all held that *Reg. v. Thurnborn* was good law; WILLIAMS, J. adding that, although he agreed with the decision in that case, yet that he had never been able to agree with some of the principles there laid down.]

Reg. v. Thurnborn, *questioned, but held binding*.

Reg. v. Glyde (1868) 37 L. J. M. C. 107; L. R. C. C. 139; 18 L. T. 613; 16 W. R. 1174; 11 Cox C. C. 103.—C.C.R.

COCKBURN, C.J.—The case falls within the rule laid down in *Reg. v. Thurnborn*, by which decision we are bound.

MARTIN, B.—I very much doubt whether the principles laid down in *Thurnborn's Case* are right; but, as in *Reg. v. Christopher* (*supra*), so also in this case, we are bound by it.

that *Thurborn's Case* is not law. At all events, it stands unreversed, and we are bound by it.

Reg. v. McKale (1868) 37 L. J. M. C. 97; L. R. 1 C. C. 125; 18 L. T. 335; 16 W. R. 800; 11 Cox C. C. 82.—*C.C.R.*; and **Reg. v. Buckmaster** (1887) 57 L. J. M. C. 27; 20 Q. B. D. 182; 57 L. T. 720; 36 W. R. 701; 16 Cox C. C. 339, 52 J. P. 853.—*C.C.R.*, *applied*.
Rex v. Harvey (1787) 1 Leach C. C. 467; 2 East P. C. 669. *Distinguished*.
Reg. v. Russell [1892] 2 Q. B. 312; 67 L. T. 124; 40 W. R. 592; 56 J. P. 743.—*C.C.R.*

Reg. v. Brooks (1838) 8 Car. & P. 295, *disentangled from*.
Reg. v. Janson (1849) 4 Cox C. C. 82.
COLERIDGE, J. (after consulting with PARKE, B.).—If *Reg. v. Brooks* is correctly reported we cannot assent to the doctrine there laid down.

Reg. v. McGrath (1869) 39 L. J. M. C. 7; L. R. 1 C. C. 205; 11 Cox C. C. 347; 21 L. T. 543; 18 W. R. 119.—*C.C.R.*, *followed*.
Reg. v. Lovell (1881) 50 L. J. M. C. 91; 8 Q. B. D. 185; 44 L. T. 319; 45 J. P. 407; 30 W. R. 416.—*C.C.R.*

Reg. v. Ashwell (1885) 55 L. J. M. C. 65; 16 Q. B. D. 190; 53 L. T. 773; 34 W. R. 297; 16 Cox C. C. 1; 50 J. P. 181.—*C.C.R.*, *distinguished and discussed*.
Reg. v. Flowers (1886) 16 Q. B. D. 643; 55 L. J. M. C. 179; 34 W. R. 367; 54 L. T. 547; 16 Cox C. C. 33, 50 J. P. 648.—*C.C.R.*

COLERIDGE, J.—This is a case which might have raised a difficult and subtle question; but from the mode of which it has been stated by the learned recorder there appears to be a clear distinction between it and *Reg. v. Ashwell*. In that case the judges who were in favour of upholding the conviction did not intend to question the ancient doctrine that an innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute larceny. On the contrary, it will be seen from the judgment of one of the judges in that case he expressly accepts that rule of law. In the present case, the learned recorder directed the jury that if the prisoner innocently received the money and afterwards fraudulently appropriated it, he was guilty of larceny. It was not our intention in *Reg. v. Ashwell* to enunciate any such rule, and the law has been incorrectly laid down to the jury by the learned recorder; they may have thought consistently with his direction that a fraudulent appropriation six months after the original receipt would be sufficient to warrant them in convicting the prisoner of larceny. We are asked to say whether the jury were wrongly directed, and we are of opinion that they were. If the judgments of the seven judges who affirmed the conviction in *Reg. v. Ashwell* are carefully read, it will be seen that there is a most substantial difference between that case and the present, and that those judges were of opinion that to justify a conviction for larceny the receipt and appropriation must be contemporaneous.—p. 645.

Reg. v. Ashwell, considered.
Reg. v. Hehr (1895) 18 Cox C. C. 267; [1895] 2 Ir. R. 709.—*C.C.R.* (IR.).

PALLES, C.B.—*Reg. v. Ashwell* has not a single prior case to support it. It was a case of first impression. The ground upon which it was arrived at is given in the judgment of Coleridge, C.J., in whose mind there must have been some serious misapprehension. I hold that it would not be competent to the Court in England to uphold the conviction in *Reg. v. Ashwell*, and it is only by following that case that it can be upheld in the present case.—p. 272.

Reg. v. Deer (1862) L. & C. 240; 32 L. J. M. C. 33; 8 Jur. (N.S.) 1216; 7 L. T. 366; 11 W. R. 43; 9 Cox C. C. 225.—*C.C.R.*; and **Reg. v. Featherstone** (1854) Dears. C. C. 369; 2 C. L. R. 774; 23 L. J. M. C. 127; 18 Jur. 538; 2 W. R. 496, 6 Cox C. C. 876.—*C.C.R.*, *explained*.

Reg. v. Kenny (1877) 2 Q. B. D. 307; 46 L. J. M. C. 156; 36 L. T. 36; 25 W. R. 679, 13 Cox C. C. 397.—*C.C.R.*

DENMAN, J.—The Law Journal report of each of those cases shows the real ground of decision. In the first case the goods were such that the wife could not have been the person to remove the whole of them from her husband's house, and, therefore, the prisoner received them from someone other than the wife. In the other, the prisoner was himself a party to the removal, and was guilty, not merely of receiving, but of stealing.—p. 310.

Reg. v. Thompson (1862) L. & C. 233; 32 L. J. M. C. 57; 8 Jur. (N.S.) 1162; 7 L. T. 393; 11 W. R. 41; 9 Cox C. C. 222.—*C.C.R.*, *discussed*.

Reg. v. Cooke (1871) 40 L. J. M. C. 68; L. R. 1 C. C. 295; 24 L. T. 108; 19 W. R. 389; 12 Cox C. C. 10.—*C.C.R.*

Reg. v. Low (1866) 10 Cox C. C. 168; 13 L. T. 642; 14 W. R. 286.—*C.C.R.*, *questioned*.

Reg. v. Dartnell (1869) 20 L. T. 1020.—*NISI PRIUS*.

Rex v. Thompson (1825) 1 M. C. O. 78, *commented on*.

Reg. v. Simpson (1854) Dears. C. C. 421; 3 C. L. R. 80; 24 L. J. M. C. 7; 18 Jur. 1080; 3 W. R. 19; 6 Cox C. C. 422.—*C.C.R.*

JERVIS, C.J.—In *Thompson's Case* there seems to have been some confusion in the use of the expression "*about the person*." The words of the Act are "*from the person*," and, with submission to the majority of the judges who held the asportation in that case not to be sufficient, I think the minority were right. The judges, in that case, may have thought that the outer coat, which covered the pocket, formed a protection to the pocket-book; but we must not fritter away the law by refining upon nice distinctions in a way to prevent our decisions from being consistent with common-sense.—p. 424.

Reg. v. Collins (1864) L. & C. 471; 33 L. J. M. C. 177; 10 Jur. (N.S.) 636; 10 L. T. 581; 12 W. R. 886; 9 Cox C. C. 497.—*C.C.R.*, *overruled*.

Reg. v. Brown (1889) 59 L. J. M. C. 47; 24 Q. B. D. 357; 61 L. T. 694; 38 W. R. 95, 16 Cox C. C. 715; 54 J. P. 408.—*C.C.R.*

COLERIDGE, C.J.— . . . As far as I can learn, the reversal of the conviction in *Reg. v. Dodd* [not reported] proceeded upon that ground—namely, that a person cannot be convicted of an attempt where he could not have completed the offence. We do not think, however, that, upon the facts, this case comes within *Reg. v. Collins*. For there seems no doubt that this boy could have completed the offence. It is very satisfactory to find that we are not obliged to quash this conviction, and we are all of opinion that *Reg. v. Dodd* cannot any longer be considered law. It proceeded on the authority of *Reg. v. Collins*, which was, in our opinion, decided upon a mistaken view of the law.—p. 48.

Reg. v. Collins, *overruled*.

Reg. v. Brown, *followed*.

Reg. v. Ring (1892) 61 L. J. M. C. 116; 66 L. T. 300; 56 J. P. 532; 17 Cox C. C. 491.—C.C.R.

COLERIDGE, C.J.—That is a case which was decided by five judges, and since this case will also be decided by five judges, the learned judge who stated the case will have the satisfaction of knowing that now nine judges hold that *Reg. v. Collins* is bad law.

Reg. v. Cory (1864) 10 Cox C. C. 23, *followed*.

Reg. v. Shickle (1868) 38 L. J. M. C. 21; L. R. 1 C. C. 158; 19 L. T. 327; 17 W. R. 144; 11 Cox C. C. 189.—C.C.R.

Reg. v. Fitch (1878) 38 L. T. 788; 14 Cox C. C. 116.—C.C.R.; and **Reg. v. Townley** (1871) 40 L. J. M. C. 144; L. R. 1 C. C. 315; 24 L. T. 517; 19 W. R. 725; 12 Cox C. C. 59.—C.C.R., *distinguished*.

Reg. v. Foley (1889) 26 L. R. Ir. 289; 17 Cox C. C. 142.—C.C.R.

Reg. v. King (1843) 13 L. J. M. C. 43; 1 D. & L. 721; 8 Jur. 271.—BAIL CT., *disapproved*.

Threlkeld v. Smith (1901) 70 L. J. K. B. 921; [1901] 2 K. B. 531; 85 L. T. 275; 50 W. R. 158.—RIDLEY and BIGHAM, JJ.

Rex v. Watson, 2 East P. C. 562, *overruled*.

Rex v. Lavender (1793) 2 East P. C. 566.—C.C.R.

[A servant going off with money which his master had given him to carry to another, and applying it to his own use, is guilty of larceny; *Rex v. Watson* is overruled on this point.]

Reg. v. Gardener (1845) 1 Car. & K. 628, *overruled*.

Reg. v. Young (1846) 2 Car. & K. 466; 1 Den. C. C. 194; 2 Cox C. C. 142.

[*Field*, that a paper put into the post-office was not the less a "post-letter" within 1 Vict. c. 36, s. 26, because it bore a fictitious address.]

Reg. v. Denmour (1861) 8 Cox C. C. 440, *impugned*.

Reg. v. Robson (1861) L. & C. 93; 31 L. J. M. C. 22; 8 Jur. (N.S.) 64; 5 L. T. 402; 10 W. R. 61; 9 Cox C. C. 29.—C.C.R.

[The editors, in a note to the report of *Reg. v. Robson*, say that, "after this expression of opinion, the authority of *Reg. v. Denmour*, in which it was held that a married woman could not be a bailee, must be regarded as shaken."—p. 97.]

Reg. v. Watkins (1841) 1 Car. & M. 264; 2 M. C. C. 217, *dissented from*.

Reg. v. Reid (1851) 15 Jur. 181; T. & M. 431; 2 Den. C. C. 88; 20 L. J. M. C. 67; 5 Cox C. C. 104.—C.C.R.

[Counsel having cited *Reg. v. Watkins*, where it was held that the burglariously breaking and entering a house with intent to commit a rape therein is not a crime which includes an assault, and on an indictment for such a burglary, the defendant, it was ruled, could not be convicted of an assault under the statute.]

ALDERSON, B.—That case was decided on a right principle, but it was a wrong decision.—p. 182.

Reg. v. Henry (1840) 2 M. C. C. 118, *questioned*.

Reg. v. Stringer (1842) 2 M. C. C. 261; 1 Car. & K. 188.—C.C.R.

[The judges doubted whether *Reg. v. Stringer* was rightly decided on the ground on which it was decided, viz., that it was not robbery to obtain money by threat of a charge of sodomy.]

Reg. v. Smith (1850) 1 Den. C. C. 510; 19 L. J. M. C. 80; T. & M. 214; 2 Car. & K. 882; 14 Jur. 92; 4 Cox C. C. 42.—C.C.R.; and **Reg. v. Walton** (1863) L. & C. 288; 32 L. J. M. C. 79; 9 Jur. (N.S.) 259; 7 L. T. 754; 11 W. R. 348; 9 Cox C. C. 268.—C.C.R., *referred to*.

Reg. v. Tomlinson (1895) 64 L. J. M. C. 97; [1895] 1 Q. B. 706, 15 R. 207; 72 L. T. 155; 43 W. R. 544; 18 Cox C. C. 75.—C.C.R.

Serlested's Case (1628) Latch 202, *questioned*.

Rex v. Southerton (1805) 6 East 126; 2 Smith 305; 8 R. R. 428.

ELLENBOROUGH, C.J.—The reasoning in that case seems to prove too much, for it goes the length of showing that obtaining money under a threat of any kind, however improbable, would be indictable at common law.—p. 139.

Rex v. Kettle (1819) 3 Chitty C. L. 947 (ed. 1826), *questioned*.

Reg. v. Bond (1850) 1 Den. C. C. 517; T. & M. 242; 3 Car. & K. 337; 4 New Sess. Cas. 143; 19 L. J. M. C. 138; 14 Jur. 390; 4 Cox C. C. 231.—C.C.R.

ALDERSON, B. (on the above case being cited in argument).—I should question the correctness of that ruling if it came before me.

Reg. v. Cox (1844) 1 Car. & K. 494, *questioned*.

Reg. v. Gallears (1849) T. & M. C. C. 196; 3 New Sess. Cas. 704; 1 Den. C. C. 501; 2 Car. & K. 981; 19 L. J. M. C. 13; 13 Jur. 1010; 8 Cox C. C. 572.—C.C.R.

POLLOCK, C.B.—I very much doubt whether that case is law.—p. 198.

[Their lordships did not follow it.]

Scattergood v. Sylvester (1850) 15 Q. B. 506; 19 L. J. Q. B. 447; 14 Jur. 977.—Q. B., *explained*.

Chichester v. Hill (1882) 52 L. J. Q. B. 160; 48 L. T. 364; 31 W. R. 245; 15 Cox C. C. 258; 47 J. P. 324.—FIELD and WILLIAMS, JJ.

FIELD, J.—What if [*Scattergood v. Sylvester*] decides is, that where the owner of cattle that have been stolen, has prosecuted the thief to conviction, but has not obtained an order of

restitution, he is entitled to have the cattle restored to him in an action against a purchaser in market overt.—p. 163. *And see the judgment at length.*

Reg. v. Gale (1824) 1 M. C. C. 11, *overruled*.
Reg. v. Salomons (1890) 1 M. C. C. 292.—C.C.R.

Reg. v. Smith (1870) 39 L. J. M. C. 112;
L. R. 1 C. C. 266; 22 L. T. 554; 18
W. R. 932; 11 Cox C. C. 511.—C.C.R.,
followed.

Reg. v. Streeter (1906) 69 L. J. Q. B. 915;
[1900] 2 Q. B. 601; 83 L. T. 288; 48 W. R. 702;
64 J. P. 537.—C.C.R.

Reg. v. Lyons (1863) 9 Cox C. C. 299;
Car. & M. 217, *overruled*.

Reg. v. Dolan (1855) Dears. C. C. 436; 3
C. L. R. 295; 24 L. J. M. C. 59; 1 Jur. (N.S.) 72;
3 W. R. 177; 6 Cox C. C. 449.—C.C.R.

COLERIDGE, J.—I have no recollection now of
the case of *Reg. v. Lyons*, cited from Car. & M.,
and, therefore, I have no right to say it was
imperfectly reported. Assuming, however, that
it was rightly reported, I must say I consider I
was wrong.—p. 442.

Reg. v. Dolan, *followed*.

Reg. v. Schmidt (1866) 35 L. J. M. C. 94;
L. R. 1 C. C. 15; 12 Jur. (N.S.) 149; 13
L. T. 679; 14 W. R. 286; 10 Cox C. C.
172.—C.C.R., *approved*.

Reg. v. Villinsky (1892) 61 L. J. M. C. 218;
[1892] 2 Q. B. 597; 5 R. 16; 41 W. R. 160; 56
J. P. 824.—C.C.R.

Reg. v. Drage (1878) 14 Cox C. C. 85,
approved.

Reg. v. Carter (1884) 53 L. J. M. C. 96; 12
Q. B. D. 522; 50 L. T. 432, 596; 32 W. R. 663;
15 Cox C. C. 448; 58 J. P. 456.—C.C.R.

Reg. v. Oddy (1851) 2 Den. C. C. 264;
T. & M. 593; 20 L. J. M. C. 198; 15 Jur.
517; 5 Cox C. C. 210.—C.C.R., *held*
inapplicable.

Reg. v. Green (1852) 3 Car. & K. 209.
Held on a trial for uttering a forged
note, *scienter*, the admissibility of evidence of
other utterings is not affected by *Reg. v. Oddy*.

Reg. v. Oddy, *considered*.
Makin v. Att.-Gen. for New South Wales
(1893) 63 L. J. P. C. 41; [1894] A. C. 57; 6 R.
373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P.
148.—P.C.

Malicious Injury to Property.

Hall v. Richardson (1889) 54 J. P. 345,
overruled.

Roper v. Knott (1898) 67 L. J. Q. B. 574;
[1898] 1 Q. B. 868; 78 L. T. 594; 46 W. R. 636;
62 J. P. 375; 19 Cox C. C. 69.—C.C.R.

RUSSELL, C.J.—In *Hall v. Richardson* the man
added water to the milk in order to remedy an
accidental mistake. . . . Although the facts may
be distinguishable from those in the present case
in several respects, yet I cannot fail to see that
damage was done in that case, and that the man
intended to do it. He did it wilfully in order to
repair a mistake. I think that that case was not
rightly decided. I think with all deference that
the cardinal error in the judgment is that there

is a confusion between damage to the thing and
consequent loss or damage to the owner of the
thing. In my opinion an offence is committed
against the statute if there be wilful damage to
the thing, although it does not cause loss to the
owner of the thing. No doubt those two results
generally co-exist. That seems to me to be the
first error in the judgment. But it also appears
from the statement of Coleridge, C.J., that "this
man . . . not with the intention to damage any-
body—least of all to damage his master . . .
put some water into the remainder of the milk
. . . ." that he came to the conclusion that in
order to constitute an offence under the statute
there must be an intention to damage somebody.
But I think that if there is wilful damage to the
thing the statute is satisfied. Lastly, Coleridge,
C.J. refers to the power of the magistrate to
give compensation in language which shows that
in the opinion of the L.C.J. the section was
confined to cases in which it would be proper to
give compensation. I think that that arose from
confusion in the mind of the learned judge
between damage to the thing and damage to the
owner of the thing, the latter of which I think
the statute does not require.—p. 576.

Reg. v. Hadfield (1870) 39 L. J. M. C. 131;
L. R. 1 C. C. 253; 22 L. T. 664; 13 W. R.
955; 11 Cox C. C. 574.—C.C.R., *followed*.
Reg. v. Hardy (1871) 40 L. J. M. C. 62; L. R.
1 C. C. 278; 23 L. T. 785; 19 W. R. 359; 11
Cox C. C. 356.—C.C.R.

Personation.

Reg. v. Martin and Reg. v. Cramp (1817)
Russ. & Ry. 324, 327, *commented on*.
Whiteley v. Chappell (1868) L. R. 4 Q. B. 147;
38 L. J. M. C. 51; 19 L. T. 355; 17 W. R. 175;
11 Cox C. C. 307.—Q.B.

LUSH, J.—The words, "a person entitled to
vote," can only mean, without a forced construc-
tion, a person who is entitled to vote at the time
at which the personation takes place; in the
present case, therefore, I feel bound to say the
offence has not been committed. In the cases
of *Reg. v. Martin* and *Reg. v. Cramp*, the judges
gave no reason for their decisions; they probably
held that "supposed to be entitled" meant sup-
posed by the person personating.—p. 148.

3. OFFENCES AGAINST PERSONS OF INDIVIDUALS.

Abduction.

Reg. v. Barrett (1885) 15 Cox C. C. 658,
dissented from.
Reg. v. Bellis (1893) 62 L. J. M. C. 155; 5 R.
492; 69 L. T. 26; 17 Cox C. C. 660; 57 J. P.
441.—C.C.R.

COLERIDGE, C.J.—In the case referred to of
Reg. v. Barrett, the facts of the case justified the
conclusion come to there, because there was no
fraud practised upon any one in that case; the
child consented to go, and no fraud was practised
upon any one else. . . . The *dictum* of Smith,
J., to the effect that the force or fraud must be
exercised on the child itself in order to bring the
case within sect. 56 of 24 & 25 Vict. c. 100 is not
part of the decision in that case, and would not
be binding over any similar case. In any case
it is too wide a *dictum*, and I cannot but think
my learned brother may have been misreported.

If it is not so, I should certainly disagree with any such direction in a case coming within the purview of such a *dictum*.—p. 156.

Assault.

Reg. v. St. George (1840) 9 Car. & P. 483; and **Reg. v. Lewis** (1840) 9 Car. & P. 523, *questioned*.

Reg. v. Brown (1838) 10 Q. B. D. 381; 52 L. J. M. C. 49; 48 L. T. 270; 81 W. R. 460; 15 Cox C. C. 199; 47 J. P. 327.—C.C.R.

COLERIDGE, C.J.—I believe I speak with the assent of my learned brothers in saying this—I certainly myself desire to say it—that if upon a fit occasion, *Reg. v. St. George* and *Reg. v. Lewis* should come up for consideration, whatever may be the authority of the learned judges by whom those cases were decided—and it is needless to say higher authority could scarcely be had—the consent of my own mind is not given to them. I might be bound by them if sitting alone, but sitting in this Court, I should take the liberty to reconsider those cases, and possibly to overrule them.—p. 384.

[POLLOCK, B. desired to reconsider the first case; HUDDLESTON, B. and MANISTY, J. both cases; whereas STEPHEN, J. declined to assent to, or dissent from, them.]

Reg. v. St. George, overruled.

Reg. v. Lewis, considered.

Reg. v. Duckworth (1892) [1892] 2 Q. B. 83; 66 L. T. 302; 40 W. R. 448; 17 Cox C. C. 495; 56 J. P. 473.—C.C.R.

COLERIDGE, C.J.—As regards the other case—*Reg. v. St. George*—I should have thought, with great deference, that it ought to have been got rid of by this time. There the prisoner raised his arm and pointed a pistol at another person, and he had his hand upon the trigger. So far as raising his arm and pointing the pistol were concerned, he did all that he could do to discharge it, and then other persons interfered and took the pistol from him, and the attempt ended there. I should think it reasonably clear to most ordinary minds that there had been an attempt to do what was prevented from being done by the interference of third persons. As to the case now before us, where the facts are of the same character as in *Reg. v. St. George*, I think we are all clearly of opinion that there was abundant evidence to be left to the jury, and to satisfy them, that there was the attempt charged in the fifth count of the indictment.—p. 86.

Reg. v. Hewlett (1858) 1 F. & F. 91, *questioned*.

Reg. v. Stopford (1870) 11 Cox C. C. 643.

BRETT, J.—I doubt the case of *Reg. v. Hewlett*, as it appears to me inconsistent with *Reg. v. Hunt* (1 Moo. C. C. 93); it seems to me to be only partially reported, a bald report, in fact. *Reg. v. Smith* (1 Cox C. C. 51) is precisely in point.—p. 645.

Reg. v. Martin (1881) 51 L. J. M. C. 36; 8 Q. B. D. 54; 45 L. T. 444; 50 W. R. 106; 14 Cox C. C. 633; 46 J. P. 228.—C.C.R., *followed*.

Reg. v. Halliday (1889) 61 L. T. 701; 38 W. R. 256; 54 J. P. 312.—C.C.R.

Reg. v. Pembilton (1874) 43 L. J. M. C. 91; L. R. 2 C. C. 119; 30 L. T. 405; 22 W. R. 553; 12 Cox C. C. 607.—C.C.R., *distinguished*.

Reg. v. Latimer (1886) 17 Q. B. D. 359; 55 L. J. M. C. 135; 54 L. T. 768, 16 Cox C. C. 70; 51 J. P. 184.—C.C.R.

ESHER, M.R.—The only case which could be cited against the well-known principle of law applicable to this case was *Reg. v. Pembilton*, but, on examination, it is found to have been decided on this ground, viz., that there was no intention to injure any property at all. It was not a case of attempting to injure one man's property and injuring another's, which would have been wholly different.—p. 361.

Reg. v. Rundle (1855) Dears. C. C. 482; 3 C. L. R. 659; 24 L. J. M. C. 129. 1 Jur. (N.S.) 430; 3 W. R. 408; 6 Cox C. C. 549.—C.C.R., *questioned*.

Buchanan v. Hardy (1887) 56 L. J. M. C. 42; 18 Q. B. D. 486; 35 W. R. 453; 51 J. P. 741.—COLERIDGE, C.J., MATHEW, CAVE and SMITH, JJ.

COLERIDGE, C.J.—I think that . . . *Reg. v. Rundle* must be held to be binding, if it be binding at all, in the case of a husband only, because the judgment in *Reg. v. Porter* (38 L. J. M. C. 126), the case which was subsequently decided, appears to have entirely departed from the reasons upon which *Reg. v. Rundle* was decided. So far as can be seen no case has actually come before the Courts, and none has been cited to us, in which the particular relation of parent and child has been considered, or in which the question has been distinctly presented to them, whether a parent is or is not within this 9th section [of the 16 & 17 Vict. c. 96]. It is true that Parke, B., in *Reg. v. Rundle* did add to the question of husband and wife specifically the case of parent and child, but the general principle of domestic control was distinctly departed from in the case of *Reg. v. Porter* where the person convicted was a brother; and certainly it was in a case in which I was counsel for the prosecution at the Exeter Assizes, where the lunacy commissioners obtained a conviction against a brother and sister for having imprisoned . . . a lunatic brother. I never heard any question raised as to the propriety of that decision. Now we have to determine the present case upon this principle, and I must say, with deference to the learned judges who decided *Reg. v. Rundle*, that I am not altogether satisfied with the reasons they gave for their decision in that case.—p. 44.

Reg. v. Rundle, *see* 53 & 54 Vict. c. 5.

Reg. v. Meredith (1838) 8 Car. & P. 589, *dictum disapproved*.

Christopherson v. Bare (1848) 11 Q. B. 473; 17 L. J. Q. B. 109; 12 Jur. 374.—Q.B.

[Counsel having cited from Lord Abinger's judgment in *Reg. v. Meredith* the following passage:—"To support a charge of assault you must show an assault which could not be justified if an action were brought for it, and leave and hence pleaded," and having argued that it was there assumed that an assault might be confessed and avoided by a plea of leave and licence.]

PATTERSON, J.—That cannot be put higher than an *obiter dictum* (p. 476). . . . The plea

is clearly bad as to the assault. . . . An assault must be an act done against the will of the party assaulted; and, therefore, it cannot be said that a party has been assaulted by his own permission.—p. 477.

Reg. v. Button (1838) 8 Car. & P. 660, *dissented from*.

Reg. v. Dilworth (1843) 2 M. & Rob. 531.—COLTMAN, J.

Reg. v. Button, *dissented from*.

Reg. v. Walkden (1845) 1 Cox C. C. 282.—PARKE, B.

Reg. v. Tooley (1709) 2 Ld. Raym. 1296, *overruled*.

Reg. v. Davis (1861) L. & C. 64; 30 L. J. M. C. 159; 7 Jur. (N.S.) 1040; 4 L. T. 559; 9 W. R. 711; 8 Cox C. C. 486.—C.C.R.

POLLOCK, C.B.—*Tooley's Case* has been overruled.—p. 71. [*See per Alderson, B., in Rex v. Warner* (1 Moo. C. C. 385).]

Reg. v. Bennett (1860) 4 F. & F. 1105; and **Reg. v. Sinclair** (1867) 13 Cox C. C. 28, *distinguished*.

Christopherson v. Bare (*supra*), *commented on*.

Reg. v. Lock (1872) 42 L. J. M. C. 5; L. R. 2 C. C. 10; 27 L. T. 661; 21 W. R. 144; 12 Cox C. C. 244.—C.C.R., *distinguished*.
Hegarty v. Shine (1878) 4 L. R. Ir. 288; 14 Cox C. C. 145.—C.A.

Headnote.—In an action for assault, the plaintiff, who was living as paramour with the defendant, became infected by him with a venereal disease. The defendant concealed from her the fact of his being so infected. *Held*, that the action would not lie. Mere concealment of the defendant being infected did not constitute such a fraud as to vitiate the consent of the woman to the immoral act. *See per* FALLES, C.B. that *Reg. v. Bennett* and *Reg. v. Sinclair* were rightly decided. *See judgments*.

Reg. v. Bennett; Reg. v. Sinclair; Hegarty v. Shine; Reg. v. Taylor (1869) 38 L. J. M. C. 106; L. R. 1 C. C. 194; 20 L. T. 402; 17 W. R. 623; 11 Cox C. C. 261.—C.C.R.; and **Reg. v. Rosinski** (1824) 1 M. C. C. 19, *considered*.

Reg. v. Clarence (1888) 58 L. J. M. C. 10; 22 Q. B. D. 23; 59 L. T. 780; 37 W. R. 166; 16 Cox C. C. 611; 53 J. P. 149.—C.C.R.

Headnote.—Where a husband had been convicted under sect. 47 of 24 & 25 Vict. c. 100, of assaulting his wife and causing her actual bodily harm by communicating to her a venereal disease, and on the same facts had also been convicted, on another count of the same indictment, of unlawfully and maliciously inflicting upon her actual bodily harm within the meaning of sect. 20 of the statute, *Held* (by Lord Coleridge, C.J., Pollock and Huddleston, BB., and Manisty, Stephen, Mathew, Smith, Wills and Grantham, JJ.; *dissentientibus*, Hawkins, Field, Day and Charles, JJ.), that the accused was wrongly so convicted, and that the conviction must be quashed. *See judgments*.

Tunnicliffe v. Todd (1847) 5 C. B. 553; 17 L. J. M. C. 67.—C.P.; and **Bradshaw v. Vaughton** (1860) 9 C. B. (N.S.) 103; 30

L. J. C. P. 93; 7 Jur. (N.S.) 468; 3 L. T. 373; 9 W. R. 120.—C.P., *followed*.
Reed v. Nutt (1890) 59 L. J. Q. B. 311; 24 Q. B. D. 669; 62 L. T. 635; 38 W. R. 621, 54 J. P. 599.—ESHER, M.R.; COLERIDGE, C.J. *doubting*.

Reg. v. Robinson (1840) 12 A. & E. 672; 4 P. & D. 391; 10 L. J. M. C. 9, *partly dissented from*.

Hancock v. Simes (1859) 28 L. J. M. C. 196; 1 El. & El. 795; 5 Jur. (N.S.) 983; 3 W. R. 422; 8 Cox C. C. 172.—Q.B.

CAMPBELL, C.J. and GROMPTON, J., the latter saying that he did not agree with the *ratio decidendi* in that case, and that he thought the granting of the certificate was not discretionary and not judicial.

See also **Coster v. Hetherington**, 28 L. J. M. C. 198; 1 El. & El. 802; 5 Jur. (N.S.) 985; 7 W. R. 413; 8 Cox C. C. 175.

Hartley v. Hindmarsh (1866) 35 L. J. M. C. 255; L. R. 1 C. P. 553; 14 L. T. 795; 14 W. R. 862; 1 H. & R. 607; 12 Jur. (N.S.) 502.—C.P., *distinguished*.

Reg. v. Miles (1890) 59 L. J. M. C. 56; 24 Q. B. D. 423; 62 L. T. 572; 38 W. R. 334; 54 J. P. 549; 17 Cox C. C. 9.—C.C.R.

Concealment of Birth.

Reg. v. Perry (1855) Dears. C. C. 471; 3 C. L. R. 691; 24 L. J. M. C. 137; 1 Jur. (N.S.) 408; 3 W. R. 404; 6 Cox C. C. 531.—C.C.R., *dissented from*.

Reg. v. Opie (1862) 8 Cox C. C. 332.
MARTIN, B., in referring to *Perry's Case*, said he entirely agreed with Pollock, C.B., in dissenting from the opinion expressed by the judges in that case.

Murder and Manslaughter.

Rex v. Grindley, Russell on Crimes (2nd ed.), vol. 1, p. 8, *overruled*.
Rex v. Carrol (1835) 7 Car. & P. 145.

PARK, J. (having read the above case, decided by Mr. Justice Holroyd).—Highly as I respect that excellent judge, I differ from him, and my brother Littledale agrees with me. He once acted upon that case, but afterwards retracted his opinion, and there is no doubt that that case is not law.

Reg. v. Hines (1874) 80 C. C. C. Sessions Paper 309, *dissented from*.

Reg. v. Senior (1895) 68 L. J. Q. B. 175; [1899] 1 Q. B. 283; 79 L. T. 562; 47 W. R. 367; 63 J. P. 8.—C.C.R.

Reg. v. Geering (1849) 18 L. J. M. C. 215, *followed*.

Reg. v. Winslow (1860) 8 Cox C. C. 397, *not followed*.

Reg. v. Flannagan (1884) 15 Cox C. C. 403.—BUTT, J.

Reg. v. Geering; Reg. v. Dossett (1846) 2 Car. & K. 306; 2 Cox C. C. 243; **Reg. v. Gray** (1866) 4 F. & F. 1102; and **Reg. v. Winslow**, *considered*.

Makin v. Att.-Gen. for New South Wales (1893) 63 L. J. P. C. 41; [1894] A. C. 57; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 601.

148.—P.C. LORDS HERSCHELL, L.C., WATSON, HALSBURY, ASHBOURNE, MACNAGHTEN, MORRIS and SHAND.

Reg. v. Geering (*supra*) and **Reg. v. Garner** (1863) 3 F. & F. 681. See Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (1).

Rex v. Cadman (1825) 1 M. C. C. 114; Carr. Supp. 237, *corrected*.
Rex v. Harley (1830) 4 Car. & P. 369.
PARK, J. said that he thought some mistake must have crept into Ryan & Moody's report, and that, although it is there stated that the swallowing of the poison was not essential, his recollection was that the judges held just the contrary. He further says, that his memory is, that Carrington's report is accurate.

Rape.

Reg. v. Fletcher (1859) Bell C. C. 63; 28 L. J. M. C. 85; 5 Jur. (N.S.) 179; 7 W. R. 204; 8 Cox C. C. 131; and **Reg. v. Fletcher** (1866) 35 L. J. M. C. 172; L. R. 1 C. C. 39; 12 Jur. (N.S.) 605; 14 L. T. 573; 14 W. R. 774; 10 Cox C. C. 248, *considered*.

Reg. v. Barratt (1873) L. R. 2 C. C. 81; 43 L. J. M. C. 7; L. R. 2 C. C. 81; 29 L. T. 409; 22 W. R. 136; 12 Cox C. C. 498.—C.C.R.

BLACKBURN, J.—I think the rule laid down in the first case of **Reg. v. Fletcher** (Bell C. C. 63) was quite right, and I do not think that in the second case of the same name the Court intended to depart from it. In every case the question must be, whether there is sufficient evidence to support the charge, and, where mental incapacity is involved, the question must be one of degree. Now, in the first case of **Reg. v. Fletcher** and in the present case, the degree of idiocy was very great. In the second case it was much slighter. And in that case the question reserved was, whether the judge ought to have left the case to the jury, there being no evidence against the prisoner except the fact of connection and the imbecile state of the girl. And what the judges held was, that in that case there ought to have been some further evidence. I do not think they at all meant to overrule the earlier case, but only to say that in the particular case before them they did not think there was evidence to go to the jury.

Reg. v. Fletcher, *commented on*.
Reg. v. Dee (1884) *infra*, col. 776.

Reg. v. Read (1849) 2 Car. & K. 957; 3 Cox C. C. 266; 1 Den. C. C. 377; T. & M. 52; 3 New Sess. Cas. 405; 18 L. J. M. C. 88; 13 Jur. 68.—C.C.R., *followed*.
Reg. v. Roadley (1880) 49 L. J. M. C. 88; 42 L. T. 515; 14 Cox C. C. 463.—C.C.R.

Reg. v. Barrow (1868) 38 L. J. M. C. 20; L. R. 1 C. C. 156; 19 L. T. 293; 17 W. R. 102; 11 Cox C. C. 191.—C.C.R., *questioned*.
Reg. v. Flattery (1877) 46 L. J. M. C. 130; 2 Q. B. D. 410; 36 L. T. 32; 25 W. R. 398; 13 Cox C. C. 388.—C.C.R.

Reg. v. Flattery; **Reg. v. Saunders** (1838) 8 Car. & P. 285; **Reg. v. Williams** (1838) 8 Car. & P. 286; and **Reg. v. Case** (1850) 19 L. J. M. C. 174; 1 Den. C. C. 580;

T. & M. 318; 4 New Sess. Cas. 347; 14 Jur. 489; 4 Cox C. C. 220.—C.C.R., *distinguishing*.
Hegarty v. Shine (1878) 4 L. R. Ir. 288; 14 Cox C. C. 145.

Reg. v. Barrow. See 48 & 49 Vict. c. 69, s. 4.

Reg. v. Barrow, *not followed*.
Reg. v. Saunders; **Reg. v. Williams**; and **Reg. v. Case**, *referred to*.
Reg. v. Dee (1884) 15 Cox C. C. 579; 14 L. R. Ir. 465.—C.C.R. (1R).

PALLES, C.B.—**Reg. v. Barrow** was decided . . . on a case reserved by Kelly, C.B., which . . . stated that he thought the case "was made out as . . . the act itself, coupled with the pushing aside of a baby the prosecutrix had in her arms, amounted to force, and there was certainly no consent before, and the reverse immediately afterwards." The case was heard by five judges of whom Kelly C.B. was not one. No counsel appeared for either the Crown or the prisoner, and the case is disposed of in the following words by Bovill, C.J., who delivered the judgment of the Court: "It does not appear that the woman . . . was asleep or unconscious at the time when the act of connection commenced. . . . It must be taken therefore that the act was done with the consent of the prosecutrix, though that consent was obtained by fraud. It falls, therefore, within the class of cases which decide that where consent is obtained by fraud, the act does not amount to rape." The judgment, by excluding the applicability to cases where the prosecutrix was asleep or unconscious, adopts the judgment in **Fletcher's Case** (*supra*, col. 775), but it seems to have there escaped attention that one of the effects of that judgment was to abolish the old distinction between such absence of consent as must exist in rape, and that which will constitute an assault. This would have made not only the circuit decisions of **Reg. v. Saunders** (8 C. & P. 285) and **Reg. v. Williams** (8 C. & P. 286), but the ruling of that Court itself in **Reg. v. Case** (1 Den. C. C. 580) authorities for the prosecution, and would have called for a determination of the distinction there taken by Wilde, C.J. and Platt, B. between the act consented to and the act committed. Thus the cardinal point in the case, the point upon which alone it must have been concluded by the judge at the trial, "there was certainly no consent," was wholly lost sight of in the decision.—p. 589.

Reg. v. Saunders; **Reg. v. Williams**; **Reg. v. Case**; **Reg. v. Flattery**; **Reg. v. Barrow**; and **Reg. v. Dee**, *considered*.
Reg. v. Clarence (1888) 68 L. J. M. C. 10; 22 Q. B. D. 28; 59 L. T. 780; 87 W. R. 166; 16 Cox C. C. 511; 53 J. P. 149.—C.C.R.

Rex v. Russell (1831) 1 M. & Rob. 122, *overruled*.
Rex v. Cox (1832) 5 Car. & P. 297.

Rex v. Wink (1834) 6 Car. & P. 397, *followed in part*.
Reg. v. Osborne (1842) Car. & M. 622.

Rex v. Hodgson (1812) R. & R. C. C. 211; 3 Car. & P. 590, note *u*.—C.C.R., *questioned*.
Rex v. Martin (1834) 6 Car. & P. 562.

WILLIAMS, J.—The question [proposed to be put by counsel] in the present case is as to previous intercourse with the prisoner, and the question in *Rea v. Hodgson* was as to intercourse with other men. I shall certainly receive the evidence, and I must say that I never could understand the case of *Rea v. Hodgson*. The doctrine that you may go into general evidence of bad character in the prosecution, and yet not cross-examine as to specific facts, I confess, does appear to me to be not quite in strict accordance with the general rules of evidence.

Reg. v. Powell (1831) 2 B. & Ad. 75; 9 L. J. (O.S.) M. C. 71.—K.B., *commented on*.
Castro v. Reg. (1881) 50 L. J. Q. B. 497; 6 App. Cas. 229; 44 L. T. 350; 29 W. R. 669; 14 Cox C. C. 546.—H.L. (E.).

Reg. v. Robins (1843) 2 M. & Rob. 512; 1 Cox C. C. 55, *overruled*.
Reg. v. Holmes (1871) L. R. 1 C. C. 334; 41 L. J. M. C. 12; 25 L. T. 669; 20 W. R. 122; 12 Cox C. C. 137.—C.C.R.

KELLY, C.B.—That was, no doubt, a decision of Coleridge, J., after consulting Erskine, J., upon the very point now in dispute. But we cannot follow that ruling in opposition to the whole current of authority upon the question.—p. 337.

Reg. v. Mehegan (1856) 7 Cox C. C. 145.—C.C.R. (IR.), *questioned*.
Reg. v. Reale (1865) L. R. 1 C. C. 10; 35 L. J. M. C. 60; 12 Jur. (N.S.) 12; 18 L. T. 835; 14 W. R. 57; 10 Cox C. C. 157.—C.C.R.

WILLIAMS, J.—Is there any contemporary Irish report of that case? I can hardly believe that it is correctly reported.

[It appears from a note at the end of the case that the reporter was not present in Court during the argument.]

Reg. v. Dicken (1877) 14 Cox C. C. 8, *followed*.

Reg. v. Ratcliffe (1882) 52 L. J. M. C. 40; 10 Q. B. D. 74; 47 L. T. 388; 15 Cox C. C. 127.—C.C.R.

Reg. v. Wealand (1888) 57 L. J. M. C. 44; 20 Q. B. D. 827; 58 L. T. 782; 36 W. R. 567; 16 Cox C. C. 402; 52 J. P. 582.—C.C.R., *considered*.

Reg. v. Paul (1890) 59 L. J. M. C. 138; 25 Q. B. D. 202; 62 L. T. 845; 38 W. R. 704; 17 Cox C. C. 111; 54 J. P. 677.—C.C.R.

HAWKINS, J.—In that case [*Reg. v. Wealand*] the prisoner was indicted in one count simply for the felony of carnally knowing a girl under thirteen. The evidence of the girl, though not upon oath, was received under sect. 4 [of the Criminal Law Amendment Act, 1885], and upon that charge it was clearly admissible within the express language of the statute. The jury found the prisoner not guilty of the felony, but, being satisfied that he was guilty of an indecent assault, they, under the express provision contained in sect. 9 of the Act, found him guilty of such assault. But for this section, they would have been bound to acquit him altogether. Now in that case no objection could have been made to the unsworn testimony, for the 4th section expressly made it admissible upon the only count which the jury had to

dispose of, and in authorising the jury under that count to convict of an indecent assault, though no indecent assault was charged, the legislature must be taken to have intended them, in the consideration of their verdict, to deal with all the evidence before them, forgetting that the exception to the general rule of evidence was not made to extend to charges other than those in sect. 4. I was a party to the judgment, and agree in all the observations of the L.C.J. in delivering it, and I venture to think they are rather in favour of than against my view of this case. In the present case, upon the first count no doubt the evidence was admissible, but upon that count the jury had no power to convict of an indecent assault; while upon the second count, which was for an indecent assault simply, the evidence was inadmissible. It is strangely anomalous to suppose that a person being acquitted upon a charge on which unsworn evidence was admissible, should nevertheless be lawfully convicted on such evidence upon a count on which it was wholly inadmissible. To my mind such a proposition is contrary to reason, good sense and law. I note particularly an observation in the judgment of the L.C.J. in *Reg. v. Wealand*, that the anomaly therein pointed out "may lead to a prisoner being indicted for the graver offence under sect. 4, when it is known that he can only be convicted of a less offence under sect. 9 on unsworn testimony given in support of the charge under sect. 4." On this I can only say that, should such a course be adopted, I should look upon it as a scandalous abuse of the law with a view to convict the accused of a grave offence upon evidence known to be inadmissible, if the indictment were confined to an honest statement of the real charge.—p. 143.

Reg. v. Wealand (*supra*) and **Reg. v. Paul** (*supra*). See now Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 15.

Rex v. Brasier (1779) Leach 199; 1 East P. C. 443.—C.C.R.; **Rex v. Clarke** (1817) 2 Stark. 241; **Reg. v. Walker** (1839) 2 M. & Rob. 212; **Reg. v. Megson** (1840) 9 Car. & P. 420; **Reg. v. Guttridge** (1840) 9 Car. & P. 471; **Reg. v. Osborne** (1842) C. & M. 622; **Reg. v. Eyre** (1860) 2 F. & F. 579; and **Reg. v. Wood** (1877) 14 Cox C. C. 46, *considered*.

Reg. v. Lillyman (1896) 65 L. J. M. C. 195; [1896] 2 Q. B. 167; 74 L. T. 730; 44 W. R. 654; 18 Cox C. C. 346; 60 J. P. 536.—C.C.R.

Reg. v. Lillyman, *applied*.
Reg. v. Kiddle (1898) 19 Cox C. C. 77.—RIDLEY, J.

Headnote.—**Reg. v. Lillyman** applies to cases where the girl on whom the offence is committed is of such tender years that the Court directs her evidence to be taken, but not on oath, and where her consent to the assault is immaterial.

Reg. v. Lillyman, *applied*.
Reg. v. Merry (1898) 19 Cox C. C. 442.—BRUCE, J.

Reg. v. Lillyman, *explained*.
Reg. v. Rowland (1898) 62 J. P. 459.
On the hearing of a charge of rape, the prosecuting counsel proposed, on the authority of the

above case, to put in evidence *verbatim* the complaint made by the prosecutrix.

HAWKINS, J. said that case was no authority for the proposition. All that it decided was that the terms of a complaint were only admissible as evidence of a want of consent by the prosecutrix, and not as evidence of the truth of the charge against the person named in the complaint.

Reg. v. Lillyman, limited.

Rex v. Kingham (1802) 66 J. P. 393.—LAWRANCE, J.

Reg. v. Chandler (1855) 24 L. J. M. C. 109; **Dears. C. C.** 453; 3 C. L. R. 680; 1 Jur. (N.S.) 429; 3 W. R. 404; 6 Cox C. C. 519.—C.G.R., and **Reg. v. Ryland** (1867) 37 L. J. M. C. 10; L. R. 1 C. C. 99; 17 L. T. 219; 16 W. R. 280; 10 Cox C. C. 569.—C.G.R. See now *Prevention of Cruelty to Children Act, 1894* (57 & 58 Vict. c. 41), s. 23 (2).

4. CONSPIRACY.

Levi v. Levi (1833) 6 Car. & P. 239, *dictum disapprov'd*.

Doollubdass v. Rumloll (1850) 15 Jur. 257.—P.C.

PARKE, B. (for J.C.).—The *dictum* of Gurney, B., in *Levi v. Levi* was much relied upon, to show that an agreement of several not to bid at an auction was an indictable offence; but this was a mere *dictum* in a *nisi prius* case, and cannot, we think, be relied upon.—p. 260.

Rex v. De Berenger (1814) 3 M. & S. 67; 15 R. R. 415, *discuss'd*.

Barry c. Croskey (1861) 2 J. & H. 1.

Rex v. De Berenger, upheld and applied.

Reg. v. Gurney (1869) 11 Cox C. C. 414.—Q.B.

Rex v. De Berenger, referred to.

Andrews v. Mockford (1896).—C.A. See *ante*, col. 401.

Reg. v. Drnutt (1867) 10 Cox C. C. 592; 16 L. T. 835; and **Reg. v. Bunn** (1872) 12 Cox C. C. 816, *discuss'd from*.
Connor v. Kent (1891) 61 L. J. M. C. 9; [1891] 2 Q. B. 545; 65 L. T. 573; 17 Cox C. C. 354; 55 J. P. 485.—C.O.R.

COLERIDGE, C.J.—Neither of these cases is very satisfactorily reported; in neither was there any motive for questioning the *dicta* of the judges; in the one, tried by Lord Esher, then Mr. Justice Brett, there was no opportunity, in consequence of the prisoner having been acquitted on all the counts to which the alleged ruling applied. We are well aware of the great authority of the judges by whom the two cases above mentioned were decided, but we are unable to concur in these *dicta*, and, speaking with all deference, we think they are not law. It seems to us that to hold that the very same acts which are expressly legalised by statute remain nevertheless crimes punishable by the common law, is contrary to good sense and elementary principle, and, that the reports, therefore, cannot be correct. If the *dicta* are law, they render the statutes passed on these subjects practically inoperative: the statutes might as well not have been passed. The *dicta* are criticised in detail and with great ability in Mr. Justice Wright's excellent work on the Law of Criminal Conspiracies and Agreements,

pp. 50—59. It is difficult to withhold consent from the statements and reasonings contained in these pages, and it seems to us that the law concerning agreements or combinations in reference to trade disputes is contained in 38 & 39 Vict. c. 86, and in the statutes referred to in it and that acts which are not indictable under that statute are not now, if indeed they ever were, indictable at common law.

Rex v. Mawbey (1796) 6 Term Rep. 619, 636, 638; 3 R. R. 282, *questioned*.

Hilton v. Eekersley (1853) 6 El. & Bl. 47; 25 L. J. Q. B. 199; 2 Jur. (N.S.) 587; 4 W. R. 326.

CAMPBELL, C.J.—I am not prepared to say that the combination which has been entered into between the parties to this bend would be illegal at common law, so as to render them liable to an indictment for a conspiracy. Such a doctrine may be deduced from the *dictum* of Grove, J., in *Rex v. Mawbey* (p. 636). "As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can; but if several men, for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." Other loose expressions may be found in the books to the same effect; and, if the matter were doubtful, an argument might be drawn from some of the language of the statutes respecting combinations. But I cannot bring myself to believe, without authority, much more cogent, that, if two workmen who sincerely believe their wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence, or any illegal means for gaining their object, they would be guilty of a misdemeanour, and liable to be punished by fine and imprisonment. The object is not illegal, and, therefore, if no illegal means are to be used, there is no indictable conspiracy.—p. 62.

Hilton v. Eekersley; Walsby v. Anley

(1861) 30 L. J. M. C. 121; 7 Jur. (N.S.) 465; 3 L. T. 666; 9 W. R. 271.—Q.B.; and **Gibson v. Lawson** (1891) 61 L. J. M. C. 9; [1891] 2 Q. B. 545; 65 L. T. 573; 17 Cox C. C. 354; 55 J. P. 485.—**COLERIDGE, C.J., MATHEW, GAVE, SMITH and CHARLES, JJ., applied.**
Lyons v. Wilkins (No. 1) (1896) 65 L. J. Ch. 601; [1896] 1 Ch. 811; 74 L. T. 358; 45 W. R. 19; 60 J. P. 325.—C.A. **LINDLEY, KAY and SMITH, L.JJ.**

Lyons v. Wilkins (No. 1) (*supra*), *confirmed*.

Lyons v. Wilkins (No. 2) (1898) 68 L. J. Ch. 146; [1899] 1 Ch. 255; 79 L. T. 709; 47 W. R. 281; 63 J. P. 339.—C.A. **LINDLEY, M.R., CHITTY and WILLIAMS, L.JJ.**

Lyons v. Wilkins (No. 2), *followed*.

Charnock v. Court (1899) 68 L. J. Ch. 550; [1899] 2 Ch. 35; 80 L. T. 564; 47 W. R. 633; 63 J. P. 456.—**STIRLING, J.**

Lyons v. Wilkins (No. 2), *applied*.

Charnock v. Court, referred to.

Skinner v. Gunton (1699) 1 Saund. 228 d.; **Savile v. Roberts** (1698) 1 Ld. Raym. 374, 379; and **Muriel v. Tracy** (1704) 6 Mod. 169, *followed*.

Walters v. Green (1899) 68 L. J. Ch. 730; [1899] 2 Ch. 696; 81 L. T. 151; 48 W. R. 23; 63 J. P. 742.—**STIRLING, J.**

Rex v. Gill (1818) 2 B. & Ald. 204; 20 R. R. 407.—K.B., *commented on*.
Reg. v. Parker (1842) 11 L. J. M. C. 102; 2 G. & D. 709; 3 Q. B. 292; 6 Jur. 822.—Q.B.

Rex v. Gill, *approved*.
Reg. v. Gompertz (1846) 9 Q. B. 824; 16 L. J. Q. B. 121; 11 Jur. 204; 2 Cox C. C. 145.—Q.B.

Rex v. Gill, *upheld*.
Reg. v. Manning (1883) 53 L. J. M. C. 85; 12 Q. B. D. 241; 51 L. T. 121; 32 W. R. 720; 48 J. P. 536.—Q.B.D.
Sylscoff v. Reg. (1847) 11 Q. B. 245; 12 Jur. 418.—EX. CH.

Rex v. Gill, *applied*.
Taylor v. Reg. (1894) 64 L. J. M. C. 11; [1895] 1 Q. B. 25; 15 R. 86; 71 L. T. 571; 43 W. R. 24; 18 Cox C. C. 45.—MATHEW and CHARLES, JJ.

Rex v. Spragg (1760) 2 Burr. 993, *distinguished*.

King v. Reg. (1844) 7 Q. B. 795; 14 L. J. M. C. 172; 9 Jur. 883.—EX. CH.

TINDAL, C.J.—But then it was urged by the learned counsel for the Crown that, supposing these objections to be well founded, this defect in the allegation of the conspiracy was cured by referring to the whole indictment—the part stating the overt acts as well as that stating the conspiracy; and *Rex v. Spragg* was cited as an authority that the whole ought to be read together. The point decided in that case appears to have been merely this, that, in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet, if the rest of the indictment contains a good charge of a misdemeanour, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without probable cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient: and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanour. But if we examine the allegations in this indictment, there is no sufficient description of any act done after the conspiracy, which amounts to a misdemeanour at common law. None of the overt acts are shown by the averments to be indictable.—p. 808.

Rex v. Pywell (1816) 1 Stark. 402, *held overruled*.

Rex v. Turner (1811) 18 East 228, *overruled*.
Reg. v. Rowlands (1851) 2 Den. C. C. 364; 17 Q. B. 671; 21 L. J. M. C. 81; 16 Jur. 268; 5 Cox C. C. 466.—C.C.R.
ERLE, J.—*Rex v. Pywell* is overruled by *Reg. v. Kenrick* (5 Q. B. 49).—p. 356.

CAMPBELL, C.J.—I will add that, after the most careful and elaborate consideration of the cases, I am satisfied that *Rex v. Turner* is not law. That was an indictment for a conspiracy to go into a preserve in the night time, and armed with offensive weapons in search of game, which in itself is an indictable offence, and

an agreement to commit an indictable offence undoubtedly amounts to a conspiracy.—p. 388.

O'Connell v. Reg. (1844) 11 Cl. & F. 155; 9 Jur. 25; 1 Cox C. C. 413.—H.L. (IR.), *applied*.

Castro v. Reg. (1881) 50 L. J. Q. B. 497; 6 App. Cas. 229; 44 L. T. 350; 29 W. R. 669; 14 Cox C. C. 546.—H.L. (E.).

O'Connell v. Reg., *applied*.
Reg. v. Manning (1883) 53 L. J. M. C. 85; 12 Q. B. D. 241; 51 L. T. 121; 32 W. R. 720; 48 J. P. 536.—Q.B.D.

5. AGAINST KING AND GOVERNMENT.

Rex v. Else (1808) R. & R. 142; and **Reg. v. Page and Jones** (1841) 1 Russ. Crimes, 82, *overruled*.

Reg. v. Greenwood (1852) 2 Den. C. C. 453.—C.C.R.

Rex v. Sutton (1737) 2 Strange 1074; Cas. temp. Hardw. 370; and **Rex v. Scofield** (1781) Cald. 397, *overruled*.

Rex v. Heath (1810) R. & R. 184.—C.C.R.

Reg. v. Goodwin (1867) 10 Cox C. C. 534, *overruled*.

Rex v. Martin (1869) 39 L. J. M. C. 31; L. R. 1 C. C. 214; 21 L. T. 469; 18 W. R. 72; 11 Cox C. C. 343.—C.C.R.

Reg. v. Toole (1867) 16 W. R. 439; 11 Cox C. C. 75; 1 R. 2 C. L. 36.—C.C.R. (IR.), *adopted*.

Att.-Gen. v. Moore (1892) 62 L. J. Ch. 607; [1893] 1 Ch. 676; 3 R. 213; 68 L. T. 574; 41 W. R. 294.—STIRLING, J.

6. AGAINST PUBLIC JUSTICE.

Perjury.

Long's Case (1604) 5 Coke 120; and **Vaux's Case** (1590) 4 Coke 44, *disapproved*.
Rex v. Aylett (1785) 1 Term Rep. 63; 1 R. R. 152.—K.B.

[During the argument the Court observed that *Long's Case* was considerably shaken in 2 Ld. Raym. 1169; and that *Vaux's Case* had also been shaken in Vent. 23 and 3 Keble 51.—p. 69.]

Reg. v. Crossley (1797) 7 Term Rep. 315; 4 R. R. 445, *applied*.

Reg. v. Vreones (1891) 60 L. J. M. C. 62; [1891] 1 Q. B. 360; 64 L. T. 389; 39 W. R. 365; 17 Cox C. C. 267; 55 J. P. 536.—C.C.R.

Wych v. Meal (1734) 3 P. Wms. 310.
United States President v. Drummond (1864) 33 Beav. 449.—M.R.

Reg. v. Berry (1859) Bell C. C. 46; 28 L. J. M. C. 86; 6 Jur. (N.S.) 820; 7 W. R. 229; 5 Cox C. C. 121.—C.C.R., *followed*.

Reg. v. Fletcher (1871) 40 L. J. M. C. 123; L. R. 1 C. C. 320; 24 L. T. 742; 19 W. R. 781; 12 Cox C. C. 77.—C.C.R.

Reg. v. Overton (1842) Car. & M. 655; 2 M. C. C. 263.—C.G.R.; *distinguished*, **Reg. v. Lavey** (1850) 3 Car. & K. 26 (*and see* 21 L. J. M. C. 10.—EX. CH.); *followed*, **Reg. v. Baker** (1895) 64 L. J. M. C. 177; [1895] 1 Q. B. 797; 15 R. 346; 72 L. T. 361; 43 W. R. 654.—C.G.R.

Reg. v. Lavey (1850) 3 Car. & K. 26, *questioned*.

Reg. v. Murray (1858) 1 F. & F. 80, *imputed*.

Reg. v. Gibbons (1862) L. & C. 109; 31 L. J. M. C. 98; 8 Jur. (N.S.) 159; 5 L. T. 805; 10 W. R. 350; 9 Cox C. C. 105.—C.G.R.

CHANNELL, B.—I never could understand that case [*Reg. v. Lavey*], unless on the ground that there was a question whether the defendant in the County Court action meant to plead or admit the claim. That point having been ascertained, the question of materiality was no longer for the jury.—p. 114.

MARTIN, B.—That case [*Reg. v. Murray*] should not be looked upon as an authority. It was only my impression of what was material, formed hastily on circuit.—p. 119.

Reg. v. Gibbons, *distinguished*.

Garbutt v. Simpson (1863) 32 L. J. M. C. 186; 8 L. T. 423; 11 W. R. 751.—Q.B.

Reg. v. Lavey and Reg. v. Gibbons, *followed*. **Reg. v. Baker** (1895) 64 L. J. M. C. 177; [1895] 1 Q. B. 797; 15 R. 346; 72 L. T. 631; 43 W. R. 654.—C.G.R.

Parker's Case (1622) Hutton 56, *questioned*. **Rex v. Beach** (1774) 1 Cowp. 229.—K.B.

Rex v. Knill (1822) 5 B. & Ald. 929, n., *questioned*.

Reg. v. Hook (1858) Dears. & B. 606; 27 L. J. M. C. 222; 4 Jur. (N.S.) 1026; 6 W. R. 518; 8 Cox C. C. 5.—C.G.R.

POLLOCK, C.B.—Probably no judge would now direct a conviction upon such evidence as was deemed sufficient in *Reg. v. Knill* without confirmatory circumstances.—p. 613.

7. AGAINST PUBLIC PEACE.

Furible Entry and Detainer.

Newton v. Harland (1840) 1 Man. & G. 644; 1 Scott (N.R.) 473; 2 Jur. 350.—C.P.; *observed upon*, **Accidental Death Insurance Co. v. Mackenzie** (1861) 5 L. T. 20; 9 W. R. 789.—C.P.; **Bettie v. Mair** (1881) 10 L. R. Ir. 208.

Newton v. Harland; Pollen v. Brewer (1859) 7 C. B. (N.S.) 371; 6 Jur. (N.S.) 509; 1 L. T. 9; and **Lows v. Telford** (1876) 45 L. J. Ex. 613; 1 App. Cas. 414; 35 L. T. 69; 18 Cox C. C. 226.—H.L. (E.); *reversing* 31 L. T. 90; *considered*.

Beddall v. Matland (1881) 50 L. J. Ch. 401; 17 Ch. D. 174; 44 L. T. 248; 29 W. R. 484.—F.R.Y. J.

Libel.

Reg. v. Bradlaugh, 2 Q. B. D. 569; 46 L. J. M. C. 286; *reversed, nom.* **Bradlaugh v. Reg.** (1878), 3 Q. B. D. 607; 38 L. T. 118; 26 W. R. 410.—C.A.

Reg. v. Sullivan (1868) 11 Cox C. C. 44, *followed*.

Reg. v. Burns (1886) 16 Cox C. C. 355 —CAVE, J.

Rex v. Harvey (1823) 2 B. & C. 257; 3 D. & R. 464; 2 L. J. (o.s.) K. B. 4; 26 R. R. 337; **Bromage v. Prosser** (1895) 4 B. & C. 247; 6 D. & R. 296; 1 Car. & P. 475; 3 L. J. (o.s.) K. B. 203; 28 R. R. 241; and **Heymann v. Reg.** (1873) L. R. 8 Q. B. 102; 28 L. T. 162; 21 W. R. 357; 12 Cox C. C. 883, *applied*.

Reg. v. Munslow (1895) 64 L. J. M. C. 138; [1895] 1 Q. B. 758; 15 R. 192; 72 L. T. 301; 43 W. R. 495; 18 Cox C. C. 112.—C.G.R.

Reg. v. London Corporation (1886) 16 Q. B. D. 772, 775; 55 L. J. M. C. 118; 54 L. T. 761; 34 W. R. 644; 16 Cox C. C. 81; 50 J. P. 614.—MATHEW and SMITH, JJ., *observations overruled*. *See* Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 4 (2).

Reg. v. Townsend (1886) 10 Cox C. C. 356; 4 F. & F. 1089, *followed*.

Reg. v. Carden (1879) 49 L. J. M. C. 1; 5 Q. B. D. 1; 41 L. T. 504; 28 W. R. 183; 14 Cox C. C. 359; 44 J. P. 119.—Q.B.D.

Rex v. St. Asaph (Dean) (1784) 3 Term Rep.

493, n., *opinion followed*. **Huntley v. Ward** (1850) 6 C. B. (N.S.) 514; 6 Jur. (N.S.) 18.

WILLES, J.—Every lawyer is well aware that although the Label Act, 32 Geo. 3, c. 60, applied more particularly to criminal cases, yet there is no distinction in this respect between the law in criminal cases and that in civil; and that the opinion of the dissentient judge (Wilkes, J.) in the case of *Rex v. The Dean of Asaph* is the proper exposition of the law.

[*Note*.—*See per* Littledale, J., in *Bayliss v. Lawrence* (11 A. & E. 925).]

Reg. v. Cavendish (1848) 12 Ir. L. R. 230, *not followed*.

Reg. v. Steel (1876) 45 L. J. Q. B. 391; 1 Q. B. D. 482; 24 W. R. 638; 13 Cox C. C. 159; *affirmed*, 46 L. J. M. C. 1; 2 Q. B. D. 37; 35 L. T. 534; 25 W. R. 34; 18 Cox C. C. 354.—C.A.

8. AGAINST PUBLIC MORALS AND POLICE.

Bigamy.

Reg. v. Fanning (1866) 17 Ir. C. L. R. 289; 10 Cox C. C. 411; 14 W. R. 701.—C.G.R. (IR.). *disapproved*.

Reg. v. Allen (1872) 41 L. J. M. C. 97; 1 L. R. 1 C. C. 367; 26 L. T. 664; 20 W. R. 756; 12 Cox C. C. 193.—C.G.R.

COCKBURN, C.J. (for the Court).—We cannot agree with Fitzgerald, B. in his judgment in *Reg. v. Fanning*, that the purpose of the statutes against bigamy was simply to make polygamous marriages penal, and that, consequently, it was only intended to constitute the offence of bigamy where the second marriage would, but for the existence of the first, be a valid one; or with those judges, who, in *Reg. v. Fanning*, found their judgments on the assumption, that in applying the statute against bigamy, the second marriage must be one which, but for the first, would be binding. Polygamy, in the sense of having two wives or two husbands at one and the same time for the purpose of cohabitation, is a thing altogether foreign to our ideas, and which may be said to be practically unknown; while bigamy, in the modern acceptance of the

term, namely, that of a second marriage consequent on an abandonment of the first while the latter still subsists, is unfortunately of too frequent occurrence.

Reg. v. Orgill (1839) 9 Car. & P. 80, *doubted*.
Yelverton v. Longworth (1864) 4 Macq. H. L. 745; 10 Jur. (N.S.) 1209; 11 L. T. 118; 13 W. R. 235.—H.L.

LORD WENSLEYDALE.—It is made a part of the respondent's case that a marriage took place by a Roman Catholic priest at Rostrevor, in Ireland, on the 15th August, 1857; but it appears that there was in force in that country an Act of the Irish Parliament of the 19 Geo. 2, c. 13, s. 1, which provides that every marriage, if celebrated by a Popish priest, between a Papist and any person that hath been, or hath professed himself to be, a Protestant at any time within twelve months before such celebration, shall be null and void to all intents. I cannot feel any doubt that, according to that law, this marriage was void. The appellant, having been born and bred a Protestant, of a Protestant family, and always treated as such, must be deemed to have continued so, unless he had done something to denote a change of his religious persuasion; and nothing of that sort appears. I have no doubt that he was a Protestant, within the meaning of that Act, and am fully supported in that opinion by those of the learned judges, Christian and Keogh, which I have read since the hearing of the case, and which are extremely full, able, and satisfactory. They are reported in *Theoball v. Yelverton* (14 Ir. Com. Law Rep. 188). He did not say he was a Roman Catholic to the priest, but that he was a "Protestant Catholic." Had he said he was a Roman Catholic it would have raised the question reputed to have been decided by Alderson, B. in *Reg. v. Orgill* in 1839, whether he was not estopped by his declaration that he was Roman Catholic. I must say I doubt greatly of the propriety of that decision and agree with an opinion of Monahan, C.J., to that effect, referred to in the argument. That his statement in that case would be evidence against him is undoubted, but that it operates as an estoppel, is a very different proposition; but it is not necessarily now to be discussed and decided. I think it clear therefore that there was no valid marriage in Ireland.

Reg. v. Newton (1843) 2 M. & Rob. 503; S. C. *nom. Reg. v. Simmonsto*, 1 Car. & K. 164; 1 Cox C. C. 30, *overruled*.

Reg. v. Savage (1876) 13 Cox C. C. 178.

LUSH, J. said he could not act upon that case, as it was at variance with the law, and he should therefore overrule it.—p. 179.

Reg. v. Turner (1862) 9 Cox C. C. 145; and **Reg. v. Horton** (1871) 11 Cox C. C. 670, *overruled*.

Reg. v. Gibbons (1872) 12 Cox C. C. 237.—BRETT, J.

Obscenity and Indecency.

Reg. v. Read (1707) Fort. 98, *overruled*.

Reg. v. Curl (1729) 2 Strange 788.—K.B.

[The Court said that if *Read's Case* was to be adjudged, they should rule it otherwise; and they held that an obscene book is punishable as a libel.—p. 791.]

Rex v. Carlile (1819) 3 B. & Ald. 167, 1 Cox C. C. 229; and **Reg. v. Hicklin** (1868) 37 L. J. M. C. 89; L. R. 3 Q. B. 360; 16 W. R. 801; 11 Cox C. C. 19; 18 L. T. 395.—Q.B., *followed*.

Steele v. Brannan (1872) 41 L. J. M. C. 85; L. R. 7 C. P. 261; 26 L. T. 509; 20 W. R. 607.—C.P.

Reg. v. Orchard (1848) 3 Cox C. C. 248, *commented on*.

Reg. v. Harris (1871) 40 L. J. M. C. 67; L. R. 1 C. C. 282; 19 W. R. 360; 24 L. T. 74; 11 Cox C. C. 659.

BOVILL, C.J.—If the facts had been clearly stated in the report of *Reg. v. Orchard*, it may be that we should have been bound by that case, but I must confess that I am unable to understand the exact facts, or the judgments applied to them, as there reported. But as far as I can understand them I do not think they are applicable to the present case.

Poaching.

Reg. v. Davis (1839) 8 Car. & P. 759, *dissented from*.

Reg. v. Andrews (1845) 1 Cox C. C. 144.

Reg. v. Davis, *overruled*.

Reg. v. Goodfellow (1845) 1 Den. C. C. 81; 1 Car. & K. 724.—C.C.R.

Fletcher v. Calthrop (1845) 6 Q. B. 880; 1 New Sess. Cas. 529; 14 L. J. Q. B. 95; 9 Jur. 205, *questioned*.

Cureton v. Reg. (1861) 1 B. & S. 208; 30 L. J. M. C. 149; 4 L. T. 286; 9 W. R. 665; 8 Cox C. C. 481.—Q.B.

HILL, J.—I cannot understand *Fletcher v. Calthrop*, and, with the greatest possible respect for the judges by whom it was decided, I think that if the point in that case ever arises again, it will deserve consideration.—p. 216.

Rex v. Rogers (1811) 2 Camp. 654, *overruled*.

Rex v. Chamberlain (1827) 1 M. C. C. 154.—C.C.R.

[The judges held that it was not necessary to call the owner of the property to prove non-consent. The evidence of the manager of the property held sufficient.]

9. PROCEDURE AND PRACTICE.

Jurisdiction.

Reg. v. Keyn (1876) 46 L. J. M. C. 17; 2 Ex. D. 63; 13 Cox C. C. 403.—C.C.R., *followed*.

Harris v. Franconia (Owners) (1877) 46 L. J. C. P. 363; 2 C. P. D. 173.—D.

Reg. v. Keyn, *inapplicable*.

Carr v. Francis (1901) 85 L. T. 144.—H.L. (U.).

Rex v. Battery, cited in **Rex v. Burdett** (1820) 4 B. & Ald. at p. 179, and **Pearson v. McGowan** (1825) 3 B. & C. 700, 3 L. J. (o.s.) K. B. 95; 5 D. & R. 616, *discussed*.

Reg. v. Ellis (1898) 68 L. J. Q. B. 103; [1899] 1 Q. B. 230; 79 L. T. 532; 47 W. R. 188; 62 J. P. 838.—C.C.R.

Indictment.

Crofton's Case (1870—1871) 1 Mod. 34, *overruled*.
Rex v. Wright (1758) 1 Burr. 543.
LORD MANSFIELD.—That *Case of Crofton* has been denied many times.—p. 547.

Rex v. Wright, *followed*.
Reg. v. Buchanan (1846) 8 Q. B. 883; 15 L. J. Q. B. 227; 10 Jur. 736; 2 Cox C. C. 36.—Q.B.

Rex v. Robinson (1759) 2 Burr. 799.—K.B. *followed*.
Reg. v. Lovibond (1871) 24 L. T. 357; 19 W. R. 759.—Q.B.

Stott's Case, 2 East P. C. 780, *explained*.
Reg. v. O'Connor (1843) 5 Q. B. 16; D. & M. 761; 13 L. J. M. C. 33; 7 Jur. 719.

Reg. v. Larkin (1854) 23 L. J. M. C. 125; Dears. C. C. 865; 2 C. L. R. 775; 13 Jur. 539; 2 W. R. 496; 6 Cox C. C. 377.—C.C.R., *referred to*.

Reg. v. Poole Corporation (1887) 56 L. J. M. C. 131; 19 Q. B. D. 602; 57 L. T. 485; 36 W. R. 239; 16 Cox C. C. 323; 52 J. P. 84.—**COLERIDGE, C.J.** and **DENMAN, J.** But see *S. C.* 19 Q. B. D. 683.

Young v. Rex (1789) 3 Term Rep. 98, 106; 1 R. B. 660.

Rex v. Jones (1809) 2 Camp. 131; 11 R. R. 680.

Rex v. Kingston (1806) 8 East 41; 9 R. R. 373.

Rex v. Robinson (1770) 4 Burr. 2527; 19 Howell St. Tr. 1075; 4 Bro. P. C. 360. *Applied*.

Castro v. Reg. (1881) 50 L. J. Q. B. 497; 6 App. Cas. 229; 44 L. T. 350; 29 W. R. 669; 14 Cox C. C. 546.—H.L. (2s.).

Trial.

Turner's Case (1664) Kelyng 30, *overruled*.
Rex v. Vandercomb (1796) 2 Leach C. C. 708, 718; 2 East P. C. 519.—EX. CH.

Reg. v. Morris (1867) 36 L. J. M. C. 84; L. R. 1 C. C. 90; 16 L. T. 636; 15 W. R. 999; 10 Cox C. C. 480.—C.C.R., *followed*.

Reg. v. Friel (1890) 17 Cox C. C. 325.—**WILLIAMS, J.**

Devonshire's (Earl) Case (1887) 11 How. St. Tr. 1354, *disapproved*.

Rex v. Taylor (1824) 3 B. & C. 502.
ABBOTT, O.J. (for the Court).—I should be sorry to consider that case as an authority for anything.—p. 514.

Juries and Challenges.

Reg. v. Geach (1840) 9 Car. & P. 499, *questioned*.

Mansell v. Reg. (1858) 8 E. & B. 54; Dears. & B. 375; 27 L. J. M. C. 4; 4 Jur. (N.S.) 432.—EX. CH.

COOKBURN, C.J.—The report of *Reg. v. Geach* is very loose, and cannot be depended upon.

Reg. v. Casey (1877) 13 Cox C. C. 645. *approved*.

Reg. v. Parnell (1880) 14 Cox C. C. 505.—Q.B. (1R.).

Evidence.

Reg. v. Fennell (1881) 7 Q. B. D. 147; 50 L. J. M. C. 126; 44 L. T. 687; 29 W. R. 742; 14 Cox C. C. 607; 45 J. P. 666.—C.C.R., *followed*.

Reg. v. Hatts (1883) 49 L. T. 780; 48 J. P. 248.—C.C.R.

Rex v. Wilson (1817) Holt N. P. 597, *overruled*.

Rex v. Ellis (1826) Ry. & M. 432.

Reg. v. Gavin (1885) 15 Cox C. C. 656.—**SMITH, J.**, *not followed*.

Reg. v. Brackenbury (1893) 17 Cox C. C. 628. **DAY, J.** admitted in evidence statements made by an accused person in answer to questions put to him by a policeman who then formally took him into custody, and expressly dissented from the ruling of A. L. Smith, J. in *Reg. v. Gavin*.

Reg. v. Drow (1837) 3 Car. & P. 140; **Reg. v. Morton** (1843) 2 M. & Rob. 514; **Reg. v. Furley** (1844) 1 Cox C. C. 76; and

Reg. v. Harris (1844) 1 Cox C. C. 106, *overruled*.

Reg. v. Baldry (1852) 2 Den. C. C. 430; 5 Cox C. C. 523; 21 L. J. M. C. 130; 16 Jur. 599.—C.C.R.

Reg. v. Warringham (1851) 2 Den. C. C. 447, n.; 15 Jur. 318; and **Reg. v. Baldry**, *applied*.

Reg. v. Thompson (1893) 62 L. J. M. C. 93; [1893] 2 Q. B. 12; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P. 312.—C.C.R.

Reg. v. Garbett (1847) 1 Den. C. C. 236; 2 Car. & K. 474; 2 Cox C. C. 448. See 61 & 62 Vict. c. 36, s. 1 (e).

Reg. v. Richards (1866) 4 F. & F. 860, *disapproved*.

Reg. v. Parker (1870) 39 L. J. M. C. 60; L. R. 1 C. C. 225; 21 L. T. 724; 18 W. R. 853; 11 Cox C. C. 478.—C.C.R.

Rex v. Fagg (1881) 4 Car. & P. 566, *disapproved*.

Rex v. Bell (1831) 5 Car. & P. 162.
GASELEE, J. (after consulting **LORD TENTERDEN, C.J.**).—My Lord Tenterden agrees with me that the opinion of Garrow, B. in *Rex v. Fagg* is much too general, as it would go to exclude any acknowledgment of guilt made by a prisoner to a constable. [Garrow, B. had stated his opinion that nothing which a prisoner stated, before he knew what the evidence against him was, ought to be used to criminate him.]

Reg. v. Mann (1885) 49 J. P. 743.—**DENMAN, J.**, *dissented from*.

Reg. v. Mitchell (1892) 17 Cox C. C. 503.

CAVE, J.—Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge that is some evidence to show that he admits the charge to be true. But, where a statement is made in such circumstances that the prisoner cannot repel the charge, it is absurd to say that his remaining silent is any evidence of the truth of the charge. In this case, where a woman was lying on her deathbed,

and her evidence was being formally taken, the last thing in the world to be expected is that the prisoner should have started up and denied it, and said that all the woman was saying was untrue, especially where she was represented by a solicitor and knew that her solicitor would be allowed to ask questions in turn, and that everything would be done for her which could be done. It would in my opinion be simply monstrous to say that because she did not do so, that is to be taken as evidence of her guilt. I am clearly of opinion, therefore, notwithstanding *Reg. v. Mann*, in which I think my learned brother must have been misreported, that this statement is not admissible in evidence.—p. 508.

Kops v. Reg. (1894) 64 L. J. P. C. 34 : [1894] A. C. 650 ; 6 R. 522 ; 70 L. T. 890 ; 58 J. P. 665.—P.C. See Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (b).

Winsor v. Reg. (1866) 35 L. J. M. C. 161 ; L. R. 1 Q. B. 890 ; 12 Jur. (N.S.) 561 ; 14 L. T. 567 ; 14 W. R. 695 ; 7 B. & S. 490 ; 10 Cox C. C. 327.—EX. CH., observations held inapplicable.

Reg. v. Bradlaugh (1883) 15 Cox C. C. 217. COLERIDGE, C.J. referring to the observation of Cockburn, C.J. in the above case to the effect that "In all cases where two persons are joined in the same indictment, and it is desired to try them separately, and that the evidence of one should be received against the other, it is better that a verdict of not guilty should be taken against the one called," said that there the fellow prisoner had been called for the Crown.—p. 228.

Reg. v. Stiginani (1867) 10 Cox C. C. 552, overruled.

Reg. v. Greenslade (1870) 11 Cox C. C. 412. BRETT, J. said he had consulted Willes, J. in reference to *Reg. v. Pietro Stiginani* and he had his authority for saying that his judgment was there incorrectly reported, and that he was of opinion that, if the evidence was relevant, it ought to be received ; but, however, notice of its production ought to be given to the prisoner or his attorney, and if such notice was not given, it was a subject for strong comment.—p. 412.

Rex v. Yewin, cited in a note to *Harris v. Tippet* (1811) 2 Camp. 637, 638, followed.

Reg. v. Shaw (1888) 16 Cox C. C. 503.—GAVE, J.

Reg. v. Rowton (1865) 34 L. J. M. C. 57 ; L. & C. 620 ; 11 Jur. (N.S.) 825 ; 11 L. T. 745 ; 13 W. R. 496 ; 10 Cox C. C. 25.—C.C.R. See 61 & 62 Vict. c. 36, s. 1 (f).

New Trial.

Reg. v. Scaife (1851) 17 Q. B. 238 ; 2 Den. C. C. 281 ; 5 Cox C. C. 243 ; 20 L. J. M. C. 229 ; 15 Jur. 607, not followed.

Att.-Gen. of New South Wales v. *Bertrand* (1867) L. R. 1 P. C. 520 ; 36 L. J. P. C. 51 ; 4 Moore P. C. (N.S.) 460 ; 10 Cox C. C. 618 ; 16 W. R. 9 ; 16 L. T. 752.—P.C.

SIR J. COLERIDGE (for J.C.).—It is alleged, and so far as their lordships are aware, truly, that according to the universal impression among lawyers, no such power exists as the Court below has exercised in this instance ; and, further,

that but a single case is reported in which an application for a new trial in felony has been made, and but one—the same case, of course—in which it has succeeded. That case occurred in 1851, and although, as is well known, the public attention has been very much drawn to the subject during the interval which has since occurred, and it cannot be doubted that verdicts have since been pronounced which might have seemed questionable, no attempt has been made in this country to press the authority of that case in support of a similar application. On a matter of such importance it is right to consider that case attentively, and it is fortunate as to the freedom with which their lordships may deal with it, that two of them who have taken part in the hearing of this appeal, also took part in the decision then arrived at. *Reg. v. Scaife, Smith and Rooke*, was a case of an indictment for felony, found at the Hull borough sessions, and removed by *certiorari*. The trial was at the York assizes, before the late Cresswell, J., and, in the course of it, a deposition of a living witness, not produced, was tendered on the part of the prosecution, there were grounds which applied only to Smith, on which it was admissible as against him ; the counsel for the prisoner objected to its reception, but the learned judge overruled the objection, and rightly,—he admitted it, as is said, "subject to the objection" ; the meaning of which probably was, that he might upon consideration have referred his ruling to the Court of Criminal Appeal. But in summing up he left the evidence generally to the jury, omitting to tell them that the deposition could affect Smith only. Singularly enough, the jury convicted Scaife and Rooke, and acquitted Smith. In the following term a rule nisi was obtained for a new trial, on the grounds of improper evidence and misdirection. The case was argued at some length, and neither in the course of the argument, nor in the judgments which followed, was a syllable uttered on the points now in question ; the attention both of the counsel and the judges seems to have been exclusively confined to the questions of evidence and misdirection ; but after the judgments pronounced, making the rule absolute, this occurred : the counsel for the rule suggested that there was a difficulty in ascertaining what rule should be drawn up, "no precedent having been found for a new trial in felony." Upon which Lord Campbell is reported to have said, "That might have been an argument against our hearing the motion." Still, however, the rule was made absolute, and a new trial, in fact, took place.

It appears, then, from this examination of the case, that a most important innovation in the practice of our criminal law was here made without a word of argument at the bar upon it, or the attention of the Court having for a moment been addressed to it, until after the opinion of all the judges had been expressed on the point really debated. And, as has been already stated, the decision has taken no root in our law, and borne no fruit in our practice. Are their lordships to be bound by it in the advice they are now to tender to her Majesty ? It is somewhat embarrassing, even apparently, to disregard any judgment of the Court of Q. B. ; but, in truth, when examined, this can scarcely be said to be a judgment upon the point now to be decided ; substantially, the Court decided, and decided rightly, the only question directly for consideration, namely, that of the reception

of evidence and misdirection, and for that alone the decision is properly an authority. That they adhered to it in spite of the consequences involved, after it was pointed out to them, is true, and their lordships now venture to say, to be regretted; for, at all events, it would seem that if such an innovation were to be made, it should not have been made without argument or indirectly. Their lordships, therefore, will feel at liberty to consider the present case apart from this authority.—p. 531.

Att.-Gen. of New South Wales v. Bertrand, *followed.*

Reg. v. Murphy (1869) 6 Moore P. C. (N.S.) 177; 88 L. J. P. C. 53, L. R. 2 P. C. 535; 21 L. T. 598; 17 W. R. 1047; 11 Cox C. C. 372.—P.C.

Reg. v. Soaife, *not followed.*

Reg. v. Duncan (1881) 50 L. J. M. C. 95; 7 Q. B. D. 198; 44 L. T. 521; 30 W. R. 61; 45 J. P. 456; 14 Cox C. C. 373.—COLERIDGE, C.J., FIELD and BOWEN, JJ.

COLERIDGE, C.J.—The only case in which a new trial was granted was *Reg. v. Soaife*, and that was not a misdemeanour but a felony—a distinction which at that time was of the greatest importance—an importance which modern legislation has almost entirely removed. If, therefore, that case stood uncommenced upon and practically unreversed, and had been followed, it would have been an authority strongly in point here. It would, to quote from the judgment in *Att.-Gen. of New South Wales v. Bertrand* (4 Moo. P. C. (N.S.) 460), have worked a revolution in the practice of the criminal law. But, as Sir J. Coleridge there explains, the point now under consideration was not presented to the Court in *Reg. v. Soaife*, and the decision cannot be said to be a judgment upon it, but a decision given *per incuriam*, afterwards admitted to be wrong. It stands, therefore, that the case has never been followed in these Courts, and has been deliberately overruled in a Court of co-ordinate jurisdiction, in which were two of the judges who were parties to the original decision.—p. 96.

Reg. v. Wandsworth Inhabitants (1817) 1 B. & Ald. 63; 2 Chit. 282; 18 R. R. 434, *limited.*

Reg. v. N. E. Ry. (1901) 70 L. J. K. B. 548; 84 L. T. 502; 49 W. R. 524; 19 Cox C. C. 682.—ALVERSTONE, C.J. and LAWRENCE, J.

Reg. v. Russell (1854) 3 El. & Bl. 942; 23 L. J. M. C. 173; 18 Jur. 1022; 2 W. R. 555, *dicta questioned.*

Reg. v. Stephens (1866) 7 B. & S. 710; 35 L. J. Q. B. 251; L. R. 1 Q. B. 702; 12 Jur. (N.S.) 961; 14 L. T. 593; 14 W. R. 859.—Q.B.

MELLOR, J.—The observations of Lord Campbell in *Reg. v. Russell* (p. 947), on which reliance was placed, may have been justified by the circumstances of this case, though the judgments of the other judges do not seem to have proceeded on the same reasons. Whether there is any satisfactory distinction between that case and the present may be open to question; but if there is none, I should act on the opinions of the other judges rather than on Lord Campbell's.

Judgment and Punishment.

Rex v. Powell (1831) 2 B. & Ad. 75; 9 L. J. (O.S.) M. C. 71, *discussed.*
Campbell v. Reg. (1846) 11 Q. B. 799; 2 New Sess. Cas. 297; 17 L. J. M. C. 89; 12 Jur. 117; 2 Cox C. C. 463.—EX. CH.

Rex v. Powell, *upheld.*

Ryalls v. Reg. (1848) 41 Q. B. 781; 17 L. J. M. C. 92.—EX. CH.

PARKE, B.—*Rex v. Powell* was not overruled in *O'Connell v. Reg.*, nor by this Court in *Campbell v. Reg.*; in which last case we affirmed the judgment of the Q. B. after a careful examination of old precedents.—p. 798.

Reg. v. Darby (1702) 1 Salk. 78, *not followed.*

Reg. v. Robinson (1759) 2 Burr. 799; 2 Ld. Ken. 513.—K.B.

[The Court held, notwithstanding *Reg. v. Darby*, that a motion in arrest of judgment may be made on the Crown side at any time before sentence pronounced.]

Error and Appeal.

Dugdale v. Reg. (1853) 2 E. & B. 129; Dears. C. C. 254; 17 Jur. 1097; 6 Cox C. C. 161, *inapplicable.*

Bell-Cox (or Cox) v. Hakes (1890) 60 L. J. Q. B. 89; 15 App. Cas. 509; 63 L. T. 392; 39 W. R. 145; 17 Cox C. C. 158, 54 J. P. 820.—H.L. (ex.).
HALSBURY, L.C., LORDS WATSON, BRANWELL, HERSHELL, MACNAGHTEN, MORRIS and FIELD.

Reg. v. Clark (1866) 36 L. J. M. C. 16; L. R. 1 U. C. 54; 12 Jur. (N.S.) 946; 15 L. T. 190; 15 W. R. 48; 10 Cox C. C. 338.—C.C.R., *discussed and distinguished.*

Reg. v. Brown (1880) 59 L. J. M. C. 47; 24 Q. B. D. 357; 61 L. T. 594; 38 W. R. 95; 16 Cox C. C. 715; 54 J. P. 408.—C.C.R.

COLERIDGE, C.J.—The judgment [in *Reg. v. Clark*], which was very short, was delivered by Cockburn, C.J., who said: "In this case we have no jurisdiction. It was not a question arising on the trial; for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this Court only applies to questions of law which arise on the trial." If those words mean that because a man pleads guilty, any defect in the statement of the case against him is immaterial, and that he is precluded from afterwards taking advantage of such defect, and that even the judge who tried him cannot state a case asking for the opinion of this Court, respectfully differ from the decision. In this case the indictment was read to the prisoner, and if he had then taken the objection, it would clearly have been a point arising on the trial; and the mere fact that he did not take it, but that it occurred to the judge afterwards, does not make it the less a point which arose on the trial. We think therefore, that we have jurisdiction to consider this case. *Reg. v. Clark* is not, moreover, directly in point, for there the question was whether the facts stated in the depositions supported the indictment. The present case is distinguishable, because here the question is as to the sufficiency of the indictment itself, which must needs have been gone into.—p. 48.

Reg. v. Brown, followed.

Reg. v. Clark, not followed.

Reg. v. Plummer (1902) 71 L. J. K. B. 805; [1902] 2 K. B. 339; 86 L. T. 836; 51 W. R. 137; 66 J. P. 617.—C.G.R.

Bail.

Reg. v. Badger (1843) 4 Q. B. 468; D. & M. 375; 12 L. J. M. C. 66; 7 Jur. 216; *Robinson, In re* (1851) 23 L. J. Q. B. 286; 2 W. R. 424; and *Linford v. Fitzroy* (1849) 13 Q. B. 240; 3 New Sess. Cas. 438; 18 L. J. M. C. 108; 13 Jur. 303. See *Bail Act, 1898* (61 & 62 Vict. c. 7).

Certs.

Reg. v. Yates (1857) 7 Cox C. C. 361. *distinguished.*

Reg. v. Bushell (1888) 16 Cox C. C. 367; 52 J. P. 136.

COLERIDGE, C.J.—I think this case is to be distinguished from *Reg. v. Yates*. That case arose on a trial for manslaughter and the principal person interested was dead. . . . But in this case the person interested is the wife of the prisoner, the person upon whom the assault, with the commission of which the prisoner is charged, was committed. I understand the magistrates expressed no opinion on the point, and I think that the wife had rights, of which she ought not to be deprived. Where there is a private prosecutor, and that prosecutor conducts the case before the magistrates, I do not think the magistrates' clerk ought to step in and take the case out of the prosecutor's hands. The wife will therefore be allowed the costs of the prosecution.—p. 369.

CROWN.

Secretary of State for War v. Chubb (1880) 43 L. T. 83.—M.R., *distinguished.*

Att.-Gen. v. Albany Hotel Co. (1896) 65 L. J. Ch. 885; [1896] 2 Ch. 696; 75 L. T. 195.—C.A. LINDLEY and LOPES, L.JJ.

De Dohse v. Reg. (1886) 66 L. J. Q. B. 422, n.; [1896] 1 Q. B. 117, n.—H.L. (E.). LORDS HALSBURY, L.C., BLACKBURN, WATSON and FITZGERALD; and *Shenton v. Smith* (1895) 64 L. J. P. C. 119; [1895] A. C. 329; 11 R. 375; 72 L. T. 130; 43 W. R. 637.—P.C., *followed.*

Dunn v. Reg. (1895) 65 L. J. Q. B. 279; [1896] 1 Q. B. 116; 73 L. T. 695; 44 W. R. 243; 60 J. P. 117.—C.A. LORD HERSHELL, ESHER, M.R. and KAY, L.J.

Dunn v. Reg. and De Dohse v. Reg., applied. *Gould v. Stuart* (1896) 65 L. J. P. C. 82; [1896] A. C. 575; 75 L. T. 110.—P.C. LORDS WATSON and HOBHOUSE, and SIR R. COUGH.

Gould v. Stuart, limited.

Young v. Waller (1898) 67 L. J. P. C. 80; [1898] A. C. 661; 78 L. T. 508.—P.C. LORDS WATSON, MACNAGHTEN, MORRIS, and SIR R. COUGH.

LORD WATSON (for J.C.).—Now although it was decided by this board in *Gould v. Stuart*

that the effect of the Civil Service Act, 1884, was to deprive the Crown of its right to dismiss its civil servants summarily, without following the procedure prescribed by the Act, it was certainly not suggested that the provisions of the Act do, either directly or by implication, take away the right of the Crown to abolish a civil office.

Yates v. Dryden (1634) Cro. Car. 589; *Leonard v. Rogers* (1609) Wight. 204; *Att.-Gen. v. Hallett* (1846) 15 M. & W. 97; 15 L. J. Ex. 246; and *Att.-Gen. v. Barker* (1872) 41 L. J. Ex. 57; L. R. 7 Ex. 177; 36 L. T. 34; 20 W. R. 509.—EX., *applied.* *Stanley (Lord) v. Wild* (1899) 69 L. J. Q. B. 318; [1900] 1 Q. B. 256; 82 L. T. 14; 48 W. R. 242.—C.A. SMITH and WILLIAMS, L.JJ.

Alexander v. Wellington (Duke) (1830) 2 Russ. & My. 35; 9 L. J. (O.S.) Ch. 36. *distinguished.*

Brown v. Harris (1807) 13 Ves. 552; 9 R. R. 221, *distinguished.*

Kinloch v. Secretary of State for India (1882) 51 L. J. Ch. 885; 7 App. Cas. 619; 47 L. T. 133; 30 W. R. 845.—H.L. (E.). SELBORNE, L.C., LORDS O'HAGAN, BLACKBURN and WATSON.

SELBORNE, L.C.—All that I will say is this: In *Alexander v. Wellington (Duke)* there was a claim between Messrs. Alexander and Lord Hastings. The trustees, if I am so to call them, had actually paid the money to Lord Hastings, or had done what was the same thing, had paid it into Court, in a suit between himself and one of his creditors, and it was to be distributed simply according to the private rights of the parties, between Lord Hastings and his creditors. With that we have nothing to do; but the question whether the fund could be put into trust in this way and administered, was determined upon appeal by Lord Brougham as Lord Chancellor, and was distinctly determined by him upon the following footing, though the trustees had been directed to collect and get in certain funds, and to prepare a scheme of distribution, which they had done, and though two subsequent warrants of the Crown had confirmed the distribution made by them, Lord Brougham distinctly held that in order to determine whether they were trustees or not, in such a sense as to introduce the jurisdiction of the Court of Chancery, the instrument making the grant, and nothing else, was to be looked to, and that the subsequent Acts could not make it a trust to be administered in the Court of Chancery if it was not so by virtue of the instrument itself; and upon the instrument itself he said he had no doubt whatever that the question on the merits was wholly beyond the jurisdiction of the Court.

A previous decision by Lord Eldon in *Brown v. Harris* has been referred to in the course of the argument. There, no doubt, the Crown did grant a fund to trustees in every sense of that word, the fund being distinctly vested in them, and vested for the purposes for which they were made trustees, and the power of the Crown who had made the grant being entirely at an end over the matter. Of course, that is quite possible, and there the Court of Chancery might exercise its ordinary jurisdiction. That cannot be doubted, but the question is whether this instrument is of that kind.—p. 890.

Greenwood v. Taylor (1845) 14 Sim. 505; 9 Jur. 480; *reversed on one point, nom. Att.-Gen. v. Cox. Pearce v. Att.-Gen.* (1850) 3 H. L. Cas. 240.

Rex v. Ward (1836-7) 2 Ex. 301, n., *followed.*

West London Commercial Bank, In re (1888) 57 L. J. Ch. 925; 38 Ch. D. 364; 59 L. T. 296. —CHITTY, J.

Rex v. Wells (1807) 16 East 278, n.: 14 R. R. 347, *followed.*

Att.-Gen. v. Leonard (1888) 57 L. J. Ch. 860; 38 Ch. D. 622; 59 L. T. 624; 37 W. R. 24.—CHITTY, J.

Uppom v. Summer (1779) 2 W. Bl. 1251, 1294, *disapproved.*

Giles v. Grover (1832) 1 Cl. & F. 72; 2 M. & Scott 197; 9 Bing. 128.

Gosman, In re (1880) 49 L. J. Ch. 590; 15 Ch. D. 67; 42 L. T. 804; 29 W. R. 14.—v.-c.; *reversed*, (1881) 50 L. J. Ch. 624; 17 Ch. D. 771; 45 L. T. 267; 29 W. R. 798.—C.A.

Gervais de Clifton (1848) Year Book, P. 22 Edw. 3. fol. 5, pl. 12, *commented on.*
Canterbury (Viscount) v. Att.-Gen. (1848) 1 Ph. 306; 12 L. J. Ch. 281; 7 Jur. 224.

Gervais de Clifton, considered.
Tobin v. Reg. (1864) 16 C. B. (N.S.) 310; 33 L. J. C. P. 199; 10 Jur. (N.S.); 1029; 10 L. T. 783; 12 W. R. 838
ERLE, C.J. (for the Court). *See judgment at length.*

Gervais de Clifton, explained.
Feather v. Reg. (1865) 6 B. & S. 257; 35 L. J. Q. B. 200; 12 L. T. 114.

Dixon v. London Small Arms Co., 44 L. J. Q. B. 63; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A. **ESHER, M.R.**, *explained.*
Dixon v. Farrer (1886) 56 L. J. Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A. **ESHER, M.R.**, *explained.*

Feather v. Reg., limited.
Dixon v. London Small Arms Co. (1876) 1 App. Cas. 632; 46 L. J. Q. B. 617; 35 L. T. 559; 25 W. R. 142.—H.L.

Bankers' Case (1700) 14 How. St. Tr. 1, **Canterbury (Viscount) v. Att.-Gen.** (*supra*); **Tobin v. Reg.** (*supra*); and **Feather v. Reg.**, *followed.*
Thomas v. Reg. (1874) L. R. 10 Q. B. 31; 44 L. J. Q. B. 9; 31 L. T. 439; 23 W. R. 176.

Feather v. Reg. and Thomas v. Reg., approved.
Windsor and Annapolis Ry. v. Reg. (1886) 55 L. J. P. C. 41; 11 App. Cas. 607; 55 L. T. 271; 51 J. P. 260.—P.C.

Dixon v. Farrer (1886) 56 L. J. Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A. **ESHER, M.R.**, *explained.*
Graham v. Public Works Commissioners (1901) 70 L. J. K. B. 860; [1901] 2 K. B. 781; 85 L. T. 96.—RIDLEY and PHILLMORE, JJ.

Att.-Gen. v. Wilson (1900) W. N. 263; *reversed*, (1900) 70 L. J. Ch. 284; 83 L. T. 646; 49 W. R. 195; [1901] W. N. 5.—C.A. **RIGBY, WILLIAMS and ROMER, L.JJ.**

Reg. v. Beadle (1857) 7 El. & Bl. 492; 26 L. J. M. C. 111; 3 Jur. (N.S.) 863; 5 W. R. 498, *unapplied.*
Moore v. Smith (1859) 1 E. & E. 597; 28 L. J. M. C. 126; 5 Jur. (N.S.) 892; 7 W. R. 206.

Reg. v. Beadle, preferred.
Dublin, Wicklow and Wexford Ry., In re, Jordan, Ex parte (1892) 31 L. R. 1r. 1.—v.-c., *not followed.*
Galvin, In re [1897] 1 Ir. R. 520.

Reg. v. Beadle, followed.
Secretary of State for War v. Booth [1901] 2 Ir. R. 692.—Q.B.D.

Reg. v. Beadle and Secretary of State for War v. Booth, followed.
Madden's Estate, In re (1901) [1902] 1 Ir. R. 63.—C.A.

Reg. v. Beadle; Moore v. Smith (1859) 1 E. & E. 597; 28 L. J. M. C. 126; 5 Jur. (N.S.) 892; 7 W. R. 206. **Lord Advocate v. Dunglas** (1842) 9 Cl. & F. 178.—H.L. (SC.); and **Smith v. Stair (Earl)** (1849) 2 H. L. Cas. 807; 13 Jur. 713.—H.L. (SC.), *applied.*

Rex v. Canterbury (Archbishop) (1902) 71 L. J. K. B. 932; [1902] 2 K. B. 503; 86 L. T. 450; 50 W. R. 476; 66 J. P. 455.—LORD ALVERSTONE, C.J., WRIGHT and RIDLEY, JJ.

Reg. v. Beadle; Moore v. Smith; and Rex v. Canterbury (Archbishop), applied.
Thomas v. Pritchard (1902) 72 L. J. K. B. 23.—ALVERSTONE, C.J., WILLS and CHANNELL, JJ.

CROWN OFFICE.

CERTIORARI.

Poole's Case (1883) 14 L. R. Ir. 14.—Q.B., *explained.*
Nally v. Reg. (1884) 15 Cox C. C. 638; 16 L. Ir. 1.

JOHNSON, J.—In *Poole's Case*, notwithstanding that I invited the attention of counsel to the question whether an application for *certiorari* was the proper course in that case, the counsel on both sides passed by that question, and addressed their arguments entirely to the merits of the application. That motion for a *certiorari* was refused, but in giving my reasons for concurring with my brother Lawson, I pointed out (and I believe with the approbation of my learned brother) that the usual and ordinary course would have been to proceed in that case by writ of error, and, therefore, that if I had entertained any doubt upon the case made for the prisoner, I should have hesitated before granting a *certiorari*, but that as I entertained no doubt I concurred that the motion for *certiorari* ought to be refused. *Poole's Case*, therefore, is not an authority for the present application.—p. 643.

Lilley v. Dorin, unreported.—POLLOCK, B. and DAVY, J., *not followed.*

Symonds v. Dimsdale (1848) 2 Ex. 533; 17 L. J. Ex. 247; 6 D. & L. 17; 12 Jur. 485, *explained.*

Cherry v. Endeau (1886) 55 L. J. Q. B. 292; 54 L. T. 768; 34 W. R. 458.
SMITH, J.—Upon the materials before the Court in *Lilley v. Dorin*, the decision was right. But

the Borough and Local Courts of Record Act, 1872, has been brought before us, and it is said that it applies to the Mayor's Court. Apart from authority, the only meaning which can be given to rule 12 in the schedule to that Act is that no case in the Mayor's Court shall be removed by writ of *certiorari* into a superior Court, unless the parties can persuade a judge that the case is fit to be tried in a superior Court. But it is said that in *Synmonds v. Dinsdale* there was a judicial interpretation of a statute of which the language is identical with that before us, and that we are bound to say that, in spite of rule 12, there is a common law right to remove a case by *certiorari* if the amount is over 50*l*. But, on looking at the case, it appears that Platt, B. made an order at chambers *ex parte* for a *certiorari*, to remove a case from the Oxford County Court, he thinking the case to be one which was fit to be tried in a superior Court. The motion in the Court of Exchequer was to rescind the order, on two grounds. First, that the plaintiff ought to have had notice of the intention to apply for the *certiorari*, and secondly, that the writ was not properly tested. Those were the only grounds decided; and that case does not fetter that which is plain from rule 12—namely, that the leave of this Court must be obtained before a writ of *certiorari* can be issued.—p. 294.

MATHEW, J. to the same effect.

Reg. v. Dickenson (1857) 7 E. & B. 831; 26 L. J. M. C. 204; 3 Jur. (N.S.) 1076; 5 W. R. 654, *observed upon*.

Reg. v. Chantrell (1875) 44 L. J. M. C. 94; L. R. 10 Q. B. 587; 33 L. T. 305; 23 W. R. 707.—Q.B.

Jones v. Davies (1822) 1 B. & C. 143, *disapproved*.

Rex v. Passman (1834) 1 A. & E. 603; 3 N. & M. 730; 3 L. J. M. C. 111.

LITTLEDALE, J.—The decision in *Jones v. Davies* went upon special grounds: it seems that the Court there thought that the proceedings had been improperly removed from the great sessions: but it is not a case which I should follow as a precedent.—p. 605.

Bradlaugh, Ex parte (1878) 47 L. J. M. C. 105; 3 Q. B. D. 509; 38 L. T. 680; 26 W. R. 758.—Q.B.D., *examined*.

Reg. v. Bradley (1894) 63 L. J. M. C. 183; 10 R. 183; 70 L. T. 379; 17 Cox C. C. 739; 58 J. P. 199.—MATHEW and CAVE, JJ.

HABEAS CORPUS.

Reg. v. Barnardo, Tye's Case (1889) 58 L. J. Q. B. 553; 23 Q. B. D. 305; 61 L. T. 547; 37 W. R. 789; 54 J. P. 132.—C.A. ESHER, M.R., COTTON and LINDLEY, L.J., *discussed*. *See* "APPEAL."

Reg. v. Barnardo, Gossage's Case (1890) 59 L. J. Q. B. 345; 24 Q. B. D. 283; 38 W. R. 315.—C.A. ESHER, M.R. and FRY, L.J. *See* *Barnardo v. Ford, infra*.

Reg. v. Barnardo, Tye's Case, *disapproved*.

Barnardo v. Ford (1892) 61 L. J. Q. B. 728; [1892] A. C. 326; 67 L. T. 1; 56 J. P. 629.—H.L. E. LORDS HALSBURY, L.C., HERSCHELL, WATSON, MACNAGHTEN, MORRIS and HANNEN; *affirming* but *questioning* S. C. *nom.* **Reg. v. Barnardo, Gossage's Case** (1890) 59 L. J. Q. B.

345; 24 Q. B. D. 283; 38 W. R. 315.—C.A. ESHER, M.R. and FRY, L.J.; *affirming* 62 L. T. 44.

LORD HERSCHELL.—If, in order to support this judgment, it were necessary to give my adhesion to the law laid down in *Reg. v. Barnardo, Tye's Case*, I should hesitate much before doing so. Having regard to the nature of a writ of *habeas corpus* and the purpose for which it was designed and has hitherto been employed, I cannot feel satisfied, as at present advised, that it is not a good return to the writ that the person to whom it relates was not at the time it was issued in the custody, power, or control of the person upon whom it is served. The doctrine that it must also show that before the writ was issued, or before he had notice of the application for its issue, he had not wrongfully parted with the custody of the person named in the writ is novel, and appears to me to involve great difficulty. A gaoler who has allowed a prisoner to escape has wrongfully parted with the custody of that person. Could he be commanded by a writ of *habeas corpus*, issued after the escape, to produce him, and be committed for contempt of court if he failed to do so? Other illustrations might be given to show the difficulty of assenting to the broad proposition laid down in the Court of Appeal. . . . The very basis of the writ is the allegation, and the *prima facie* evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another in custody. To use it as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law and not warranted by it.—pp. 732, 733.

Barnardo v. Ford (1892).—H.L. (E.), *supra*. *See* Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 3.

Fletcher, In re (1843) 1 D. & L. 726, 13 L. J. M. C. 16; 8 Jur. 146, *doubted*.

Bowdler, In re (1848) 17 L. J. Q. B. 243; 12 Q. B. 612.—Q.B.

Fletcher, In re, and Bowdler, In re, *distinguished*.

Henderson v. Preston (1883) 57 L. J. Q. B. 607; 21 Q. B. D. 382; 59 L. T. 534; 36 W. R. 334; 52 J. P. 820.—STEPHEN, J.; *affirmed*, C.A.

Reg. v. Staffordshire JJ. (or Firehill North JJ.) (1884) 54 L. J. M. C. 17; 14 Q. B. D. 13; 51 L. T. 534; 33 W. R. 203; 49 J. P. 86.—C.A., *referred to*.

Reg. v. King (1888) 57 L. J. M. C. 20; 20 Q. B. D. 430; 58 L. T. 607; 36 W. R. 600; 52 J. P. 164.—C.A.

Anderson, In re (1861) 30 L. J. Q. B. 129; 7 Jur. (N.S.) 122, *observed upon*.

Mansergh, In re (1861) 1 B. & S. 400; 30 L. J. Q. B. 296; 7 Jur. (N.S.) 825; 4 L. T. 469; 9 W. R. 703.

Reg. v. Allen (1860) 3 E. & E. 338; 30 L. J. Q. B. 38, *limited*.

Reg. v. Mount (1875) L. R. 6 P. C. 283; 44 L. J. P. C. 58; 32 L. T. 279; 23 W. R. 572.

SIR MONTAGUE SMITH (for J.C.).—The case of *Reg. v. Allen* was exceptional in its circumstances; the prisoner had been tried by court-martial in India, and when he had been brought

to England under an invalid warrant, there seemed to be no lawful way of carrying the sentence into effect.—p. 305.

Benns v. Mosley (1857) 2 C. B. (N.S.) 416; 3 Jur. (N.S.) 694; 5 W. R. 538, *followed*.
Weldon v. Neal (1885) 54 L. J. Q. B. 399; 15 Q. B. D. 471; 33 W. R. 581.

Hardwick v. Bluck (1797) 7 Term Rep. 297, *questioned*.
Rex v. Middlesex (Sheriff) (1798) 7 Term Rep. 327.

MANDAMUS.

Reg. v. Lambourn Valley Ry. (1888) 58 L. J. Q. B. 136; 22 Q. B. D. 463; 60 L. T. 54; 53 J. P. 248.—**FOLLOCK, B.** and **MANISTY, J.**, *distinguished*.
Reg. v. L. & N. W. Ry. (1894) 63 L. J. Q. B. 695; [1894] 2 Q. B. 512; 10 R. 339; 58 J. P. 719.

WRIGHT, J.—Of course we deal with that case with all possible respect as a decision which binds us *in pari materia*; but there the Court was not dealing with a question of this kind. I have never heard that decision questioned, and I do not suppose it ever will be. It was a civil dispute, and it held that the remedy by action of *mandamus* was the applicant's proper remedy. But there is one expression in it which the learned judge is, I think, incautiously reported to have made, that it is an answer to any application for a prerogative *mandamus* if it be shown that a *mandamus* could have been granted for the same purpose in the action. I say, and I have said with the assent of other judges at various times, that this would be unduly narrowing the powers of this Court to grant a prerogative *mandamus*. There must be very many cases in which prerogative *mandamus* is a thing which ought to be granted for the purpose of speedy justice, or other reasons, where it would take a long time and be very difficult and very uncertain whether the same results would be arrived at in any other way. I do not think that *Reg. v. Lambourn Valley Ry.* governs this case, and we have no doubt that the practice which has been inveterate for years of enforcing the taking up of these awards by prerogative writ of *mandamus* is a proper remedy.—p. 698.

Reg. v. Lambourn Valley Ry., *followed*.
Reg. v. L. & N. W. Ry. and G. W. Ry. (1896) 66 L. J. Q. B. 516; 74 L. T. 624.—**RUSSELL, C.J.**, and **WRIGHT, J.**

Thompson, Ex parte (1845) 14 L. J. Q. B. 176; 6 Q. B. 721, *followed*.
Reg. v. Bodmin Corporation (1892) 61 L. J. M. C. 151; [1892] 2 Q. B. 21; 66 L. T. 562; 40 W. R. 606; 56 J. P. 504.—**DAY** and **CHARLES, JJ.**

Reg. v. Goodrich (or Leicester Freemen) (1850) 19 L. J. Q. B. 413; 15 Q. B. 671; 14 Jur. 914, *dictum applied*.
Portingell, Ex parte (1891) 61 L. J. M. C. 1; [1892] 1 Q. B. 35; 65 L. T. 603; 40 W. R. 102; 56 J. P. 276.—**C.A.** **ESHER, M.R., FRY** and **LOPES, L.JJ.**

Rex v. Treasury Commissioners (1835) 4 A. & E. 286; 1 H. & W. 533; 5 N. & M. 589; 5 L. J. K. B. 20, *overruled*.
Reg. v. Inland Revenue Commissioners, Nathan,

In re (1884) 12 Q. B. D. 461; 53 L. J. Q. B. 229; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452.—**C.A.** **BRETT, M.R.**—With regard to *Rex v. Lords Commissioners of the Treasury*, I confess it is case with which I cannot agree. It is put upon the ground, that a relation was established between the parties of depositor and depositor; that is to say, although the money had been paid by the Crown into the hands of the Commissioners of the Treasury, it never having been the money of the claimant, yet the Commissioners of the Treasury, by the acts which they had done, but as in common law it would be called, attome to the claimant and agreed to hold the money for him. The moment that they came to this conclusion, they showed that he could have maintained an action for money had and received against the Commissioners of the Treasury, and if so, of course a *mandamus* ought not to have issued. I cannot agree, therefore, that upon this grounds put by the Court in that case, it was proper decision. If it were a decision which could be upheld, and I think it cannot, it is an authority for saying that where that relation has not been raised by the acts of such Commissioners, a *mandamus* would lie to them. If a *mandamus* would have lain to them if it had not been for that attornment, I cannot conceive I must say frankly, that, sitting here, I consider that the case of *Rex v. Lords Commissioners of the Treasury* cannot be maintained on any ground.—p. 475.

BOWEN, L.J.—I agree with the M.R. in thinking that *Rex v. Lords Commissioners of the Treasury* is a wrong decision.—p. 480.

Reg. v. Treasury Commissioners (1872) 41 L. J. Q. B. 178; 4 L. R. 7 Q. B. 357; 1 L. T. 64; 20 W. R. 396; 12 Cox C. 277, *distinguished*.
Armstrong v. Wilkinson (1878) 47 L. J. P. 31; 3 App. Cas. 355; 38 L. T. 185; 26 W. 550.—**P.C.**

Reg. v. Woods and Forests Commissioners **Budge, Ex parte** (1850) 15 Q. B. 76; 19 L. J. Q. B. 497, *held overruled*.
Birch v. Marylebone Vestry (1869) 17 W. 1014; 20 L. T. 697.

COCKBURN, C.J.—The distinction taken in *R. v. Commissioners of Woods and Forests* that it lies (to treat for the purchase of houses, &c.) being given by the Commissioners acting in public capacity, did not constitute a contravention enforceable by *mandamus* is now overruled the decision in *Coe v. Wise* (14 W. R. 865).
BLACKBURN, J. to the same effect.

Ellis, Ex parte, **Folk. on Libel** (4th ed. p. 592, *limited*).

Reg. v. Carden (1879) 5 Q. B. D. 1; 49 L. M. C. 1; 41 L. T. 504; 28 W. R. 133; 14 C. C. 359; 44 J. P. 119.

COCKBURN, C.J.—In *Ellis, Ex parte*, which has been referred to, it seems to me that the Court went to the utmost limits of its mandamus jurisdiction, and I should be extremely unwilling to extend the doctrine of that case to any set of circumstances.—p. 5.

Reg. v. Stacy (or Stacey) (1850) 19 L. J. M. 177; 14 Q. B. 789; 14 Jur. 549, *dictum disapproved*.
Reg. v. Worcestershire Justices (1854) 3 E

B. 477; 3 C. L. R. 1833; 23 L. J. M. C. 113; 18 Jur. 424.

[Counsel, in argument, having cited the following *dictum* of Patteson, J. in the above case:—"In substance the sessions treated the matter as a mere nullity, and therefore did not go into the merits of the appeal. The respondents should have applied for a *mandamus* to hear the appeal."]

CAMPBELL, C.J. said that he had great respect for the Bench, and that he learned judge, but that, if he did say that a *mandamus* would lie in that case, he could not agree with him. But that he doubted whether he did say it, for in the report of the same case in the Queen's Bench Reports no such *dictum* appeared.

Reg. v. Percy (1873) 43 L. J. M. C. 45; L. R. 9 Q. B. 64; 22 W. R. 72, *observed upon*.

Reg. v. Phillimore (or Pilling) (1884) 14 Q. B. D. 474, n. (2); 51 L. T. 205; 32 W. R. 593; 48 J. P. 774.

COLLIERIDGE, C.J. (CAVE and WILLIAMS, JJ. concurring).—We are not prepared to say that we think *Reg. v. Percy* was rightly decided so far as it is to be understood to decide that the Act *only* applies where justices require protection. We are clearly of opinion that such a construction narrows the operation of the statute too much.

Reg. v. Phillimore, followed.

Reg. v. Percy, not followed.

Reg. v. Biron (1884) 54 L. J. M. C. 77; 14 Q. B. D. 474; 51 L. T. 429; 49 J. P. 68.—GROVE and SMITH, JJ.

Rex v. York Corporation (1792) 5 Term Rep. 66, *overruled*.

Rex v. Margate Pier Co. (1819) 3 B. & Ald. 220; 2 Chit. 256; 22 R. R. 356.—K.B.

ABBOTT, C.J.—It is undoubtedly more convenient to such an objection (*i.e.*, an objection to a writ of *mandamus*) should be taken at first, and that will probably account for the observations of Lord Kenyon and Buller, J. in the case cited. But the other authorities, showing that such an objection may at any time be taken, do not seem to have occurred to these learned judges when these observations were made.—p. 224.

Rex v. York Corporation, overruled.

Rex v. Margate Pier Co. and Rex v. Bristol Dock Co. (1827) 6 B. & C. 181; 9 D. & R. 805; 5 L. J. (o.s.) M. C. 51; 30 R. R. 280, *followed*.

Delamere (Lord) v. **Reg.** (1887) L. R. 2 H. L. 419; 36 L. J. Q. B. 313; 17 L. T. 1.—H.L. (E.). CHELMSFORD, L.C.—If the allegations in the writ of *mandamus* were insufficient, the plaintiffs in error might have moved to quash the writ, even after their return to it, as appears from the cases of *Rex v. Margate Pier Co.* and *Rex v. Bristol Dock Co.* Instead of doing so, they not only allowed pleas to be filed, and issues to be raised upon the return, but they proceeded to trial; and a verdict was given against them.—p. 425. *And see* reporter's note at foot of page.

London Corporation v. Reg. (1848) 13 Q. B. 1, 80; 17 L. J. Q. B. 330; 13 Jur. 38.—EX. CH., *questioned*.

Reg. v. S. E. Ry. (1853) 4 H. L. Cas. 471; 17 Jur. 901.

O.C.

Reg. v. Southampton Port and Harbour Commissioners (1861) 30 L. J. Q. B. 244; 1 B. & S. 5; *reversed*, (1865) 6 B. & S. 325.—EX. CH.; *latter decision reversed*, (1870) L. R. 4 H. L. 44; 39 L. J. Q. B. 253; 23 L. T. 111; 18 W. R. 11.—H.L. (E.).

PROHIBITION.

Buggin v. Bennett (1767) 4 Burr. 20 *considered*.

London Corporation v. Cox (1867) 36 L. Ex. 225; L. R. 2 H. L. 239; 16 W. R. 44 H.L. (E.).

Buggin v. Bennett and Broad v. Perks (1888) 57 L. J. Q. B. 638; 21 Q. B. 533; 60 L. T. 8; 37 W. R. 44; J. P. 39.—C.A. ESHER, M.R., COTTELL, LINDLEY, BOWEN, FRY and LOPES, L.C. *considered*.

Farguharson v. Morgan (1894) 63 L. J. Q. 474; [1894] 1 Q. B. 552; 9 R. R. 202; 70 L. 152; 42 W. R. 306; 58 J. P. 495.—C.A. LO HALSBURY, LOPES and DAVEY, L.JJ.

Reg. v. London County JJ. and L. C. (1894) 63 L. J. Q. B. 301; [1894] 1 Q. 453; 9 R. 148; 70 L. T. 148; 42 W. 225; 58 J. P. 380.—C.A. ESHER, M. LOPES and KAY, L.JJ., *considered*.

Reg. v. Jones (1894) 63 L. J. Q. B. 65 [1894] 2 Q. B. 382; 10 R. 287; 70 L. T. 84 42 W. R. 607; 58 J. P. 733.—CAVE and COLLINS, JJ.

Everton (Overseers) Ex parte (1871) L. R. C. P. 245; 40 L. J. C. P. 201; 24 L. 361; 19 W. R. 927, *distinguished*.

Wallace v. Allen (1875) 44 L. J. C. P. 35 L. R. 10 C. P. 607; 23 W. R. 703; 32 L. T. 8.—C.P.

Rex v. Kealing (1832) 1 D. P. C. 4 *approved*.

Liverpool United Gas Co. v. Everton Overseer (or Everton Overseers, Ex parte) (1871) L. J. C. P. 201; L. R. 6 C. P. 245; 24 L. T. 36 19 W. R. 927.—C.P.

QUO WARRANTO.

Darley v. Reg. (1846) 12 Cl. & F. 5 *applied*.

Reg. v. St. Martin's-in-the-Fields Guardian (1851) 17 Q. B. 149; 20 L. J. Q. B. 423; Jur. 800.

Darley v. Reg., followed.

Reg. v. Hampton (1856) 6 B. & S. 923; 12 J. (N.S.) 433; 13 L. T. 431; 15 W. R. 43.

Darley v. Reg., applied.

Reg. v. Burrows (1891) 61 L. J. Q. B. 8 [1892] 1 Q. B. 399; 66 L. T. 25; 40 W. R. 2.—MATHEW and SMITH, JJ.

Reg. v. Stacey (1785) 1 Term. Rep. 1, *principle applied*.

Rex v. Parry (1837) 6 A. & E. 810; 2 N. & 414; **Rex v. Lambeth Rector** (1838) A. & E. 356; and **Reg. v. Cousins** (1842) L. J. Q. B. 124; 28 L. T. 116.—Q *applied*.

Reg. v. Ward (1873) 42 L. J. Q. B. 126; L. R. 8 Q. B. 210; 23 L. T. 118; 21 W. R. 632.—B. COURT.

Reg. v. Jones (1873) 28 L. T. 270.—Q.B., *followed*.
Reg. v. Tidy (1892) 61 L. J. Q. B. 791; [1892] 2 Q. B. 179; 67 L. T. 219; 41 W. R. 128; 56 J. P. 650.—WRIGHT and COLLINS, JJ.

CUSTOM.

Jenkins v. Harvey (1835) 5 L. J. Ex. 17; 2 C. M. & R. 393.—PARKE, B., *approved*.
Shepherd v. Payne (1864) 33 L. J. C. P. 158; 16 C. B. (N.S.) 132; 10 Jur. (N.S.) 540; 10 L. T. 193; 12 W. R. 581.—EX. CH.

Jenkins v. Harvey and Shepherd v. Payne, *discussed*.
Bryant v. Foot (1867) 36 L. J. Q. B. 65; L. R. 2 Q. B. 161.—Q.B.; *affirmed*, (1868) 37 L. J. Q. B. 217; L. R. 3 Q. B. 497; 9 B. & S. 444; 18 L. T. 587; 16 W. R. 808.—EX. CH.

Shepherd v. Payne, *discussed*.
Lawrence v. Hitch (1868) 37 L. J. Q. B. 209; L. R. 3 Q. B. 521; 9 B. & S. 467; 18 L. T. 483; 16 W. R. 813.—EX. CH.; *reversing* L. R. 2 Q. B. 184, n.—Q.B.

Bryant v. Foot and Lawrence v. Hitch, *questioned*.

Mills v. Colchester Corporation (1867) 36 L. J. C. P. 210; L. R. 2 C. P. 476; 16 L. T. 626; 10 W. R. 955; *affirmed*, (1868) 37 L. J. C. P. 278; L. R. 3 C. P. 575; 16 W. R. 987.—EX. CH.
 WILLES, J.—Secondly, however, it was objected that, looking to the pleadings, the sum payable for the license was not alleged to be a fixed, but only a reasonable compensation, which must necessarily vary from time to time; and so that the custom was void for uncertainty; or that, looking to the evidence as to payment of a fixed sum in connection with the change in the value of money during the period over which the payment ran, the custom must be unreasonable or impossible. This argument is founded upon a supposed difficulty in sustaining a custom for a reasonable payment, not being a fixed and arbitrary sum, but capable of varying in nominal amount with the value of money from time to time; and it derives considerable authority from the judgment of the majority of the Court of Q. B. . . . in the late cases of *Bryant v. Foot* and *Lawrence v. Hitch*, where the learned judges dissented from what they considered to be a novel assumption of this Court in the judgment in *Shepherd v. Payne*, that a customary fee need not be of an amount fixed before legal memory, but may be of reasonable amount, like a toll. It is observable, however, that Bramwell, B., in the Ex. Ch. [*Shepherd v. Payne*], and the dissentient judge, Blackburn, J., in the Queen's Bench [*Bryant v. Foot*], adopted the opinion of this Court; and further, that the attention of the majority of the Court of Q. B. does not appear to have been directed to the authorities which sustain customary or prescriptive claims for reasonable amounts, such as Blackstone's Commentaries 78, where the nature of a valid custom in respect of certainty is explained, nor to the authorities, such as Com. Dig. tit. "Toll" (D), *Dunbar v. Wigglesworth* (1752) Willes 654, and *Gard v. Callard* (1817) 6 M. & S. 69, which show that toll of a reasonable amount

may be claimed by grant or by prescription, which stands upon the same footing as custom; nor to the opinion of Lord Holt in *Dalton v. Gerard* (1700) Holt 596, who seems to have taken for granted that there may be a reasonable fee annexed to an ancient office (which fee, as Blackburn, J., said in *Bryant v. Foot*, may in process of time have become taxed at a given sum); nor to the circumstance that fees to the church were not fixed in ancient times—see judgment in *Miller v. Say* (1742) Willes 631, n.; nor to *Layburn v. Crisp* (1838) 8 L. J. Ex. 118; 4 M. & W. 320, where a custom to have the exclusive right of unloading oysters in the port of London, and to receive a reasonable sum for so doing, was upheld at a trial at bar; nor, in short, to any of the authorities for applying the familiar principle, "*id certum est quod certum reddi potest*," to the maintenance of a custom; which principle was acted upon, though it was not thought necessary to recite it, in *Shepherd v. Payne*. And the reason of the thing is, as we conceive, in accordance with the authorities. Thus, a custom to pay such or such a measure of corn would be good; and therefore a custom to pay in money the value of that measure of corn must be good, and if to pay the value of a measure of corn, why not pay the value of any other commodity or advantage capable of estimation? We cannot, therefore, as at present advised, decide against the custom upon this ground.—p. 216.

Fitch v. Rawling (1795) 2 H. Bl. 393; 3 R. R. 425; and *Abbot v. Weekly* (1665) 1 Lev. 176; *referred to in* *Bell v. Wardell* (1740) Willes 202, *followed*.

Millechamp v. Johnson (1746) Willes 205, n., *disented from*.

Hall v. Nottingham (1875) 1 Ex. D. 1; 45 L. J. Ex. 50; 33 L. T. 697; 24 W. R. 58.

KELLY, C.B.—The matter comes to be a question of authorities; but among these there appears to be an irreconcilable difference. On the one hand we have *Abbot v. Weekly* and *Fitch v. Rawling*, and on the other, [*Millechamp v. Johnson*], the case reported in the note to *Bell v. Wardell*. In the latter case it was held that a custom for all the inhabitants of a town for the time being to have and enjoy the liberty and privilege of playing at any rural sports or games in a close every year, at all times in the year, at their will and pleasure was a bad custom. It was not so held on the ground that the expression "at all times in the year" was too general, for that expression was held not to mean more than at all reasonable times; but only on the ground that the custom as laid down was too general. Some sports may occupy the whole surface of the land, and thus this custom might take that entire surface out of the possession of the owner at all times. This I take to be the *ratio decidendi* in that case; but on the other hand we have *Abbot v. Weekly* and *Fitch v. Rawling*. In the first of these it was held that the dancing there mentioned might be held at all times of the year, and, taking the two cases together, they show that all lawful games and pastimes may be used at all times. I think we ought to give effect to those authorities, as being of more weight than that on the other side.—p. 3.

RELEASES, B. to the same effect. AMPHLETT, B. concurred.

Fitch v. Rawling and Coventry (Earl) v. Willes (1863) 9 L. T. 384.—Q.B., *referred to*.
Bourke v. Davis (1889) 41 Ch. D. 110; 62 L. T. 34; 38 W. R. 167.—KAY, J.

Ratcliffe v. Chaplin (1611) 4 Leon. 242; Godb. 166, *followed*.
Denn v. Goodwin v. Spray (1786) 1 Term Rep. 466; 1 R. R. 250.—ASHHURST, J. (for the Court).

Denn v. Spray, *explained*.
Doe v. Foster v. Sisson (1810) 12 Mast 62.—K.B., *followed*.
Locke v. Colman (1836) 1 Myl. & Cr. 423; S. C. (1837) 2 Myl. & Cr 635.—COTTENHAM, L.C.

Denn v. Spray, Roe v. Beebee v. Parker (1792) 5 Term Rep. 26.—K.B.; and **Doe v. Sisson**, *commented on*.
Muggleton v. Barnett (1857) 27 L. J. Ex. 125; 2 H. & N. 669; 4 Jur. (N.S.) 139.—EX. CH.
WIGHTMAN, J.—*Denn v. Spray* is a direct authority against the plaintiff in the present case.—p. 126. [His lordship discussed that case and also *Doe v. Sisson*.]

WILLIAMS, J.—It was contended, however, on the part of the defendants, that a custom of this nature cannot be properly said to exist beyond the instances in which it can be shown to have actually prevailed and been put in use. And certainly Lord Coke is reported to have so laid down the rule in *Ratcliffe v. Chaplin*, and this direction was cited and relied upon in the Court of Q. B. in *Denn v. Spray*. But the more modern authorities are, I think, quite irreconcilable with it. Thus, it was held in the subsequent case of *Roe v. Parker*, that an ancient presentment by a homage of the customs of a manor was sufficient evidence as to a descent, though no evidence was adduced of any person having taken under it; and Lord Kenyon said, that if the decision of *Denn v. Spray* went as far as to determine that such a document is not admissible in evidence, unless instances in fact are previously proved to warrant the introduction of it, he must beg leave to dissent from it. And Grose, J. observed, that it must be remembered, there are considerable inaccuracies in the report of that case, and he thought Lord Coke meant to comment on the credit which was due to the evidence, rather than its admissibility. This was followed by *Doe v. Sisson*. There the custom proved by particular instances, was, that the eldest sister, and, if she were dead, the son of such eldest sister, succeeded; but there was no instance of any descent beyond that. And the question in the cause was between the grandson of an eldest sister and the sons of two younger sisters. But one witness stated the reputation to be, that the eldest sister should take, and if all were dead, the descendants of the eldest sister. The Court of Q. B. held in that case, that upon this evidence it was properly left to the jury to determine whether the grandson of the eldest sister was entitled to the whole, although there was no proof of such extended custom having been put in use. The present case, in itself, affords an example of the difficulty of applying the doctrine, that the custom shall only prevail as to descendants of which instances can be proved. For if the contest had been whether the custom extended to uncles, it must have been held that by reason of the want of an instance, there was no evidence of the custom extending so far as them, notwithstanding the

instance of its descending further in the case of their sons. To carry this illustration a step further: suppose that in the present case there had been on the rolls a further instance of this kind of descent in the case of the children of a first cousin, would it not be more reasonable to infer that the custom extended to collaterals generally, than to suppose that any *lex loci* could have been instituted so whimsical as to extend to first cousins once removed, and yet exclude uncles and first and second cousins? It may be further observed, that *Denn v. Spray* was decided, not only on the ground that the custom was not shown to extend to collaterals, but also upon the peculiar wording of the custom, as contained in the customary of the manor, namely, "*si aliquis tenens hujus manerii obierit*," &c., which necessarily excluded nephews and nieces, inasmuch as they make out their claim or pedigree through their father or mother, who never was a tenant of the manor, and consequently could not have died seised, and on whom therefore the custom as to the course of descent never attached. For this reason, as well as those given by my brother Bramwell, in his judgment in the Court of Ex., we may well hold, that *Denn v. Spray* was rightly decided, without overruling the decision of the learned judge at the trial of the present case.—p. 127.

GROSEWELL, J.—It has been suggested that if *Denn v. Spray* be taken as a decision that a custom can only be proved by evidence of its being acted upon, it was overruled in *Doe v. Sisson*. In that case an estate was claimed by the grandson of an eldest sister of the person last seised. Entries on the court rolls proved that copyholds descended to an elder sister, to the exclusion of a youngest sister, and the son of an elder sister inherited to the exclusion of the children of younger sisters; and evidence was given that the reputation of the custom was that the more remote descendants of the eldest sister took. This evidence was objected to; but the Court held that it was rightly admitted. I quite agree in that opinion, but what was the reputation! That a custom, or, as I explain it, a course of acting existed in the manor. The reputation was, therefore, evidence, perhaps not very cogent, but still evidence of the fact of lands having descended in that manner. It was, therefore, evidence of an act done, and in perfect accordance with *Denn v. Spray*.—p. 129.

ERLE, J.—The defendants relied on a rule supposed to be laid down in *Denn v. Spray*, that a custom can be proved only by instances of usage entered on the court rolls. For this rule the Court relied on the language of Lord Coke in *Ratcliffe v. Chaplin*, that the party maintaining the custom must show precedents on the court rolls to prove the usage, and that it had been put in use, and that although it had been deemed and reputed to be the true custom, yet the Court could not give credit to the proof by witnesses. But this rule is not supported by the decision cited for it. The point for decision in *Ratcliffe v. Chaplin* was, whether a new trial should be granted on the ground of the verdict being against the evidence; and, as there were conflicting entries; the remarks which the Court adopted in *Denn v. Spray* were extra-judicial, pertinent only to an observation of the jury that they knew the customs by reputation. Moreover, it is clear that the rule so adopted in *Denn v. Spray* was overruled in *Doe v. Sisson*, where

evidence of reputation was held sufficient to support a finding by the jury that the custom extended to more distinct degrees than could be found entered on the court rolls; and this decision in *Doe v. Sison* was confirmed and acted upon by Lord Cottenham in *Loche v. Colman*.—p. 130.

COLERIDGE, J. to the same effect as CRESSWELL, J.

COCKBURN, J. (after discussing *Ratcliffe v. Chaplin*, continued): *Denn v. Spry* went, however, a step further. It was there held, that where it was shown that the custom that, as amongst females, the eldest only should inherit, extended not only to daughters but to sisters, it could not thence be inferred that the custom extended to the case of an eldest niece (of which there was no actual instance); although in a customary of the manor, which the Court recognised as legal evidence, it was expressly declared that no tenements within the manor were divisible, whether amongst heirs male or female. The Court admits the authority of *Ratcliffe v. Chaplin* to its fullest extent, treats the customary of the manor as entitled to no weight, and adopts the language of Lord Coke in its most general sense, without at all referring it to the subject-matter to which it was in truth applied, and lays it down that, as custom cannot be extended further than the actual instances on the court rolls establish it, I am bound to say, that the judgment in that case appears to me to be unsatisfactory and inconclusive, and to have proceeded upon a misapprehension of the scope and the effect of the judgment in *Ratcliffe v. Chaplin*. Its authority seems to have been very much shaken by the subsequent case of *Doe v. Sison*. . . . If the rule contended for upon the authority of *Ratcliffe v. Chaplin* and *Denn v. Spry* be the correct one, and were to prevail, it is extremely probable that this extraordinary and anomalous state of circumstances would arise, that while the son of the youngest uncle could inherit, the uncle himself, though nearer in degree, could not; a consequence so obviously absurd, as forcibly to illustrate the unsoundness of the doctrine from which it would spring.—pp. 133, 134.

[*Note*.—The majority of the Court, COLERIDGE, WIGHTMAN, CRESSWELL and CROMPTON, JJ. (COCKBURN, C.J., ERLE and WILLIAMS, JJ. dissenting), held that there was no evidence to show that the custom extended to authorise the descent to the youngest son of the youngest brother of the great-grandfather of the person last seized.]

Muggleton v. Barnett, referred to.

Doe d. Gooding v. Gooding (1820) Chitty on Descents, p. 183, not followed.

Doe d. Mason v. Mason (1770) 8 Wils. K.B. 63, followed.

Chenoweth, In re, Ward v. Dwellley (1902) 71 L. J. Ch. 739; [1902] 2 Ch. 488; 86 L. T. 890; 63 W. R. 663.—FARWELL, J.

Blewett v. Tregonning (1885) 4 L. J. K.B. 234; 3 A. & E. 554; 5 N. & M. 308; 1 H. & W. 432.—K.B.; and *Hammerton v. Honey* (1876) 24 W. R. 603.—JESSEL, M.R., distinguished.

De la Warr (Earl) v. Miles (1891) 17 Ch. D. 535; 60 L. J. Ch. 754; 44 L. T. 437; 39 W. R. 809.—C.A. JAMES, BRETT and COTTON, L.JJ., varying, (1890) 49 L. J. Ch. 476; 42 L. T. 469.—BACON, V.-C.

COTTON, L.J.—But, no doubt, it must be shown that the acts of the defendant are acts of user in connection with his particular tenement; and that, I think, is shown, because what is proved in respect of this defendant and his predecessors in title is, that they cut the litter in respect of and for the use of their farm only; and as that was so, the right was exercised in respect of that tenement, and is connected with the tenement, i.e., with the possession and occupation of the tenement and the ownership of the tenement. That, in my opinion, entirely distinguishes the case from the two cases on which the plaintiff relied. . . . One was *Blewett v. Tregonning*, and all that was laid down was to this effect: "It must be pointed out to the jury that they must be satisfied that the occupiers of the firm enjoyed the privilege because they were occupiers, and that the right was attached to the farm." . . . The other case, which at first sight seemed more in favour of the respondents, was *Hammerton v. Honey*. In that case what was attempted to be asserted was a claim of all the inhabitants of a village to use a green for the purpose of recreation. The evidence given was that all people, whether of the village or not, had used it; and it was held that this evidence would not support a claim of right in respect of the inhabitants of that village. Some of the persons who used it happened to be inhabitants of the village, but there was no distinction at all between their user and that of all the rest of her Majesty's subjects, and therefore the user by all her Majesty's subjects as such, the villagers not using it as villagers but as her Majesty's subjects, did not afford any evidence in support of the claim sought to be established.—p. 537.

Lanchbury v. Bode (1898) 67 L. J. Ch. 196; [1898] 2 Ch. 120; 78 L. T. 14; 62 J. P. 348.—KECKWICH, J., distinguished.

Alms Com. Charity, In re, Charity Commissioners v. Bode (1900–1901) 71 L. J. Ch. 76; [1901] 2 Ch. 750; 85 L. T. 533.

STIRLING, J.—It was contended that the case was governed by the decision in *Lanchbury v. Bode*, which related to the same land. The payment which had to be considered in that case, however, was of a different kind, and Kekewich, J., in dealing with it, says that "when the question comes to one of a charge on land there is quite a different question to be considered." Moreover in *Lanchbury v. Bode*, from the nature of the payment, the effect of sect. 66 of the Inclosure Act had not to be considered.—p. 81.

DAMAGES.

Hadley v. Baxendale (1854) 23 L. J. Ex. 179; 9 Ex. 341; 2 O. L. R. 517; 18 Jur. 558; 2 W. R. 302.—ALDERSON, B. (for the Court), commented on. *And*, see col. 811.

Simons v. Patchett (1857) 26 L. J. Q. B. 195; 7 El. & Bl. 568; 3 Jur. (N.S.) 742; 5 W. R. 500.—CROMPTON, J.

Hadley v. Baxendale, applied.

Waters v. Towers (1855) 22 L. J. Ex. 186; 8 Ex. 401.—ALDERSON, B. (for the Court), commented on.

Smeed v. Foord (1859) 28 L. J. Q. B. 178; 1 El. & Bl. 602; 5 Jur. (N.S.) 291; 7 W. R. 266,

—Q.B.; *Gee v. Lancashire and Yorkshire Ry.* (1860) 30 L. J. Ex. 11; 6 H. & N. 211; 6 Jur. (N.S.) 1118; 3 L. T. 328; 9 W. R. 103.—EX.

Hadley v. Baxendale, referred to.

De Mattos v. Gibson (1860) 80 L. J. Ch. 145; 1 J. & H. 79; 7 Jur. (N.S.) 282; 3 L. T. 121.—WOOD, V.-C.

Hadley v. Baxendale, applied.

Wilson v. Lancashire and Yorkshire Ry. (1861) 80 L. J. C. P. 232; 9 C. B. (N.S.) 632; 7 Jur. (N.S.) 232; 3 L. T. 839; 9 W. R. 635.—C.P.

Wilson v. Lancashire and Yorkshire Ry., approved.

Shulze v. G. E. Ry. (1887) 56 L. J. Q. B. 442; 19 Q. B. D. 30; 57 L. T. 438; 35 W. R. 683.—C.A. *ESHER, M. R., FRY and LOPES, L.JJ.*

Hadley v. Baxendale and Smeed v. Foord (supra), held not applicable.

Collard v. S. E. Ry. (1861) 80 L. J. Ex. 393; 7 H. & N. 79; 7 Jur. (N.S.) 950; 4 L. T. 410; 9 W. R. 697.—POLLOCK, C.B., MARTIN and CHANNELL, BB.

Collard v. S. E. Ry., discussed.

The Parana (post, col. 812).

Hadley v. Baxendale, dissented from.

Smeed v. Foord and Gee v. Lancashire and Yorkshire Ry., approved.

Boyd v. Fitt (1863) 14 Ir. C. L. R. 43.—PIGOT, C.B. (for the Court).

Hadley v. Baxendale, discussed.

Wilson v. Newport Dock Co. (1866) 35 L. J. Ex. 97; L. R. 1 Ex. 177; 4 H. & C. 232; 12 Jur. (N.S.) 233; 14 L. T. 230; 14 W. R. 558. MARTIN, B. (who dissented from the majority), said: This case [*Hadley v. Baxendale*] is, therefore, an authority that in a similar case such loss of profit cannot be made an element of damages, and must be excluded; but it is an authority no further, and anything said by the Court in delivering judgment, is to be judged by its being consonant to law and reason. . . . I do not adopt the qualifications mentioned by Alderson, B. in the judgment in *Hadley v. Baxendale* as applicable to every case. They may have been perfectly right there, but they are not of universal application. . . . As to *Hadley v. Baxendale*, I was a party to it, and have no desire to depreciate it, but in *Boyd v. Fitt* the Court of Ex. in Ireland dissented from it, and approved of the views of Crompton, J. in *Smeed v. Foord*, and Wilde, B. in *Gee v. Lancashire and Yorkshire Ry.*, as being sounder expositions of the law as to remoteness of damages.—p. 100.

POLLOCK, C.B.—*Hadley v. Baxendale* was cited at the trial, and much commented on during the argument. That case was very much considered. The argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it. Lord Wensleydale, the late Alderson, B. and my brother Martin were parties to it, and it is due to Lord Wensleydale and the late Alderson, B. to say that a more extensive and accurate knowledge of decisions in our law books, and a more acute power of analysing and discussing them, and, as far as my brother Martin is concerned, in addition, a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist at the formation of any

decision. And, certainly, it does not lessen the authority of that case that Lord Campbell, in *Smeed v. Foord*, said—in that it merely affirmed what was to be found in Pothier,—in 2 Kent's Com. 665, in the French Code,—and in all the other authorities; and it may be added, that Crompton, J. (against whose summing-up it was directed), in that same case, said he agreed with it as far as it went,—which we consider to be agreeing with it altogether. That decision was not presented as any new discovery in jurisprudence; but we think it put in a clearer and more distinct light a principle which had been previously recognised in prior cases, and the want of which, in the English law, had been pointed out. The authorities are all collected in a note to *Ticars v. Wilcocks*, [2 Smith's Leading Cases, 5th ed. 461].—p. 103. CHANNELL and PIGOTT, BB. concurred.

Hadley v. Baxendale, principle applied.

Prehn v. Royal Bank of Liverpool (1870) 39 L. J. Ex. 41; L. R. 5 Ex. 92; 21 L. T. 830; 18 W. R. 463.—KELLY, C.B., MARTIN and PIGOTT, BB.

Hadley v. Baxendale, discussed.

Horne v. Midland Ry. (1873) 42 L. J. C. P. 59; L. R. 8 C. P. 131; 28 L. T. 312; 21 W. R. 481.—EX. CH.

Hadley v. Baxendale and Horne v. Midland Ry., not applied.

Larios v. Bonany y Gurety (1873) L. R. 5 P. C. 346.—P.C. SIR J. COLVILLE, SIR B. PEACOCK, SIR M. SMITH and SIR B. COLLIER.

Hadley v. Baxendale, principle explained.

Elbinger Actien-Gesellschaft v. Armstrong (post, col. 814).

Hadley v. Baxendale, distinguished.

Phillips v. L. & S. W. Ry. (1879) 49 L. J. C. P. 233; 5 C. P. D. 280; 42 L. T. 6; 44 L. T. 217.—C.A. BRAMWELL, BRETT and COTTON, L.JJ. BRAMWELL, L.J.—I may point out in conclusion, what to my mind is the utter dissimilarity between this case and that of *Hadley v. Baxendale*. There there was delay in the delivery of a chattel, and the plaintiff claimed certain damages—not done to the chattel itself but consequential upon the delay which he had proved. Here the damages done are done to the individual carried, and not damages in consequence of his non-arrival at a particular place at a particular time. The analogy would apply more to the case of goods of a different value than to consequential damages for delay, as in *Hadley v. Baxendale*.—p. 236.

Hadley v. Baxendale, considered.

Irvine v. Midland G. W. Ry. (1880) 6 L. R. Ir. 55.—FITZGERALD and DOWSE, BB.

Hadley v. Baxendale, distinguished.

Lilley v. Doubleday (post, col. 819).

Hadley v. Baxendale, applied, Rodocanachi v.

Milburn Bros. (1886) 17 Q. B. D. 316.—MANISTY, J.; affirmed, 56 L. J. Q. B. 202; 18 Q. B. D. 67; 56 L. T. 594; 35 W. R. 241; 3 Asp. M. C. 100.—C.A. *ESHER, M. R. and LOPES, L.J.*; *Hammond & Co. v. Bussey* (1887) 57 L. J. Q. B. 58; 20 Q. B. D. 79.—C.A. *ESHER, M. R., BOWEN and FRY, L.JJ.*; *Cooper v. Richards* (1887) 3 Times L. R. 739.—FIELD and MANISTY, JJ.

Hadley v. Baxendale, discussed.

Finlay v. Churney (1888) 57 L. J. Q. B. 247; 20 Q. B. D. 494; 58 L. T. 664; 36 W. R. 534; 52 J. P. 324.—C.A. *ESHER, M.R., BOWEN and PRY, L.J.J.*; *The Argentine* (1888) 58 L. J. P. 1; 18 P. D. 191; 58 L. T. 643; 36 W. R. 814.—C.A. *LINDLEY and BOWEN, L.J.J.*; *ESHER, M.R. dissenting*; *affirmed*, 59 L. J. P. 17; 14 App. Cas. 519; 61 L. T. 706; 6 Asp. M. C. 433.—H.L. (E.). *LORDS HERSHELL, FITZGERALD and MACNAGHTEN.*

Hadley v. Baxendale, applied.

Ebbetts v. Conquest (1895) 64 L. J. Ch. 702; [1895] 2 Ch. 377; 12 R. 430; 73 L. T. 69; 44 W. R. 56.—C.A. *LINDLEY, LOPES and RIGBY, L.J.J.*; *affirmed, non, Conquest*; *Ebbetts* [1896] 65 L. J. Ch. 808; [1896] A. C. 490; 75 L. T. 36; 45 W. R. 50.—H.L. (E.). *LORDS HERSHELL, MACNAGHTEN and MORRIS*; *applied, McNeill*; *Richards* (1898) [1899] 1 I. R. 85.—*PORTER, M.R.*; *Agnus* v. Great Western Colliery Co. (*post*, col. 815).

Hadley v. Baxendale, referred to.
South African Territories v. Wallington (*post*, col. 813).

Simpson v. L. & N. W. Ry. (1876) 45 L. J. Q. B. 182; 1 Q. B. D. 274; 38 L. T. 805; 24 W. R. 294.—*COCKBURN, C.J., MELLOR and FIELD, J.J.*, *approved but distinguished.*

Candy v. Midland Ry. (1878) 38 L. T. 226.—*CLASBY, B. and HAWKINS, J.*

[The learned judges held that there was no special contract or notice in the case before them.]

Porter v. Vorley (1832) 1 L. J. C. P. 170; 9 Bing. 93; 2 Moore & Sc. 141.—*TINDAL, C.J.*, *distinguished.*

Hill v. Smith (1844) 13 L. J. Ex. 243; 12 M. & W. 618; 8 Jur. 179.—*PARKE, B.* (for the Court).

Porter v. Vorley, disapproved.

Carv v. Roberts (1833) 2 L. J. K. B. 183; 5 B. & Ad. 78; 2 N. & M. 42; 39 R. R. 405, *approved and applied.*

Ashdown v. Ingamells (1880) 5 Ex. D. 280; 50 L. J. Q. B. 109; 43 L. T. 424.—C.A. *BRAMWELL, L.J.*—At first sight *Porter v. Vorley* appears to support the contention of the defendant; but it is clear to me that the Court of Ex., in *Hill v. Smith*, did not approve of it; and, moreover, the facts in it were very different from those before us. There a phreton had been injured by the defendant's negligence, and the true owner might at any time have demanded that the defendant should pay for the repair of the damage, not on account of any contract existing between them, but on account of the injury which the true owner had sustained. The damage to the phreton might have been treated as a tort. I must confess, however, that I feel a very great distrust as to the propriety of that decision, because if the person from whom the defendant had hired it had remained solvent, he would have been entitled to recover full damages. Upon the other hand, *Carv v. Roberts* seems to me rightly decided.—p. 284.

BRETT, L.J. to the same effect. *BAGGALLAY, L.J.* concurred with hesitation.

Ashdown v. Ingamells, discussed.

Perkins, In re, Poyser v. Beylins (1898) 67 L. J. Ch. 454; [1898] 2 Ch. 182; 78 L. T. 666; 46 W. R. 595; 5 Manson 193.—*NORTH, J.*; *affirmed*, C.A. *LINDLEY, M.R., RIGBY and COLLINS, L.J.*

[This case was applied by North J., but held by the C. A. not to be applicable.]

The Parana (1877) 2 F. D. 118; 36 L. T. 388; 25 W. R. 596.—C.A. *JAMES and MELLISH, J.J.*, and *BAGGALLAY, J.A.*; *reversing*, 1 P. D. 452; 35 L. T. 32; 24 W. R. 264.—*SIR R. PHILLIMORE, approved.*

The Notting Hill (1884) 9 P. D. 103; 53 L. J. P. 56; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. C. 241.—C.A.

BRETT, M.R.—The very point was carefully dealt with in *The Parana*, where the question arose as to the application of that rule [as laid down in *Hadley v. Baxendale* (*supra*, col. 808)]. The case of a loss of market by delay arising from a collision was considered incidentally to that case, though it was not the point of the actual decision. *Mellish, L.J.*, said that loss of market in the sense that persons are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived, is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case. And, therefore, it is not the natural and reasonable result of a collision at sea. That case is an authority binding upon us. For my part I do not wish to say that, if I had to decide that case, I should have decided it differently. I can see no distinction between the principles there laid down and those which we have now to apply. There was in *The Parana* an action of contract, and here the question arises upon an action of tort. But in the passage which I have read from *Mayne on Damages* (3rd ed. p. 39), which is founded on *Hadley v. Baxendale*, no distinction is made between the two kinds of actions in regard to damages. I agree that upon the question of remoteness there is no difference between actions upon contract and those not upon contract.—p. 113. *BOWEN and PRY, L.J.J.* concurred.

The Parana, approved.

Duckham Bros. v. G. W. Ry. (1899) 80 L. T. 774.—*DARLING, J.*

The Parana, referred to.

Dunn v. Donald Currie & Co. (1901) 17 Times L. R. 789.—*MATHEW, J.*

The Notting Hill, approved.

Sneesby v. Lancashire and Yorkshire Ry. (1875) 43 L. J. Q. B. 1; 1 Q. B. D. 42; 33 L. T. 372; 24 W. R. 99.—C.A. *CAIRNS, L.C., COLERIDGE, C.J., BRAMWELL, B. and BRETT, J.*, *referred to.*
Victorian Ry. Commissioners v. Coultas (1888) 57 L. J. P. C. 69; 13 App. Cas. 222; 58 L. T. 390; 37 W. R. 129; 52 J. P. 500.—*P.C. LORDS FITZGERALD and HOBHOUSE, SIR B. PEACOCK and SIR R. COUCH.*

Victorian Ry. Commissioners v. Coultas, not followed.

Bell v. G. N. Ry. (1890) 26 L. R. Ir. 428.—*PALLES, C.B., ANDREWS and MURPHY, J.J.*

Victorian Ry. Commissioners v. Coultas,
distinguished.

Pugh v. L. B. & S. C. Ry. (1896) 65 L. J. Q. B. 521; [1896] 2 Q. B. 248; 74 L. T. 724; 44 W. R. 627.—C.A. ESHER, M.R., KAY and A. L. SMITH, L.JJ.

ESHER, M.R.—The question is whether, upon the true construction of this policy, and applying it to the facts which have happened, the defendants are not contractually liable. It therefore becomes unnecessary in this case to consider *Victorian Ry. Commissioners v. Coultas*, which was an action for negligence. I will not express any opinion whether one would follow it or not, for the present is a very different case.—p. 522.

Anon., referred to in Bristow v. Waddington
(1806) 2 B. & P. (N.S.) 300.—MANSFIELD, C.J., *questioned*.

Powell v. Saunders (1813) 5 Taunt. 28.

PER CURIAM.—There certainly must be some mistake as to the case supposed to be cited by the C.J.—p. 29.

Jones v. Boyce (1816) 1 Stark. 493; 18 R. R. 812—ELLENBOROUGH, C.J., *principle applied*.

The City of Lincoln (1889) 59 L. J. P. 1; 15 P. D. 15; 62 L. T. 49; 38 W. R. 345; 6 Asp. M. C. 475.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Jones v. Boyce, explained.

Victorian Ry. Commissioners v. Coultas
(*supra*), *not followed*

Wilkinson v. Downton (1897) 66 L. J. Q. B. 493; [1897] 2 Q. B. 57; 76 L. T. 493; 45 W. R. 525.—WRIGHT, J. See judgment at length.

Victorian Ry. Commissioners v. Coultas, discussed and not followed.

Wilkinson v. Downton, approved.

Dulieu v. White & Sons (1901) 70 L. J. K. B. 587; [1901] 2 K. B. 669; 85 L. T. 126.—KENNEDY and PHILLIMORE, JJ. See judgments, where the cases are discussed.

Western Waggon and Property Co. v. West
(1891) 61 L. J. Ch. 244; [1892] 1 Ch. 271; 66 L. T. 402; 40 W. R. 182.—CHITTY, J., *approved*.

South African Territories v. Wallington (1897) 66 L. J. Q. B. 551; [1897] 1 Q. B. 692; 76 L. T. 520; 45 W. R. 467; 13 Times L. R. 361.

—C.A. ESHER, M.R., LOPES and CHITTY, L.JJ.; *affirmed*, (1898) 67 L. J. Q. B. 470; [1898] A. C. 309; 78 L. T. 426; 46 W. R. 545.—H.L. (E.). HALSBURY, L.C., LORDS WATSON, HERSCHELL, MACNAGHTEN and MORRIS.

South African Territories v. Wallington, principle applied.

Bahamas (Inagua) Sisal Plantation, Ltd. v. Griffin (1897) 14 Times L. R. 140.—BIGHAM, J.

South African Territories v. Wallington, discussed.

Gorringe v. Land Improvement Co. (1898) [1899] 1 Ir. R. 142.—PORTER, M.R.

Emblen v. Myers (1860) 35 L. J. Ex. 71; 6 H. & N. 54; 2 L. T. 774; 8 W. R. 665.—POLLOCK, C.B., BRAMWELL, CHANNELL and WILDE, BB., *followed*.

Bell v. Midland Ry. (1861) 30 L. J. C. P. 273;

10 C. B. (N.S.) 287; 7 Jur. (N.S.) 1200; 4 L. T. 293; 9 W. R. 612.—ERLE, C.J., WILLES and BYLES, JJ.

Borries v. Hutchinson (1865) 34 L. J. C. P. 169; 18 C. B. (N.S.) 445; 11 Jur. (N.S.) 267; 11 L. T. 771; 13 W. R. 386.—ERLE, C.J., WILLES and KEATING, JJ., *followed*.

Hinde v. Liddell (1875) 44 L. J. Q. B. 105; L. R. 10 Q. B. 265; 32 L. T. 449; 23 W. R. 650.—COCKBURN, C.J., BLACKBURN, MELLOR and FIELD, JJ.

Borries v. Hutchinson, distinguished.

Thol v. Henderson (1881) 8 Q. B. D. 457; 46 L. T. 483; 46 J. P. 422.

GROVE, J.—In that case the existence of the sub-contract was known to the seller at the time of the sale, or at all events the fact was known to the seller that the goods were purchased for a specific purpose, and that, delivery being required for that specific purpose, the buyer would incur loss by such non-delivery as would prevent his effecting that specific purpose. So that the seller must be taken to have had notice either of the sub-sale or that the goods were bought for some specific purpose, that is, in general terms, that he had knowledge of the purpose for which the goods were bought. The loss arising when that purpose could not be carried out was something which the parties to the contract may be taken to have contemplated as a result of breach of contract, and the case is really a modification of *Hadley v. Baxendale* (*supra*, col. 808).—p. 458.

Borries v. Hutchinson, doubted.

Elbinger Actien-Gesellschaft v. Armstrong (1874) 43 L. J. Q. B. 211; L. R. 9 Q. B. 473; 30 L. T. 871; 23 W. R. 127.—BLACKBURN, J. (for the Court), *approved*.

Grébert-Bornis v. Nugent (1885) 15 Q. B. D. 85; 44 L. J. Q. B. 511; 1 Times L. R. 434.—C.A.

BOWEN, L.J.—As to *Borries v. Hutchinson*, I will say only that I am not convinced that it is altogether reconcilable either with our present decision or with *Elbinger Actien-Gesellschaft v. Armstrong*. It is enough to say that, either it is reconcilable with *Elbinger Actien-Gesellschaft v. Armstrong*, or if not, that the latter case ought to prevail, since I think that the principles which are laid down in it are very clear and sound.—p. 94.

BRETT, M.R. to same effect. BAGGALLAY, L.J. concurred.

Grébert-Bornis v. Nugent, applied.

Vickers v. Church Extension Association (1886) 4 Times L. R. 674.—CHARLES, J.

Thol v. Henderson (*supra*), *distinguished*. McNeill v. Richards (1898) [1899] 1 Ir. R. 85.—PORTER, M.R.

Tindall v. Bell (1843) 12 L. J. Ex. 160; 11 M. & W. 228.—PARKE, B. (for the Court), *discussed*.

Mors Le Blanch v. Wilson (1873) 42 L. J. C. P. 70; L. R. 8 C. P. 227; 21 W. R. 109.—BOVILL, C.J., GROVE and DENMAN, JJ.

Mors Le Blanch v. Wilson, overruled.

Baxendale v. L. C. & D. Ry. (1874) 44 L. J. Ex. 20; L. R. 10 Ex. 35; 32 L. T. 330; 23 W. R. 167.—EX. CH.

COLERIDGE, C.J.—The Exchequer seems to have decided on the authority of *Mors Le Blanch*

v. *Wilson*. The two cases are not precisely similar, but in principle are not very distinguishable; and if it be necessary to give an opinion on *Mora Le Blanch v. Wilson*, I must say, with regret, that I think it was not rightly decided.—p. 26.

QUAIN, J.—That case seems to have been decided upon the authority of *Tindall v. Bell*, which was a mere *semble* of Parke, B. It is on review now, and I agree with Lord Coleridge and my brother Keating that it was wrongly decided.—p. 28.

KEATING, J. and ARCHIBALD, J. to the same effect.

LUSH, J. dissented.

Baxendale v. L. C. & D. Ry. (*supra*), followed.
Fisher v. Val de Travers Asphalt Co. (1876) 45 L. J. C. P. 47; 1 C. P. D. 511; 35 L. T. 366.—
COLERIDGE, C.J., BRETT and LINDLEY, JJ.

Baxendale v. L. C. & D. Ry., discussed and distinguished.
Hammond & Co. v. Bussey (1887) 57 L. J. Q. B. 58; 20 Q. B. D. 79.—C.A. FISHER, M.R., BOWEN and PEY, L.J.J.

Baxendale v. L. C. & D. Ry. and *Fisher v. Val de Travers Asphalt Co.* discussed and distinguished.
Hammond & Co. v. Bussey, followed.
Agus v. Great Western Colliery Co. (1890) 68 L. J. Q. B. 312; [1899] 1 Q. B. 413; 80 L. T. 140; 47 W. R. 408.—C.A.

HALSBURY, L.C.—The law laid down in *Hadley v. Baxendale* (*supra*, col. 808) in 1854, as to the measure of damages in an action of contract, has been treated for nearly half a century as a guiding rule. The rule is that where two parties have made a contract, which one of them has broken, the other party is entitled to recover in respect of such breach such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as a probable result of the breach of it. . . . But for *Baxendale v. L. C. & D. Ry.* . . . and *Fisher v. Val de Travers Asphalt Co.*, which followed it, I should have thought it impossible to contend that it was not a reasonable consequence of the defendants' breach of contract that the plaintiff had to enter upon a contest which resulted in a successful resistance to an extravagant claim for damages. I can draw no distinction between the costs of legal proceedings reasonably incurred in this manner and the cost of the attendance of a surgeon upon a man wounded by a tort; and, apart from the authority of those cases, I should have thought that these costs were within the rule, and that the plaintiff could recover them. But, undoubtedly *Baxendale v. L. C. & D. Ry.* must be considered. This former case in one respect, because there the plaintiff had continued the action previously brought against him in the face of an opinion of counsel that he had no possible defence, and his defence was in fact unsuccessful. That state of facts constituted an argument against allowing the plaintiff to recover the costs of the former action, which it was difficult to get over; and had the decision dealt with those facts only, I should have thought it clearly right, and it would not have been difficult to deal with in this case. But unfortunately the judges who decided the case

thought it right in delivering their judgments to express opinions which I must admit are not in conformity with those I am now expressing. But then, on the other hand, I have here a decision of the C.A. in a later case—*Hammond & Co. v. Bussey*—which is inconsistent with those opinions. It is impossible to read the judgments of Bowen and Fry, L.J.J. in that case without seeing that they differed from the opinions expressed by the judges in *Baxendale v. L. C. & D. Ry.*, which, I think, may be said to be *obiter dicta*, because they were not necessary for the decision of the case. The two cases, I frankly admit, cannot stand together, and in those circumstances we must, I think, follow the later decision, which is, moreover, in accordance with the law laid down in the older cases. At the same time, I think that the actual decision in *Baxendale v. L. C. & D. Ry.* can be supported on the different facts of that case.—p. 316.

A. L. SMITH and CHITTY, L.J.J. to the same effect.

Randall v. Raper (or *Roper*) (1858) 27 L. J. Q. B. 266; El. Bl. & El. 84; 4 Jur. (N.S.) 662; 6 W. R. 445.—Q.B., discussed.
Josling v. Irvine (1861) 30 L. J. Ex. 78; 6 H. & N. 512; 4 L. T. 251.—EX.

Randall v. Roper, distinguished.
Borries v. Hutchinson (*supra*, col. 814).

Josling v. Irvine, followed.
Brown v. Muller (1873) 41 L. J. Ex. 214; L. R. 7 Ex. 319; 27 L. T. 272; 21 W. R. 18.—
KELLY, C.B., MARTIN and CHANNELL, BB.

Brown v. Muller, considered and dicta applied.
Roper v. Johnson (1878) 42 L. J. Q. B. 65; L. R. 8 C.P. 167; 28 L. T. 296; 21 W. R. 384.

KEATING, J.—I further think that the rule laid down in *Brown v. Muller* as to assessing damages is to be applied to the present case in what I may call *cy-pres*. The judgments pronounced in that case by the C.B. and my brothers, Martin and Channell, though undoubtedly mere *obiter dicta*, . . . are however of great authority. . . . The difficulty here has arisen from *Hochster v. De la Tour* [(1853) 22 L. J. Q. B. 455; 2 El. & Bl. 678; 17 Jur. 972; 1 W. R. 459. See "CONTRACT," col. 670], which was the first case in which it was decided, with reference to an executory contract, that notice of the refusal by one of the parties would entitle the other to treat it as a breach, and bring his action before the time for performance. *Hochster v. De la Tour* has been recognised by several subsequent decisions and is fairly now established as law, and we must assume it to be law. It has, however, introduced a difficulty which did not before exist as to the assessment of damages. That case was followed by *Frost v. English* [(1873) 41 L. J. Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.—EX.—] and "CONTRACT," col. 670; and though it was not necessary there any more than in *Hochster v. De la Tour* to assess the damages, Cockburn, C.J. in delivering the judgment of the Court, laid down to my mind a similar rule for assessing the damages, as is referred to by the learned judges in *Brown v. Muller*, and that is that the period of time at which the difference between the market and contract price is to be determined is that at which the contract should have been performed if it had continued to exist; in other

words, the measure of damages is the difference between the price of the goods if the contract had been performed and the market price at the times when they ought to have been delivered. Such prices are liable to be mitigated by any circumstances which may have that tendency.—p. 67.

BRETT and GROVE, JJ. to the same effect.

Roper v. Johnson, distinguished.

Shaws Brow Iron Co. v. Birchgrove Steel Co. (1889) 6 Times L. R. 50.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Brown v. Muller (supra), discussed.

Roth & Son v. Taysen, Townsend & Co. (1895) 1 Com. Cas. 240.—MATHEW, J.; affirmed, (1896) 1 Com. Cas. 306.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Hiort v. L. & N. W. Ry. (1877) 38 L. T. 424.—KELLY, C.B. and CLEASBY, B.; reversed, (1879) 48 L. J. Ex. 545; 4 Ex. D. 188; 40 L. T. 674; 27 W. R. 778.—C.A. BRAMWELL and THESIGER, L.JJ.; BAGGALLAY, L.J. dissenting

Hamlin v. G. N. Ry. (1856) 26 L. J. Ex. 20; 1 H. & N. 408; 2 Jur. (N.S.) 1122; 5 W. R. 76.—POLLOCK, C.B. (for the Court), discussed.

Hobbs v. L. & S. W. Ry. (1875) 44 L. J. Q. B. 49; L. R. 10 Q. B. 111; 32 L. T. 352; 23 W. R. 520.

COCKBURN, C.J.—That case amounts to this, that where a party has lost custom by not being able to get to a place at the time he wished, the pecuniary loss arising is too remote to be the subject of damages. That may be true, because in each case you would have to go into the question whether there was a loss, and you would have to assess that loss, and it would be difficult, on the principle laid down in *Hadley v. Baxendale* (supra, col. 808), to say that the company could have in their contemplation, as a probable result of the breach of contract to carry to the place of destination, all the circumstances that may result from a detention. But the case is not an authority that personal inconvenience should never be taken into consideration; and if it had so held I should not agree with the decision.—p. 51.

BLACKBURN, MELLOR and ARCHIBALD, JJ. to the same effect.

Hamlin v. G. N. Ry., dictum of ALDERSON, B., discussed.

Le Blanche v. L. & N. W. Ry. (1876) 45 L. J. C. P. 521; 1 C. P. D. 286; 34 L. T. 687; 24 W. R. 808.—C.A. And see post, col. 819.

MELLISH, L.J.—Now, I agree that, as a general rule, what is said by Alderson, B., in *Hamlin v. G. N. Ry.*, is correct, namely: "The principle is that if the party does not perform his contract the other may do so for him as near as may be, and charge him for the expense incurred in so doing." I agree also with what is said by the judges of the C. P. D. that this rule is not an absolute one applicable to all cases, and that the question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances. This, however, is a very vague rule, and it is desirable to consider whether any more definite rule can be laid down. Now, one mode of determining what, under the circumstances, was

reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. The rule that what is reasonable under peculiar circumstances may be discovered by considering what a prudent person uninsured would do under the same circumstances, is applicable to many cases besides those which arise under policies of marine insurance. I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost if he had no company to look to, he ought to be allowed to incur at the cost of the company if he has been delayed through a breach of contract on the part of the company, but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself if he had no company to look to.—p. 530.

JAMES and MELLOR, L.JJ. and CLEASBY, B. to the same effect.

BAGGALLAY, J.A.—In my opinion *Hamlin v. G. N. Ry.* offers no support to the plaintiff's argument, but in the report in the Law Journal Reports, Alderson, B., is stated to have made the following observations in the course of the argument:—"The plaintiff might have taken a post chaise and charged it;" and again [His lordship read the passage cited above and continued:] Now I think these observations of Alderson, B., which do not appear in the report of the case in Hurlstone and Norman, must be considered as having been made with reference to the particular case before the Court, and not as intended to lay down an absolute principle applicable to all cases however different in their circumstances. . . . Brett, J., in delivering the judgment of the Court [below], is reported to have said:—"We think, that the rule attributed to Alderson, B. in *Hamlin v. G. N. Ry.* is a good expression of the law. We think it may properly be said that, if the party bound to perform a contract does not perform it, the other party may do so for him as nearly as reasonably may be, and charge him for the reasonable expense incurred in so doing." This appears to me to be a more correct enunciation of the principle applicable to such cases than the particular words attributed to Alderson, B.—p. 535.

Hobbs v. L. & S. W. Ry., commented on.

M'Mahon v. Field (1881) 7 Q. B. D. 591; 50 L. J. Q. B. 311, 552; 45 L. T. 381; 46 J. P. 245.—C.A.; reversing, 44 L. T. 175; 29 W. R. 472.—FRY, J.

BRAMWELL, L.J.—In *Hobbs v. L. & S. W. Ry.*, it was said that the damage to the wife was a secondary consequence of the breach of contract and too remote; and, by way of illustration, the case was given of a person walking home in the dark who took a false step which resulted in a fall and a broken limb; but I must say I do not see why a passenger who, by the default of the railway company, was obliged to walk home in the dark might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur.—p. 594.

BRETT, L.J.—Then it is said that the case is governed by that of *Hobbs v. L. & S. W. Ry.*

Now I must confess that if I acquiesce in that case I cannot quite agree with it. What were the facts there? A man with his wife and children took a ticket by the train to Hampton Court, his residence being between two and three miles from Hampton Court. The train did not go to Hampton Court, but took them to Esher station where they were turned out at about twelve o'clock on a wet night, and being unable to get any conveyance or accommodation at an inn, were obliged to walk about six miles to their home. The wife in consequence of the exposure caught a cold, and it was said that such damage was too remote to be recovered. Why was it too remote? There was no accommodation or conveyance to be obtained at Esher at that time of night, so that it was not only reasonable that they should walk, but they were obliged to do so. Why was it that which happened was not the natural consequence of the breach of contract? Suppose a man let lodgings to a woman and then turned her out in the middle of the night with only her night clothes on, would it not be natural consequence that she would take a cold? Had Esher station been a large one, and there had been five which might have been had, or accommodation at an inn, and the passengers had refused that and had elected to walk home, I should have thought then that what happened arose from their own fault, but that was not so, yet, nevertheless, the judges who decided *Hobbs v. L. & S. W. Ry.* decided, as a matter of fact, that the cold was so improbable a consequence, that it was not to be left to the jury whether it was occasioned by the breach of contract. It is not, however, necessary for me to say more than that I am not contented with it, for there is a difference between such a case and the present one.—p. 596. COTTON, L.J. concurred.

Burrows v. March Gas and Coke Co. (1872)
41 L. J. Ex. 46; L. R. 7 Ex. 96; 26 L. T. 318; 20 W. R. 493.—EX. CH., *applied*.

Hobbs v. L. & S. W. Ry., commented on.
Lilley v. Doubleday (1881) 51 L. J. Q. B. 310;
7 Q. B. D. 510; 44 L. T. 814.—GROVE, LINDLEY
AND STEPHEN, JJ.

Lilley v. Doubleday and M'Mahon v. Field
(*supra*), *referred to*.

Lepia v. Rogers (1892) 5 R. 57; [1893] 1 Q. B. 31; 68 L. T. 584; 57 J. P. 55.—HAWKINS, J.

Le Blanche v. L. & N. W. Ry. (supra, col. 817), followed.

Woodgate v. G. W. Ry. (1884) 51 L. T. 826;
33 W. R. 428; 1 Times L. R. 138.—HAWKINS,
AND A. L. SMITH, JJ.

Woodgate v. G. W. Ry., distinguished.
McCartan v. N. E. Ry. (1885) 54 L. J. Q. B. 441.—HUDDLESTON, B. AND WILLS, J.

Le Blanche v. L. & N. W. Ry. and McCartan v. N. E. Ry., followed.
G. W. Ry. v. Lowenfeld (1892) 8 Times L. R. 280.—JUDGE STONOR.

Le Blanche v. L. & N. W. Ry. and McCartan v. N. E. Ry., followed.
Duckworth v. Lancashire and Yorkshire Ry. (1901) 84 L. T. 774; 49 W. R. 541; 65 J. P. 517.—ALVERSTONE, C.J. AND LAWRENCE, J.

Burrows v. March Gas and Coke Co., applied.

Ovington v. McVicar (1864) 2 Macpherson 1066, *not approved*.

Wrightup v. Chamberlain (1839) 7 Scott 598; 2 Am. 28; 2 Jur. 328.—TINDAL, C.J.; and **Kiddle v. Lovett (1880)** 16 Q. B. D. 605; 84 W. R. 518.—DUNMAN, J., *discussed*.

Mowbray v. Merryweather (1895) 65 L. J. Q. B. 50; [1895] 2 Q. B. 640; 14 R. 767; 73 L. T. 459; 44 W. R. 49; 59 J. P. 804.—C.A. ESHER, M.R., KAY AND RIGBY, L.JJ.

Mowbray v. Merryweather, applied.

Hawkins v. Smith (1896) 12 Times L. R. 532.—DAY AND LAWRENCE, JJ.

Mowbray v. Merryweather, followed.

Vogan v. Oulton (1899) 81 L. T. 435.—C.A. A. L. SMITH, COLLINS AND V. WILLIAMS, L.JJ. *And see* "CARRIERS," "NEGLIGENCE," and "SALE OF GOODS."

DEBTORS ACT.

Barrett v. Hammond (1879) 48 L. J. Ch. 249; 10 Ch. D. 285; 27 W. R. 471.—V.-C., *discussed from*.

Marris v. Ingram (1879) 49 L. J. Ch. 123; 13 Ch. D. 338; 41 L. T. 613; 28 W. R. 434.—M.R. [Counsel quoted the following remarks of Bacon, V.-C.: "The law is not vindictive; it is not intended to act as a punishment, and sending the defendant to gaol will not enable him to pay the money."]

JESSEL, M.R.—With the greatest respect for the opinion of the V.-C., I think the object of the Act was punishment.

Barrett v. Hammond, followed.

Marris v. Ingram, distinguished.

Holroyde v. Garnett (1882) 51 L. J. Ch. 663; 20 Ch. D. 532; 46 L. T. 801; 30 W. R. 604.—BACON, V.-C.

Marris v. Ingram, applied.

Preston, In re (1888) 52 L. J. Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 804.—C.A.

Marris v. Ingram and Crowther v. Elgodd (1887) 56 L. J. Ch. 416; 34 Ch. D. 691; 56 L. T. 415; 35 W. R. 369.—C.A. COTTON, LINDLEY AND LOPES, L.JJ., *followed*.

Preston v. Etherington (1887) 57 L. J. Ch. 176; 37 Ch. D. 104; 58 L. T. 318; 36 W. R. 49.—C.A. COTTON AND LOPES, L.JJ.

Marris v. Ingram; Reg. v. Pratt (1870) 39 L. J. M. C. 73; L. R. 5 Q. B. 176; 18 W. R. 626; S. C. *nom.* Cole, Ex parte, 21 L. T. 750.—Q.B.; and **Hewitson v. Sherwin (1870)** L. R. 10 Eq. 53; 22 L. T. 576; 18 W. R. 802.—V.-C., *applied*.

Buckley v. Crawford (1892) 62 L. J. Q. B. 87; [1893] 1 Q. B. 105; 5 R. 125; 67 L. T. 681; 41 W. R. 239; 57 J. P. 89.—COLERIDGE, C.J. AND WILLS, J.

Marris v. Ingram and Crowther v. Elgodd, distinguished.

Piddock v. Burt (1893) 68 L. J. Ch. 246; [1894] 1 Ch. 843; 8 R. 104; 70 L. T. 553; 42 W. R. 248.

CHITTY, J.—The case of a partner is quite different from these cases because he receives money belonging to the firm on behalf of himself and his co-partners, and it appears to me that I should be straining the law if I were to hold that a partner receiving money on account of the partnership—that is, on behalf of himself and his co-partners—received it in a fiduciary capacity, towards the other partners.

Marris v. Ingram, applied.

(Church's Trustee v. Hibbard (1902) 72 L. J. Ch. 46.—C.A.)

Washer v. Elliott (1876) 45 L. J. C. P. 144; 1 C. P. D. 169; 34 L. T. 56; 24 W. R. 432, *explained*.

Ives, In re, Addington, Ex parte (1886) 16 Q. B. D. 665; 55 L. J. Q. B. 246; 34 W. R. 593; 54 L. T. 877; 3 Morrell 88.

CAVE, J.—The words of sect. 5 of the Debtors Act, 1869, subs. 2, are—"Any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court, to be paid by instalments, and may, from time to time, rescind or vary such order." The words "such order" obviously refers to the order of the Court directing payment by instalments. The County Court, therefore, may order payment by instalments of the amount due on an order or judgment of the High Court, and may rescind or vary its own order; but when the High Court has itself directed payment by instalments of its own judgment, the County Court has no power to vary that order. This is all that was decided by the judgment in *Washer v. Elliott*. The judgment in that case proceeds on the extravagance of a construction which would have enabled an inferior Court to rescind or vary the order of a superior Court for the payment of a judgment debt by instalments, and so make the inferior Court a Court of Appeal over the superior Court (p. 669).

Washer v. Elliott, considered and followed.

Schuller v. Wood (1894) 64 L. J. Q. B. 243; 15 R. 91.—**WILLS and WRIGHT, JJ.**

WILLS, J.—The judgment in that case shows clearly that the Debtors Act does not affect sects. 36 and 38 of the Mayor's Court Act. The headnote in *Washer v. Elliott* is inaccurate.

Ives, In re, Addington, Ex parte (*supra*), *dictum* dissented from.

Jones v. Jenner (1856) 25 L. J. Ex. 319; 2 Jur. (N.S.) 574; 4 W. R. 651, *principle applied*.

Montgomery v. De Bulmes (1898) 67 L. J. Q. B. 768; [1898] 2 Q. B. 420; 78 L. T. 671; 47 W. R. 22.—C.A. **CHITTY and COLLINS, L.JJ.** **CHITTY, L.J.**—Against that there is what Cave, J. said in *Ives, In re, Addington, Ex parte*. I have attended to that, as I should to anything that fell from that learned judge, but it seems to me that he has not taken the right view. The view he has taken is inconsistent with that taken by the Court of Exchequer in *Jones v. Jenner*, and it seems to me that the more reasonable view was that adopted by that Court.—p. 770.

Harper v. Seringour (1880) 5 C. P. D. 366; 29 W. R. 264; and **Esdaile v. Visser** (1880) 13 Ch. D. 421; 41 L. T. 745; 28 W. R. 281.—C.A., *dictum* of **JAMES, L.J.**, *observed upon*.

Chard v. Jervis (1882) 9 Q. B. D. 178; 51 L. J.

Q. B. 442; 51 L. J. Ch. 429; 30 W. R. 504.—C.A. **JESSEL, M.R. and HOLKER, L.J.**

JESSEL, M.R.—We have been referred to *Esdaile v. Visser*. Every remark of **JAMES, L.J.** is entitled to great respect; but when his lordship says that it would require an overwhelming case to induce the Court of Appeal to differ from the judge if he says he is satisfied of the debtor's ability to pay, I think the adjective rather too strong. I agree that it requires a strong case; indeed, we never ought to overrule the question of the Court below on a question of fact, unless it is clearly made out that the decision is wrong, and probably **JAMES, L.J.** meant no more than this. In that case, moreover, the lord justice observes that all the materials had been before the judge. In the present case we have before us important materials which were not before the Court below. . . . The case of *Harper v. Seringour* is of no weight on the present occasion. The judges there came to a particular conclusion of fact, and their doing so does not bind even a Court of co-ordinate jurisdiction to come to the same conclusion in any other case. We cannot tell why the judges came to that conclusion; they may have had reasons for disbelieving the debtor's evidence, and no rule of law can be deduced from the case.—p. 181.

Knowles, In re, Doodson v. Turner (1883) 52 L. J. Ch. 685; 48 L. T. 760.—**KAY, J.**, *referred to*.

Aylesford (Earl) v. Poulett (Earl) (1892) 61 L. J. Ch. 406; [1892] 2 Ch. 60; 66 L. T. 484; 40 W. R. 424.—**NORTH, J.**

Reeves v. Fowle (or **Reg. v. Brompton County Court Judge and Reeves**) (1886) 56 L. J. Q. B. 49; 18 Q. B. D. 213; 55 L. T. 663; 35 W. R. 130; 61 J. P. 547.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**; *reversed, nom. Stonor v. Fowle* (1887) 57 L. J. Q. B. 387; 13 App. Cas. 20; 58 L. T. 1; 36 W. R. 742; 52 J. P. 228.—**H.L. (E.)**. **LORDS HALSBURY, L.C., WATSON, BRAMWELL, HERSHELL and MACNAGHTEN.**

Stonor v. Fowle, applied.

Watson, In re, Johnston, Ex parte, Johnston v. Watson (1892) 62 L. J. Q. B. 85; [1893] 1 Q. B. 21; 4 R. 90; 67 L. T. 519; 41 W. R. 34.—C.A. **ESHER, M.R., LOPES and KAY, L.JJ.**

Watson, In re, Johnston, Ex parte, Johnston v. Watson (1892) 62 L. J. Q. B. 85; [1893] 1 Q. B. 21; 67 L. T. 519; 41 R. 90; 41 W. R. 34.—C.A. **ESHER, M.R., LOPES and KAY, L.JJ.**, *followed*.

Low, In re, Bland v. Low (1893) 63 L. J. Ch. 60; [1894] 1 Ch. 147; 70 L. T. 57; 7 R. 346.—C.A. **LINDLEY, DAVEY and SMITH, L.JJ.**, *explained*.

Bankruptcy Notice, In re (1898) 67 L. J. Q. B. 308; [1898] 1 Q. B. 388; 77 L. T. 710; 46 W. R. 325; 5 Manson 7.—C.A. **SMITH, CHITTY and COLLINS, L.JJ.**

Watson, In re, Johnson, Ex parte, Johnson v. Watson, and Bankruptcy Notice, In re, distinguished.

Fellows v. Thornton (1884) 54 L. J. Q. B. 279; 14 Q. B. D. 335; 52 L. T. 389; 33 W. R. 258.—**COLERIDGE, C.J. and STEPHEN, J.**, *commented on*. **Johnstone v. Bucknall** [1898] 2 Ir. R. 499.—**GIBSON, J.**

CHITTY, L.J.—In the absence of authority upon the subject, it might have been competent to us to decide that the effect of sect. 4 of that Act (the Judgments Extension Act, 1868) is not to limit the operation of sect. 3, but merely to provide for the control over registered judgments in so far only as relates to execution under the Act; but it appears to me that the question is no longer open in this Court, and that *In re Watson* has already decided that the effect of sect. 4 is to limit the operation of sect. 3 to execution upon the judgments registered under that section. The issuing of a bankruptcy notice is clearly not a process of execution upon the judgment. Therefore the case comes exactly within the authority of *In re Watson*. The case of *In re Lou* . . . was . . . merely a case of a Court of equity imposing equitable terms when asked to grant an injunction. I do not see that there is any direct conflict between that case and *In re Watson*. The latter case was not cited in *In re Lou*, nor was sect. 4 of the Judgments Extension Act, 1868, alluded to; and the Court of Appeal do not seem to have assumed in any way to overrule the decision in *In re Watson*.

Cobham v. Dalton (1875) 44 L. J. (Ch. 702; L. R. 10 Ch. 655; 23 W. R. 865.—*L.J.J.*, distinguished.

Lewes (Earl) v. Barnett (1877) 47 L. J. Ch. 144; 6 Ch. D. 252; 26 W. R. 101.—*C.A.*

Cobham v. Dalton, explained.
Ross v. Gutteridge (1882) 52 L. J. Ch. 280; 48 L. T. 117.—PEARSON, J.

Cobham v. Dalton, distinguished.
Freston, In re (1883) 52 L. J. Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 51 W. R. 804.—*C.A.*

Cobham v. Dalton, dissented from.
Middleton v. Chichester (1871) 40 L. J. Ch. 237; L. R. 6 Ch. 152; 24 L. T. 173; 19 W. R. 290, 369.—*L.C.* and *L.J.J.*, approved.

Mitchell v. Simpson (1890) 59 L. J. Q. B. 355; 25 Q. B. D. 183; 63 L. T. 405; 38 W. R. 565; 55 J. P. 36.—*C.A.* ESHER, M.R., FRY and LOPES, *L.J.J.*, referred to.
Smith, In re, Hands v. Andrews (1893) 62 L. J. Ch. 336; [1893] 2 Ch. 1; 2 R. 360; 68 L. T. 337; 41 W. R. 289; 57 J. P. 516.—*C.A.* ESHER, M.R., LINDLEY and LOPES, *L.J.J.*; partly reversing KEKEWICH, J.

LINDLEY, *L.J.* (for the Court)—Although Cobham v. Dalton was decided in 1875, and Middleton v. Chichester was decided in 1871, and the lords justices who decided Cobham v. Dalton were members of the Court which decided Middleton v. Chichester, the view there taken and expressed with reference to the punitive character of sect. 4 of the Debtors Act, 1869, seems to have been overlooked by them. Lord Justice James does not allude to it; Lord Justice Mellish said: "Now arrest for debts is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged." This observation was true of ordinary debts: *In re McWilliams* (1 Sch. & Lef. 169); *Lees v. Newton* (L. R. 10 C. P. 658); but not of obligations to pay under orders made under sect. 4, sub-sect. 3 of the Debtors Act, 1869. The punitive character of sect. 4 of the Debtors Act, 1869, which was pointed out in

Middleton v. Chichester has been since so often recognised that it cannot now be questioned; see *Morris v. Ingram* (*ante*, col. 820); *In re Gent* (40 Ch. D. 190); although the Court has, under the Act of 1878, a discretion to grant or refuse an attachment, in cases falling within it; and in one of the latest cases, viz., *Aylesford (Baro) v. Penderel (Baro)* (1892) 2 Ch. 60) an attachment against a defaulting trustee was refused. *In re Boyley* (15 Q. B. D. 329), *In re Manning* (30 Ch. D. 480), *Preston v. Etherington* (37 Ch. D. 104) and *Mitchell v. Simpson* were referred to in the course of the argument; but they are not decisions upon the effect of sect. 3 of the Bankruptcy Act, 1883, upon commitments under sect. 4 of the Debtors Act, 1869. In these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil process, but as punitive, is distinctly recognised. Having regard to the Debtors Act, 1878, and to the decisions to which we have referred, it would be clearly wrong now to apply Lord Justice Mellish's observations in *Cobham v. Dalton*, above quoted, to obligations to pay money in obedience to orders made under the Debtors Act, 1869, s. 4, sub-s. 3.

Cobham v. Dalton, observations questioned.
Middleton v. Chichester and Smith, In re, Hands v. Andrews, followed.
Edgemoor, In re (1902) 71 L. J. K. B. 722; [1902] 2 K. B. 408.—*C.A.* WILLIAMS, ROMER and STIRLING, *L.J.J.*

Middleton v. Chichester, applied.
Church's Trustee v. Hibbard (1902) 72 L. J. Ch. 46; [1902] 2 Ch. 784.—*C.A.*

Simes, In re, Simes v. Newbery (1890) 62 L. T. 721; 38 W. R. 570.—KEKEWICH, J., not followed.

Wray, In re (1887) 56 L. J. Ch. 1106; 36 Ch. D. 138; 57 L. T. 605; 36 W. R. 67.—*C.A.* GYTON, BOWEN and FRY, *L.J.J.*, followed.

Edye, In re (1891) 63 L. T. 702; 39 W. R. 198.—CHITTY, J.

Simes, In re, Simes v. Newbery, overruled.
Smith, In re, Hands v. Andrews (*supra*).
KEKEWICH, J.—There ought to be no hesitation on my part, and in truth there is none, to review my decision in *In re Simes*. The fact that *In re Wray* was not cited sufficiently justifies that course, and the additional fact that in *In re Edye* Chitty, J. expressed his disapproval of my decision is conclusive.

Sparkes v. Bell (1828) 3 B. & C. 1; 6 L. J. (o.s.) K. B. 206, questioned.
Lockwood v. Salter (1833) 5 B. & Ad. 803; 2 L. J. K. B. 198.

PARKER, J.—In *Sparkes v. Bell* the Court does not appear to have considered the question whether the wife was discharged by the discharge of the husband; and it was an application on her behalf to the equitable jurisdiction of the Court which ultimately refused to interfere. If the question had arisen on plea, or *avoué querele*, the result might have been different.—p. 311.

Larkin v. Marshall (1850) 4 Ex. 804, 19 L. J. Ex. 161; 14 Jur. 46, dissented from.
Ivens v. Butler (1857) 7 E. & B. 159; 26 L. J. Q. B. 145; 3 Jur. (N.S.) 334.

Masters v. Johnson (1852) 8 Ex. 63: 21 L. J. Ex. 253, *discontinued from*.
Williams v. Gibbon (1863) 83 L. J. Q. B. 33.—
 q.j.

Jackson v. Mawby (1875) 45 L. J. Ch. 53: 1 Ch. D. 86.—*V.-C., followed.*
Ayres v. Ayres (1901) 71 L. J. P. 18; 85 L. T. 648.—**BARNES, J.**

DEED AND BOND.

1. VALIDITY AND OPERATION.
2. FORM AND EFFECT.
3. CONSTRUCTION.
4. PARTICULAR DEEDS AND BONDS.
5. PROCEEDINGS ON BONDS.
6. CANCELLATION AND RECTIFICATION.

1. VALIDITY AND OPERATION.

Texira v. Evans, cited in **Master v. Miller** (1793) 1 Anst. at p. 228, *overruled*.
Hibblewhite v. M'Morine (1840) 6 M. & W. 200; 9 L. J. Ex. 217; 4 Jur. 769.

PARKE, B.—The only case cited in favour of the validity of a deed in blank, afterwards filled in, is that of *Texira v. Evans*. . . . But this case is justly cited by Mr. Preston, in his edition of Sheppard's Touchstone, 68, as it assumes there could be an attorney without deed, and we think it cannot be considered law.—p. 214.

Brown v. London Corporation (1861) 9 C. B. (N.S.) 726; 30 L. J. C. P. 225; 7 Jur. (N.S.) 729; 3 L. T. 813; 9 W. R. 336; *affirmed*, (1862) 13 C. B. (N.S.) 828; 31 L. J. C. P. 280; 8 Jur. (N.S.) 1103; 10 W. R. 522.—**EX. CH.**

Wilkinson v. Anglo-Californian Gold Mining Co. (1852) 18 Q. B. 728; 21 L. J. Q. B. 327; 17 Jur. 257, *held inapplicable*.

Yarmouth Exchange Bank v. Blethen (1885) 10 App. Cas. 293; 54 L. J. P. C. 27; 53 L. T. 537; 33 W. R. 801.—**P.C.**

[*Exchange Bank of Yarmouth v. Blethen* was a case in which a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by the plaintiffs, who appended a note that they executed only in respect of certain claims scheduled to the deed, and amounting to 73,531 dollars, and it appeared that subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed. It was held that they were bound, as the note did not amount to a refusal to execute, and having received payment under the deed, they could not be heard to repudiate it and deny their execution.]

SIR R. COLLIER (for J.C.).—The case mainly relied on in support of the contention that the qualified execution amounted, in law, to no execution at all, was that of *Wilkinson v. Californian Gold Mining Co.* . . . It appears to their lordships that this case, which affirms an undoubted principle of law, does not apply to the present. The note appended to the plaintiff's execution of the deed does not, in their judgment, amount to a non-execution, or a refusal to execute any part of the deed; it is at least capable of being interpreted as descriptive of the amount

of debt which the plaintiffs intended to claim, being considerably more than that which is set opposite to their names in Schedule A., coupled with an intimation that they did not mean to claim more, and in this view it would not amount to a non-execution of the deed.—p. 298.

Hore v. Dix (1659) 1 Sd. 25; and **Samon v. Jones** (1700) 2 Vent 318, *overruled*.

Roe d. Wilkinson v. Tranmarr (1757) 2 Ken. 239; 2 Wils. 682; 2 Wils. 785, *referred to*.

Lewis v. Davies (1837) 2 M. & W. 503.

PARKE, B. (for the Court).—The only objection which can be raised as to the operation of the deed is, not that the intent to raise a use was not plain, but that the intent was to raise that use out of the seisin of the trustees, and not out of that of the grantor: and that such intent could not operate, as the trustees could not, it is admitted, take any estate at all: and this objection was grounded on the authority of the case of *Hore v. Dix*, where it was held that a covenant with strangers, that they should hold the land to the use of the grantor for life, with remainder to the son, was void. But Lord Justice Willes considers this very objection in the case of *Roe v. Tranmarr*, and intimates his dissatisfaction with that decision upon this point. He says that he should have been of another opinion, "because in a covenant to stand seised, the estate properly arises out of the estate of the grantor, and his intent that it should not, I think, signifies nothing: for though his intent is to be regarded as to what estate is to pass, and to whom, it is not at all to be regarded as to the manner of passing it (of which he is supposed to be ignorant), if it were, it would overturn almost all cases." And though the learned Chief Justice distinguishes the case then under consideration from that of *Hore v. Dix* and *Samon v. Jones*, there can be no doubt but that the learned editor of the valuable edition of Saunders's Reports is right in stating, in his note in *Chester v. Willan* (2 Saund. 97), that *Hore v. Dix* and *Samon v. Jones* are in effect overruled by this decision.—p. 517.

Jenkins v. Young (1630) Cro. Car. 230;
Meredith v. Joans (1630) Cro. Car. 244;
 and **Peacock v. Eastland** (1870) 39 L. J. Ch. 534; L. R. 10 Eq. 17; 22 L. T. 706; 18 W. R. 856, *applied*.

Buckler's Case (1597) 2 Co. Rep. 55 a;
Barnick's Case (1697) 5 Co. Rep. 93 b;
 and **Roe d. Wilkinson v. Tranmarr** (*supra*), *applied*.

Savill v. Bethell (1902) 71 L. J. Ch. 652; [1902] 2 Ch. 523.—**C.A. COLLINS, M.R., STIRLING and HARDY, L.JJ.**

2. FORM AND EFFECT.

Sandilands, In re (1871) L. R. 6 C. P. 411; *nom. Mayer, In re*, 40 L. J. C. P. 201; 24 L. T. 273; 19 W. R. 641, *considered*.

National Provincial Bank of England v. **Jackson** (1886) 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597.—**C.A. COTTON, LINDLEY and LOPES, L.JJ.**

COTTON, L.J.—It is said, and said truly, that neither wax nor wafer is necessary in order to constitute a seal to a deed, and that frequently, as in the case of a corporation party to a deed, there is only an impression on the paper; and

In re Sandilands, was referred to, where an instrument had been forwarded from the colonies, together with an official certificate of its having been duly acknowledged, and this was recognised by the Court as a deed, although there was no seal, but only the ribbon on it. That case is not now under appeal, but it is evident that the question was merely as to what was the true inference of fact, and although perhaps, having regard to the certificate, it was right then to say that the deed had been sealed, here, in my opinion, it would be wrong to do so. It is true that if the finger be pressed upon the ribbon that may amount to sealing, but no such inference can be drawn here where the attesting witness who has given evidence recollects nothing of the act, and when Jackson had already committed no fraud in the matter, and then perhaps attended another.—p. 11.

Sandilands (or Mayer). In re, distinguished. Smith, In re, *Oswell v. Shepherd* (1892) 7 L. T. 64.—C.A. LINDLEY, BOWEN and KAY, JJ.
BOWEN, L.J.—It seems to me that *Re Sandilands* was an exceptional case, and that the decision there depended upon the particular facts of that case. It does not justify the Court, whenever a document is produced before it, rich, though bearing no seal, purports to have been sealed, in assuming that it has actually been sealed. I cannot see my way to assuming as fact in the present case.—p. 66.

3. CONSTRUCTION.

Cardigan (Earl) v. Armitage (1823) 2 B. & C. 197; **Bullen v. Denning** (1826) 4 L. J. (Os.) K. B. 314; 3 B. & C. 842; and **Bullock v. Burdett** (1866) 3 Dyer 281 a; Moore 81, *applied*.

Heyward's Case (1895) 2 Co. Rep. 35 a, 36 a, *observations applied*.
Boddington v. Robinson (1875) 44 L. J. Ex. 223; L. R. 10 Ex. 270; 33 L. T. 364; 23 W. R. 925.—EX., *commented on*.

Will v. Bethell (1902) 71 L. J. Ch. 652; [1902] 2 Ch. 523.—C.A. COLLINS, M.R., STIRLING and HARDY, L.JJ.

Lee v. Alexander (1888) 8 App. Cas. 853.—H.L. (SC.), *distinguished*.
rr v. Mitchell (1893) 1 R. 147; [1893] A. C.—H.L. (SC.).

Parker v. Marchant (1842) 1 Y. & C. C. C. 290; 11 L. J. Ch. 223; 6 Jur. 292.—V.-C., *dictum followed and approved*.
Anderson v. Anderson (1895) 64 L. J. Q. B. [1895] 1 Q. B. 749; 14 R. 367; 72 L. T. 313; W. R. 322.—C.A. ESHER, M.R., LOPES and JY, L.JJ.

x v. Clarke, L. R. 7 Q. B. 748; reversed, [1891] 43 L. J. Q. B. 178; L. R. 9 Q. B. 565; T. 646; 22 W. R. 774.—EX. CH.

Howkins v. Jackson (1850) 2 Mac. & G. 372; 2 H. & Tw. 301; 19 L. J. Ch. 451.—L.C., *distinguished*.

Lindo v. Lindo (1839) 1 Beav. 496; 8 L. J. Ch. 284.—M.R., *followed*.
Turner v. Turner, Hall v. Turner (1880) 14

Ch. D. 829; 42 L. T. 495; 28 W. R. 859; 44 J. P. 784.—V.-C.

Berridge v. Ward (1861) 10 C. B. (N.S.) 400; 30 L. J. C. P. 218; 7 Jur. (N.S.) 876; S. C. at NISI PRIUS, 2 F. & F. 208, *distinguished*.
Devonshire (Duke) v. Pattinson (1887) 57 L. J. Q. B. 189; 20 Q. B. D. 263; 58 L. T. 392; 52 J. P. 276.—C.A. ESHER, M.R., BOWEN and JY, L.JJ.; and **Micklethwait v. Newlay Bridge Co.** (1886) 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132.—C.A. COTTON, LINDLEY and LOPES, L.JJ., *reversing BACON, V.-C. applied*.

Pryor v. Petre (1894) 63 L. J. Ch. 531; [1894] 2 Ch. 11; 7 R. 424; 70 L. T. 331; 42 W. R. 435.—C.A. LINDLEY, KAY and SMITH, L.JJ.

LINDLEY, L.J.—The leading case on the subject is *Berridge v. Ward*, which is a very strong case. That case decides that "where a piece of land which adjoins a highway is conveyed by general words, the presumption of the law is that the soil of the highway *issue ad medium filium*, passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it." The question in this case is whether there are circumstances sufficient to exclude that presumption. In the first place it must be borne in mind that it is a rebuttable presumption. . . . we cannot find this little bit of land which is in dispute specified in any description of the parcels, either in the deed, or in the schedule, or in the plan. That, however, is not enough, having regard to *Berridge v. Ward*, to exclude the presumption. But when we come to look at the recital as to the trees and at the trees included in the valuation, it appears to me that the learned judge has decided this case rightly upon that recital and upon those trees. The trees which were valued were trees on the property agreed to be sold. It is not as though the recital had been that the trees were to be ascertained by valuation and so on; but it is a recital of what the parties agreed was to be conveyed. We ask what trees are conveyed, and we find they do not include those on this strip of land. It may be that any one of the facts I have mentioned would not be conclusive, but when you join them all together I think that there is sufficient to rebut the presumption.—pp. 531, 532.

Micklethwait v. Newlay Bridge Co., followed.

Leigh v. Jack (1879) 49 L. J. Ex. 220; 5 Ex. D. 284; 28 W. R. 452.—C.A. COCKBURN, C.J., BRAMWELL and COTTON, L.JJ., *dictum disapproved*.

White's Charities, In re, Charity Commissioners v. London Corporation (1898) 67 L. J. Ch. 430; [1898] 1 Ch. 659; 78 L. T. 550; 46 W. R. 479.

ROMER, J. (during the argument).—The dictum of Cockburn, C.J. in *Leigh v. Jack* that the presumption [of ownership *ad medium filium* on the part of the conveying party] does not apply to recent conveyances where there is evidence available on the point is not in accordance with what is now the settled law on the subject.

Smith v. Chambers (1877) 5 Rettie 97, *followed*.

Blair v. Assets Co. (1896) [1896] A. C. 409.—H.L. (SC.).

4. PARTICULAR DEEDS AND BONDS

Pyncent v. Pyncent (1747) 3 Atk. 571—L.C.; and **Warren v. Rudall** (1860) 1 J. & H. 1, 13; 29 L. J. Ch. 543; 6 Jur. (N.S.) 395; 2 L. T. 693; 8 W. R. 331.—V.C., *disapproved*.

Leathes v. Leathes (1877) 46 L. J. Ch. 562, 5 Ch. D. 221; 36 L. T. 646; 25 W. R. 492.—M.R. **JESSEL, M.R.**—The only case the other way is **Warren v. Rudall**, where the deeds were in Court, and Wood, V.C. stated the rule thus: "With respect to the title deeds, it is a settled doctrine that this Court never interferes as to the possession of deeds between a father tenant for life and a son entitled in remainder; but in the case of a stranger tenant for life the Court will interfere; and this is, in fact, a particularly strong case, because the deeds are in Court, and I am asked to deliver them out. The reversioner has no connection with the tenant for life, the title deeds must remain in Court." There is a *dictum* of Lord Hardwicke in **Pyncent v. Pyncent** to the same effect, but it is quite contrary to law, for the mere fact of the reversioner being a stranger to the tenant for life has nothing to do with the question.

Taylor v. Manners (1865) 35 L. J. Ch. 128; L. R. 1 Ch. 48; 11 Jur. (N.S.) 986; 13 L. T. 388; 14 W. R. 154.—L.J.J., *observation referred to*.

Edwards v. Walters (1896) 65 L. J. Ch. 557; [1896] 2 Ch. 167; 74 L. T. 896; 44 W. R. 647.—C.A. **LINDLEY, LOPES and KAY, L.J.J.**

Handcock v. Handcock (1848) 10 Ir. L. R. 565, *doubted*.

Handcock v. Handcock (1848) 11 Ir. Eq. R. 472. **BRADY, L.C.**—I am not prepared to follow the certificate on the second point, at least without further consideration.—p. 474.

Good, Ex parte, Armitage, In re (1877) 46 L. J. Bk. 65; 5 Ch. D. 46; 36 L. T. 338; 25 W. R. 422.—C.A.; and **Wolmershausen, In re, Wolmershausen v. Wolmershausen** (1890) 62 L. T. 541; 38 W. R. 537.—**STIRLING, J.**, *distinguished*.

E. W. A., In re (1901) 70 L. J. K. B. 810; [1901] 2 K. B. 642; 85 L. T. 31; 49 W. R. 642; 8 Mansou 250.—C.A. **RIGBY and COLLINS, L.J.J.**; **ROMER, L.J.** *doubting*. See judgment of **COLLINS, L.J.**

Gibbs v. Sidney (1888) 49 L. T. 132; W. N. (1888) 148.—**NORTH, J.**, *not followed*.

Stephenson v. Yorke (1900) 69 L. J. Ch. 253; [1900] 1 Ch. 505; 82 L. T. 55; 48 W. R. 480.

BUCKLEY, J.—Having regard to the three sections referred to, I think that, in a proper case, the Court now has power to direct that the register shall be rectified by vacating the existing registration, and I make the order, in the terms of the minute, as asked.

Jack v. Armstrong (1819) 1 Huds. & Br. 727; and **Stephens, In re** (1875) Ir. R. 10 Eq. 282, *discussed*.

Reg. v. Truro (Lord) (1888) 57 L. J. Q. B. 577; 21 Q. B. D. 555; 59 L. T. 242; 36 W. R. 775.—C.A. **COTTON, BOWEN and FRY, L.J.J.**

BOWEN, L.J.—The Irish cases are upon an Act which, so far as this section [sect. 5 of 7 Anne, c. 20] is concerned, is exactly in the same terms. But

what is the object of the Irish Act? The preamble shows that it was to secure not merely publicity, but authenticity, genuineness—to strike not merely at secrecy, but to strike at forgery, and, as is well known, not only was the condition of things in Ireland at that time different from the condition of things in England, but great importance was attached by the legislature to the difference which existed between the state of the two countries. As the object of the Irish statute was not merely to secure publicity, it may well be that the Court thought that if the wider construction which we are now adopting were put upon the words "witnesses to the execution," the entire objects of the legislature would not be secured, because it is obvious that a precaution against forgery would thus have been omitted. If proof of the execution by the grantee only were sufficient, there would be no security as to the genuine execution by the grantor, and it may be on that ground that the Court of Exchequer Chamber felt themselves bound to come to the conclusion to which they did in **Jack v. Armstrong**, which was afterwards followed in **Re Stephens**.

5. PROCEEDINGS ON BONDS.

Simpson v. Howden (Lord) (1837) 1 Keen 338.—M.R.; *reversed*, (1837) 3 Myl. & C. 97; 6 L. J. Ch. 315, 1 Jur. 703.—L.C.

Simpson v. Howden (Lord) (1837) 3 Myl. & C. 97; 6 L. J. Ch. 315; 1 Jur. 703.—L.C., *doubts in removed*.

S. C. (1842) 9 Cl. & F. 61; 3 Railw. Cas. 294.—**H.L. (E.)**; *affirming*, (1839) 10 A. & E. 793; 2 P. & D. 714; 8 L. J. Ex. 281.—**EX. CH.**

Simpson v. Howden (Lord), *held inapplicable*. **Williams v. Flight** (1842) 5 Beav. 41.

Simpson v. Howden (Lord), *commented on*. **Taylor v. Chichester and Midhurst Ry.** (1867) 36 L. J. Ex. 201, 210, L. R. 2 Ex. 356, 376; 14 L. T. 437; 16 W. R. 147.—**EX. CH.**; *reversed*, (1870) 39 L. J. Ex. 217; L. R. 4 H. L. 628; 23 L. T. 657.—**H.L. (E.)**.

Simpson v. Howden (Lord), *applied*. **Hoare v. Bremridge** (1872) 42 L. J. Ch. 1; L. R. 8 Ch. 22; 27 L. T. 593; 21 W. R. 43.—**L.C.** and **L.J.J.**

Simpson v. Howden (Lord), *followed*. **Ayerst v. Jenkins** (1873) 42 L. J. Ch. 690; L. R. 16 Eq. 275, 283; 29 L. T. 126; 21 W. R. 878.—**L.C.**

Simpson v. Howden (Lord); **Bromley v. Holland** (1892) 7 Ves. 3; and **Hoare v. Bremridge**, *distinguished*.

Brooking v. Mandsley (1888) 57 L. J. Ch. 1001; 38 Ch. D. 636, 646; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296.

STIRLING, J.—These authorities are, no doubt, of great value, but they relate to the cancellation of void or voidable instruments (as is shown by the case of **Thornton v. Knight**, 16 Sim. 504, already cited), and do not necessarily apply to cases where, as here, the instrument is not void or voidable, and relief by way of cancellation cannot be given.

White v. Sealey (1778) 1 Doug. 49, *disapproved*.
Lonsdale (Lord) v. Church (1788) 2 Term Rep. 388. See next case.

Lonsdale (Lord) v. Church, *disapproved*.
Wildc v. Clarkson (1795) 6 Term Rep. 303.
KENYON, C.J.—I cannot accede to the doctrine in the case cited by the plaintiff's counsel: according to that an obligor who became bound in a penalty of 1,000*l.* conditioned to indemnify the obligee, may be called upon to pay 10,000*l.* or any larger sum, however enormous.—p. 304.

Protector Endowment Loan Co. v. Grice, 49 L. J. Q. B. 247; 5 Q. B. D. 121; 42 L. T. 183; 28 W. R. 427; *reversed*, (1880) 49 L. J. Q. B. 812; 5 Q. B. D. 592; 43 L. T. 564; 45 J. P. 172.—C.A.

Gordillo v. Weguelin, 35 L. T. 609.—JESSEL, M.R.; *reversed*, (1877) 46 L. J. Ch. 691; 5 Ch. D. 287; 36 L. T. 206; 25 W. R. 820.—C.A. JAMES, L.J. and AMPHLETT, J.A.; BRETT, J.A. *dissenting*.

Hutton v. Harris [1892] A. C. 547.—H.L. (IR.), *distinguished*.
Knipe v. Blair (1900) [1900] 1 Ir. R. 372.—C.A.

6. CANCELLATION AND RECTIFICATION.

McClatchie v. Haslam (1890) 63 L. T. 376.—KEKEWICH, J.; *reversed*, (1891) 65 L. T. 691; 17 Cox C. C. 402.—C.A. LINDLEY, BOWEN and FRY, L.J.J.

Williams v. Bayley (1866) 35 L. J. Ch. 717; L. R. 1 H. L. 200; 14 L. T. 802; 12 Jur. (N.S.) 875.—H.L. (E.), *explained*.

McClatchie v. Haslam (*supra*), in C.A.
LINDLEY, L.J.—He [Kekewich, J. in the Court below] appears to us to have decided the case in her [the plaintiffs'] favour upon an erroneous view of the law as laid down in *Williams v. Bayley*. . . I have explained, we have all explained, in dealing with *Jones v. Merionethshire Permanent Benefit Building Society* (65 L. T. 685), that in order to invalidate a transaction of this kind you must prove one of two things: either an agreement not to prosecute, which we can dismiss from our minds here; or pressure and undue influence. It is not the law that, if a lady makes a sacrifice to get her husband out of a scrape, she can necessarily impeach the security which she gives, even although the result is to "stifle a prosecution."

Leuty v. Hillas (1858) 2 De G. & J. 110; 27 L. J. Ch. 634; 4 Jur. (N.S.) 1166; 6 W. R. 217.—L.C., *distinguished*.
Ellis v. Ellis (1892) 67 L. T. 287.

ROMER, J.—In the case before me the defendant has certainly been guilty of no impropriety—has taken no advantage of the plaintiffs—and cannot be said, like the defendant in the cited case of *Leuty v. Hillas*, to have taken his conveyance wrongfully, and with knowledge of the rights or claims of the plaintiffs to any part of the property included in the conveyance.—p. 289.

Walker v. Armstrong (1856) 8 De G. M. & G. 531; 25 L. J. Ch. 738; 2 Jur. (N.S.) 959; 4 W. R. 770; and **Lovell v. Wallis** (1888)

53 L. J. Ch. 494; 49 L. T. 593.—KAY, J.; S. C. (1884) 50 L. T. 681.—KAY, J., *referred to*.

Bonhote v. Henderson (1895) 64 L. J. Ch. 556; [1895] 1 Ch. 742; 13 IL 523; 72 L. T. 556; 43 W. R. 502.—KEKEWICH, J.; *affirmed*, (1895) 2 Ch. 202; 13 B. 329, n.; 72 L. T. 814; 43 W. R. 580.—C.A. LINDLEY, LOPES and KAY, L.J.J.

Bonhote v. Henderson, *referred to*.
James v. Couchman (1885) 29 Ch. D. 212; 52 L. T. 344.—NORTH, J., *not followed*.
Rake v. Hooper (1901) 83 L. T. 469.—KEKEWICH, J.

DEFAMATION.

1. WHAT IS ACTIONABLE.
2. PRIVILEGE.
3. PRACTICE AND PROCEDURE.
4. DAMAGES.

I. WHAT IS ACTIONABLE.

Capital and Counties Bank v. Henty (1880) 42 L. T. 814; 28 W. R. 490.—GROVE and DEXMAN, JJ.; *reversed*, (1880) 49 L. J. C. P. 830; 5 C. P. D. 514; 43 L. T. 651; 28 W. R. 851; 45 J. P. 188.—C.A. COTTON and BRETT, L.J.J.; THESIGER, L.J. *dissenting*; *the latter decision affirmed*, (1882) 52 L. J. Q. B. 232; 7 App. Cas. 741; 47 L. T. 662; 31 W. R. 157; 47 J. P. 214.—H.L. (E.). LORDS SELBORNE, L.C., PENZANCE, BLACKBURN, WATSON and BRAMWELL.

Capital and Counties Bank v. Henty (*supra*) in H.L., *followed*.

Nevill v. Fine Art and General Insurance Co. (1896) 66 L. J. Q. B. 195; [1897] A. C. 68; 75 L. T. 806; 61 J. P. 500.—H.L. (E.). LORDS HALSBURY, L.C., MACNAGHTEN, SHAND and DAVEY.

Ogden v. Turner (1703) 2 Salk. 696; 6 Mod. 104; Holt 40, *questioned*.

Onslow v. Horne (1771) 3 Wils. 177, 186; 2 W. Bl. 750.—DE GREY, L.C.J.

Ogden v. Turner. See now 54 & 55 Vict. c. 51, s. 1.

Anon. (1589) 3 Leon. 231, *overruled*.
Jones v. Herne (1759) 2 Wils. 87.—C.P.

Cuddington v. Wilkins (1615) Hobart, 67, 81; and **Searle v. Williams** (1618) Hobart, 293, *approved*.

Leyman v. Latimer (1878) 47 L. J. Ex. 470; 3 Ex. D. 362; 37 L. T. 819; 26 W. R. 305; 14 Cox C. C. 51.—C.A.

Backster's Case (1590—1591) cited Cro. Jac. 430, *disapproved*.
Carslake v. Mapledoram (1788) 2 Term Rep. 473.

ASHBURST, J. said that the case was very loosely reported and therefore not much to be relied on.—p. 475.

Austin v. White (1590—1591) Cro. Eliz. 214, *questioned*.

Carslake v. Mapledoram (1788) 2 Term Rep. 473.

BULLER, J.—The case in Cro. Eliz., which has

been cited, is too loosely reported to be relied on.—p. 475.

Carlake v. Mapledoram, distinguished.
Bloodworth v. Gray (1844) 8 Scott (N.R.) 9; 7 Man & G. 384.

TINDAL, C.J.—The distinction taken in that, as in all the older cases, is this—that words imputing to another that he is at the present time afflicted with a disgusting and contagious disease are actionable in themselves, inasmuch as they import a present unfitness to be admitted into society, but the same reason for avoiding the company of one who has had a contagious disorder does not exist.—p. 11.

Fleming v. Newton (1848) 1 H. L. Cas. 363; *commented on*, **Dixon v. Holden** (1868) 37 L. J. Ch. 889; L. R. 7 Eq. 488; 20 L. T. 357; 17 W. R. 482.—*v. c.*; *referred to*, **Mulkern v. Ward** (1872) 41 L. J. Ch. 464; L. R. 13 Eq. 619; 26 L. T. 831.—*v. c.*; *applied*, **Cosgrave v. Trade Auxiliary Co** (1874) Ir. R. 8 C. L. 349; *referred to*, **Prudential Assurance Co. v. Knott** (1875) 44 L. J. Ch. 192; L. R. 10 Ch. 142; 31 L. T. 866; 23 W. R. 249.—L.C. and L.JJ.

Fleming v. Newton; McNally v. Oldham (1863) 16 Ir. C. L. R. 298; 8 L. T. 604; and **Cosgrave v. Trade Auxiliary Co.** (1874) Ir. R. 8 C. L. 349, *considered*.
Williams v. Smith (1888) 58 L. J. Q. B. 21; 22 Q. B. D. 134; 59 L. T. 757; 37 W. R. 93; 52 J. P. 823.—**POLLOCK, B. and MANISTY, J.**

Fleming v. Newton and Annaly v. Trade Auxiliary Co. (1890) 26 L. R. Ir. 11. 394, *followed*.

Williams v. Smith, discussed.
Searles v. Scarlett (1892) 61 L. J. Q. B. 573; [1892] 2 Q. B. 56; 66 L. T. 837; 40 W. R. 696; 56 J. P. 789.—C.A. **ESHER, M.R., LINDLEY and KAY, L.JJ.**

LINDLEY, L.J.—**Fleming v. Newton** in the H. L. and **Annaly v. Trade Auxiliary Co.** in the Irish C. A. show that the mere publication of what appears in the register of County Court judgments is a privileged publication. That being so, it is necessary for the plaintiff to prove something more than a mere publication of the extract. Here there is no evidence of express malice on the part of the defendant. The existence of the note to the effect that it is probable that a large proportion of the judgments have been satisfied distinguishes the present case from **Williams v. Smith**. I think that this was a privileged document, published on a privileged occasion.—p. 576.

Fleming v. Newton and Searles v. Scarlett, considered.
Reis v. Perry (1895) 64 L. J. Q. B. 566; 15 R. 427; 43 W. R. 648.—**DAY and WRIGHT, JJ.**

Young v. Macrae (1862) 3 B. & S. 264; 32 L. J. Q. B. 6; 9 Jur. (N.S.) 538; 7 L. T. 354; 11 W. R. 63, *distinguished*.

Western Counties Manure Co. v. Lawes' Chemical Manure Co. (1874) L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5.

BRAMWELL, B.—The disparaging statement in the case of **Young v. Macrae** was not expressly said to be untrue: it was only said generally that the libel was untrue, which it might be if

• O.C.

only so much of it was untrue as contained praise of the defendant's own goods.—p. 222.

Western Counties Manure Co. v. Lawes' Chemical Manure Co., distinguished.
Day v. Brownrigg (1878) 48 L. J. Ch. 173; 10 Ch. D. 294; 39 L. T. 553; 27 W. R. 217.—C.A.

Western Counties Manure Co. v. Lawes' Chemical Manure Co., referred to.
Thorley's Cattle Food Co. v. Massam (1880) 14 Ch. D. 763; 42 L. T. 851; 28 W. R. 966.—C.A.; and **Dicks v. Brooks** (1880) 49 L. J. Ch. 812; 15 Ch. D. 22; 43 L. T. 71; 29 W. R. 87.—C.A.

Western Counties Manure Co. v. Lawes' Chemical Manure Co., commented on.
Evans v. Harlow (1844) 13 L. J. Q. B. 120; 5 Q. B. 624; D. & M. 507; 8 Jur. 571, *approved*.

White v. Melhn (1895) 64 L. J. Ch. 308; [1895] A. C. 154; 11 R. 141; 72 L. T. 334; 43 W. R. 353; 59 J. P. 628.—**H.L. (E.). LORDS HERSCHELL, L.C., WATSON, MACNAGHTEN, MORRIS and SHAND.**

HERSCHELL, L.C.—The utmost that the **Western Counties Manure Co. v. Lawes' Chemical Manure Co.** can be claimed as an authority for is this, that an action will lie for falsely disparaging another's goods where special damage results. **Evans v. Harlow** is a distinct authority that it will not lie where special damage does not result. In the present case it cannot be pretended that any special damage was either alleged or proved.

Young v. Macrae and Evans v. Harlow, followed.
Hubbuck v. Wilkinson (1898) 68 L. J. Q. B. 34; [1899] 1 Q. B. 86; 79 L. T. 429.—C.A. **LINDLEY, M.R., CHITTY and WILLIAMS, L.JJ.**

Harman v. Delany (1731) 2 Str. 898; and **Evans v. Harlow, distinguished from each other and approved.**

Linotype Co. v. British Empire Type-Setting Machine Co. (1899) 81 L. T. 331.—**H.L. (E.). LORDS HALSBURY, L.C., MACNAGHTEN and MORRIS.**

HALSBURY, L.C.—The principle which distinguishes the two cases (and, as I have said, it is the principle only with which I am dealing, and not the particular words of either of the libels proceeded against) is that while mere criticism upon a manufacture or goods is lawful, an imputation upon a man in the way of his trade is, even without special damage, properly the subject of an action.—p. 333.

Riding v. Smith (1876) 45 L. J. Ex. 281; 1 Ex. D. 91; 34 L. T. 500; 24 W. R. 487.—**EX., referred to.**

Thorley's Cattle Food Co. v. Massam (1880) —C.A. (*supra*); and **Thomas v. Williams** (1880) 49 L. J. Ch. 605; 14 Ch. D. 864; 43 L. T. 91; 28 W. R. 983.—**FRY, J.**

Hargrave v. Le Breton (1769) 4 Burr. 2422, *applied*.

Riding v. Smith, explained.
Ratcliffe v. Evans (1892) 61 L. J. Q. B. 535; [1892] 2 Q. B. 524; 66 L. T. 794; 40 W. R. 578; 56 J. P. 837.—C.A. **ESHER, M.B., BOWEN and FRY, L.JJ.**

Ratcliffe v. Evans, distinguished.

Ajello v. Worsley (1898) 67 L. J. Ch. 172; [1898] 1 Ch. 274; 77 L. T. 788; 46 W. R. 245.
 STIRLING, J.—The class of cases which in [Bowen, L.J. in a passage from his judgment in *Magd. Stevedoring Co. v. McGregor* (23 Q. B. D. 598, 614) which had been relied upon] probably had in his mind was that of which *Ratcliffe v. Evans* is an example—namely, where the defendant has intentionally published an untrue statement regarding the plaintiff's business, and thereby has in the ordinary course caused damage to the plaintiff. Here the untrue statement related to the defendant's own business: and I may point out that, if it affected the plaintiff's business at all, it did not affect it exclusively.

Ratcliffe v. Evans, distinguished.

Royal Baking Powder Co. v. Wright (1900) 18 Rep. Pat. Cas. 95, 103.—H.L. (E.). LORDS HALSBURY, L.C., MORRIS, DAVEY, JAMES and ROBERTSON.

Stanton v. Smith (1727) 2 Ld. Raym. 1480; 2 Str. 762, disapproved.

D'Oyley v. Roberts (1837) 3 Bing. (N.C.) 885; 5 Scott 40; 3 Hodges 154; 6 L. J. C. P. 279.
 COLTMAN, J.—It is the only case which has a tendency to support the argument for the plaintiff. But it is a solitary case, and at variance with decisions before and since. To render words of this kind ["He has defrauded his creditors and has been horsewhipped off the course at Doncaster"] actionable, they must have relation to the trade or profession of the plaintiff.—p. 840.

Stanton v. Smith, approved.

Jones v. Littler (1841) 7 M. & W. 423; 10 L. J. Ex. 171.

Parrat v. Carpenter (1597) Cro. Eliz. 502, held overruled.

Gallwey v. Marshall (1853) 9 Ex. 294; 2 C. L. R. 399; 23 L. J. Ex. 78; 2 W. R. 106.
 PARKER, B.—That case is overruled by *Dod v. Robinson* (Ayley 63)—p. 295.

Walden v. Mitchell (1690—1691) 2 Vent. 265, questioned.

Onslow v. Horne (1771) 3 Wils. 177; 2 W. Bl. 750.
 DE GREY, L.C.J.—I know of no case where even an action for words was grounded upon eventual damages, which may possibly happen to a man in a future situation, notwithstanding what the Chief Justice throws out in *Walden v. Mitchell*, where he is made to say "that where a man had been in an office of trust, to say that he behaved himself corruptly in it, as it imputed great scandal, so it might prevent his coming into that, or the like office again, and, therefore, was actionable." I think the Chief Justice went too far.—p. 188.

Onslow v. Horne, qualified.

Lumby (or Lumley) v. Allday (1831) 1 C. & J. 301; 1 Tyr. 217; 9 L. J. (O.S.) Ex. 62.

BAYLEY, J. (for the Court).—The plaintiff relied on the rule laid down by De Grey, C.J. in *Onslow v. Horne*, "that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and businesses, and do or may probably tend to ruin damage." The same case occurs in Sir Wm. Bl. Rcp. 753, and there the rule is expressed to be "if the words be of

probable ill-consequence to a person in a trade or profession, or an office." The objection to the rule as expressed in both reports appears to me to be that the words "probably" and "probable" are too indefinite and loose, and unless they are considered as equivalent to "*having a natural tendency to*," and are confined within the limits, I have expressed in stating the defendant's objections, of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant.—p. 305.

Onslow v. Horne, followed.**Gallwey v. Marshall (supra) and Lumby v. Allday, considered.**

Alexander v. Jenkins (1892) 61 L. J. Q. B. 634; [1892] 1 Q. B. 797; 66 L. T. 891; 40 W. R. 546; 56 J. P. 452.—C.A. LORD HERSCHELL, LINDLEY and KAY, L.JJ.

LINDLEY, L.J.—We have to face decisions which show that when a person is merely accused of unfitness for an office of honour (not of profit, with which we are not dealing), that unfitness must be one which would expose him to the risk of removal from the office which he fills, or seeks to fill. That this is the law was settled at least as early as *Onslow v. Horne*, when De Grey, C.J. reviewed some previous decisions, and I can find no doubt thrown on that doctrine in any case which has been decided since. It has been recognised more or less in subsequent cases, and neither in *Gallwey v. Marshall* nor in *Lumby v. Allday* do we find that that principle has been doubted. I do not know that it was expressly sanctioned in the last-mentioned case, but I think it was in *Gallwey v. Marshall*.

Alexander v. Jenkins, considered.

Booth v. Arnold (1895) 64 L. J. Q. B. 443; [1895] 1 Q. B. 671; 14 R. 326; 72 L. T. 310; 43 W. R. 360; 59 J. P. 215.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

LOPES, L.J.—In my judgment, words imputing want of integrity, dishonesty, or malversation to any one holding a public office of confidence or trust, whether an office of profit or not, are actionable *per se*. On the other hand, when the words merely impute unsuitableness for the office, incompetence, or want of ability, without ascribing any misconduct touching the office, then according to the decision in *Alexander v. Jenkins*, no action lies, where the office is honorary, without proof of special damage. It is said that this view is contrary to the recent case of *Alexander v. Jenkins*; but a careful perusal of that case leads me to a different conclusion. [His Lordship referred to passages in the judgments in that case.] *Alexander v. Jenkins* is, therefore, no authority for the contention of the defendant, and in the absence of authority I should hesitate long before I held that words imputing gross misconduct in the discharge of the duties of a public office were not actionable *per se*, even where that office was an office of credit or honour.

Campbell v. Spettiswoode (1863) 3 B. & S. 769; 32 L. J. Q. B. 185; 9 Jur. (N.S.) 1069; 8 L. T. 201; 11 W. R. 569; 8 C. 3 F. & F. 421, approved and followed.

Kenwood v. Harrison (1872) 41 L. J. C. P. 206; L. R. 7 C. P. 606; 26 L. T. 938; 20 W. R. 1000, dissented from.
 Merivale v. Carson (1887) 20 Q. B. D. 275; 58

L. T. 331; 36 W. R. 231; 52 J. P. 261.—C.A. ESHER, M.R. and BOWEN, L.J.

BOWEN, L.J.—The present case is not, strictly speaking, one of "privileged occasion." In a legal sense that term is used with reference to a case in which one or more members of the public are clothed with a greater immunity than the rest. But in the present case we are dealing with a common right of public criticism which every subject of the realm equally enjoys—the right of publishing a written criticism upon a literary work which is offered to public criticism. It is true that a different metaphysical exposition of this common right is to be found in the judgment of Willes, J., in *Henwood v. Harrison*. That learned judge and the majority of the Court of Common Pleas seem to have treated this right as a branch of the general law of privilege, and to have found a justification for the use of the word "privilege" in the subject-matter of the criticism, although there is no limit of the number of persons entitled to make the criticism. With great respect to Willes, J., I agree with the Master of the Rolls that this is not so good an exposition of the right as that which is given by Blackburn, J. and Crompton, J., in *Campbell v. Spottiswoode*. . . . Among other reasons why I prefer the view of Blackburn, J. and Crompton, J., is this, that it leaves undisturbed the mode of directing the jury in cases of this class which has been ordinarily adopted, viz., to begin by asking them whether they think the limits of fair criticism have been passed. That implies that there is no libel, if those limits are not passed.—pp. 282, 283

Carr v. Hood (1808) 1 Camp. 355, n.; 10 R. R. 701, n., *observed upon*.
Thompson v. Shackell (1828) M. & M. 187; 31 R. R. 728.

2. PRIVILEGE.

Revis v. Smith (1856) 25 L. J. C. P. 195; 18 C. D. 126; 2 Jur. (N.S.) 614; 4 W. R. 506.—C.P., *applied*.
Fitzjohn v. Mackinder (1861) 30 L. J. C. P. 257; 9 C. B. (N.S.) 505; 7 Jur. (N.S.) 1283; 4 L. T. 149; 9 W. R. 477.—EX. CH.

Dawkins v. Roakey (Lord) (1866) 4 F. & F. 806, *referred to*.
Dawkins v. Paulet (Lord) (1869) 39 L. J. Q. B. 53; 1 R. R. 5 Q. B. 94; 9 B. & S. 708; 21 L. T. 584; 18 W. R. 336.—Q.B.; COCKBURN, C.J. *dissenting*.

Dawkins v. Roakey (Lord) (1875) 45 L. J. Q. B. 8; 1 R. R. 7 H. L. 744; 33 L. T. 196; 23 W. R. 931.—H.L. (N.), *considered*.
Royal Aquarium v. Parkinson (1892) 61 L. J. Q. B. 409; [1892] 1 Q. B. 481; 66 L. T. 513; 40 W. R. 450; 56 J. P. 404.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

ESHER, M.R.—It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. In *Dawkins v. Lord Roakey*

the doctrine was extended to a military Court of inquiry. It was so extended on the ground that the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act.

Dawkins v. Roakey (Lord), *referred to*
Primrose v. Waterston (1902) 4 FRASER, 783.
—CT. OF SESS.

Dawkins v. Paulet (Lord) (*supra*), *referred to*.
Marks v. Frogley (1898) 67 L. J. Q. B. 605; [1898] 1 Q. B. 888; 78 L. T. 607; 46 W. R. 548.
—C.A. SMITH, CHITTY and COLLINS, L.J.J.

Royal Aquarium v. Parkinson (*supra*), *referred to*.
Reg. v. L.C.C., Edwardes, Ex parte (1894) 15 R. 60; 71 L. T. 638 —CHARLES and WRIGHT, JJ.; Hodson v. Pare (1899) 68 L. J. Q. B. 309; [1899] 1 Q. B. 455; 80 L. T. 13; 47 W. R. 241.—C.A.

Rex v. Williams (1686) 2 Show 471, *impugned*.
Rex v. Wright (1799) 8 Term Rep. 293; 4 L. L. 649.—K.B.
GROSE, J.—The case of *R. v. Williams* is most like this case, but it must be remembered that that was declared by a great authority to be a disgrace to the country.—p. 297.

Rex v. Wright (1799) 8 Term Rep. 293; 4 L. R. 649, *commented on*.
Curry v. Walter (1796) 1 Bos. & P. 525; 8 Term Rep. 298; 1 Esp. 457; 4 R. R. 717; 5 H. R. 743, *quoted*.
Rex v. Creevey (1813) 1 M. & S. 273; 14 R. R. 427.—K.B.

LORD ELLENBOROUGH, C.J.—As to *Curry v. Walter*, it is not necessary for the present purpose to discuss that case; whenever it becomes necessary, I shall say that the doctrine there laid down must be understood with very great limitations; and shall never fully assent to the unqualified terms attributed in the report of that case to Eyre, C.J.—p. 279.

Curry v. Walter, *approved*.
Lewis v. Levy (1855) 27 L. J. Q. B. 282; 11 B. & El. 537, 4 Jur. (N.S.) 970; 6 W. R. 629.—Q.B.
CAMPBELL, C.J.—The decision . . . in *Curry v. Walter* rested on sound legal principles, and is now almost universally approved of.—p. 289.

Rex v. Wright, *commented on and approved*.
Rex v. Abington (Lord) (1794) 1 Esp. 226; Peake 236; 5 R. R. 733; and *Rex v. Creevey*, *distinguished*.
Wason v. Walter (1868) L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 19 L. T. 409; 17 W. R. 169; 8 B. & S. 671.

Kendillon v. Malthy (1842) Car. & M. 402; 2 M. & Rob. 488, *dissented from*.
Munster v. Lamb (1883) 11 Q. B. D. 588; 52 L. J. Q. B. 726; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805.—C.A. BRETT, M.R. and FRY, L.J.
BRETT, M.R.—From our judgments, it is

obvious that we dissent from the opinion of Lord Denman, C.J., expressed by him at Nisi Prius in *Kendillon v. Milby*—p. 608.

Munster v. Lamb, followed.

Pedley v. Morris (1891) 61 L. J. Q. B. 21; 65 L. T. 526; 40 W. R. 42.—DAY and GRANTHAM, JJ.

Munster v. Lamb, referred to.

Primrose v. Waterston (1902) 4 Fraser 783.—CT. OF SESS.

Williamson v. Freer (1872) 43 L. J. C. P. 161; L. R. 9 C. P. 393; 30 L. T. 332; 22 W. R. 878, *distinguished*.

Purcell v. Sowler (1877) 46 L. J. C. P. 308; 2 C. P. D. 215; 36 L. T. 416; 25 W. R. 362.—C.A., *considered*.

Pittard v. Oliver (1891) 60 L. J. Q. B. 219; [1891] 1 Q. B. 474; 64 L. T. 758; 39 W. R. 311; 55 J. P. 100.—C.A. ESHER, M.R. SIR J. HANSEN and FRY, J.J.

ESHER, M.R.—*Williams v. Freer*, which was tried before me, was wholly different to the present case: there the defendant, who was the plaintiff's master, thought that she had committed a felony, and had her written to her father or mother to come and see to her, no doubt his written communication would have been privileged, it being a communication made to the girl's legal guardians. Unfortunately he did not adopt this humane course, but sent a telegram to her father, in which he charged her with felony, which telegram was necessarily read and copied by the telegraph clerks; and the Court held that such a mode of transmitting the communication was not privileged, for it was not merely a saying of the things to the father in the presence of somebody else, but was a separate saying of them to the telegraph clerks. . . . The effect of what the Court said in this case (*Purcell v. Sowler*) was, that, though the occasion was privileged as regards the time and place at which the words were spoken, and as regards the person who spoke them, yet the matter was not one of public interest, and therefore the publication in the newspaper was not privileged.

Waring v. M'Caldin (1873) Ir. R. 7 C. L. 282.—EX., *dictum dissented from*.

Tompson v. Dashwood (1883) 52 L. J. Q. B. 425; 11 Q. B. D. 43; 48 L. T. 943.—WILLIAMS and MATHEW, JJ., *overruled*.

Heblitch v. MacIlwaine (1894) 63 L. J. Q. B. 587; [1894] 2 Q. B. 54; 9 R. 452; 70 L. T. 826; 42 W. R. 422; 58 J. P. 620.—C.A. ESHER, M.R., SMITH and DAVEY, L.J.

ESHER, M.R.—Mr. Baron Fitzgerald there [in *Waring v. M'Caldin*] said: "If, without express malice, I make a defamatory charge, which I *bona fide* believe to be true, against one whose conduct in the respect defamed has caused me injury, to one whose duty it is or whose duty I reasonably believe to be, to inquire into and redress such injury, the occasion is privileged, because I have an interest in the subject-matter of my charge, and the person to whom I make the communication has, on hearing the communication, a duty to discharge in respect of it." That statement is, no doubt, true; but the learned judge has interpolated the words, "or whose duty I reasonably believe it to be." . . . I do not myself think they were intended to be put in, but if they were then I am unable to agree

with them (p. 590). There [in *Tompson v. Dashwood*] a letter containing defamatory statements of the plaintiff was written by the defendant under such circumstances as would have made the communication of it to the person to whom the defendant intended to send it a privileged communication; but the defendant put it by mistake into a wrong envelope and sent it to another person, and the Court there held that such communication was privileged. I think the Court intended to make and did make a distinction between the writing of the letter and the publication of it. If that be so, I am unable to agree with it. It is not the mere writing of a libel, but the publication of it, which gives a cause of action. The Court, therefore, could not properly draw any distinction between the writing and its publication. The real question is whether the publication was made on a privileged occasion. I think that the only way in which we can deal with *Tompson v. Dashwood* is to say that we cannot agree with it, and that it was wrongly decided.—p. 591

Davies v. Sneed (1870) 39 L. J. Q. B. 202; L. R. 5 Q. B. 608; 23 L. T. 126, *followed*.

Waller v. Lock (or Loch) (1881) 51 L. J. Q. B. 274; 7 Q. B. D. 619; 45 L. T. 242; 30 W. R. 18; 46 J. P. 484.—C.A. JESSEL, M.R., BRETT and COTTON, L.J.

Blagg v. Sturt (1846) 10 Q. B. 899; 16 L. J. Q. B. 39; 11 Jur. 1011, *distinguished*.

Harrison v. Bush (1855) 5 El. & Bl. 344, 25 L. J. Q. B. 25; 1 Jur. (N.S.) 846; 3 W. R. 474.

LORD CAMPBELL, C.J. (for the Court).—In *Blagg v. Sturt* a different opinion appears to have been entertained; and if that had been a solemn decision, the *ratio decidendi* being that such a memorial, *bona fide* addressed to the Secretary of State, is an actionable libel, we should have felt ourselves bound by it, and referred the defendant to a Court of error for the purpose of having the doctrine reviewed, although a distinction might have been taken between the office of town clerk and clerk to the justices of a borough, and the office of justice of the peace for a county. But the substantial difference between the two cases is, that in *Blagg v. Sturt*, there was express malice (p. 354). . . . We think that the authorities considerably outweigh the reasoning of the Court in *Blagg v. Sturt* on the incapacity of the Secretary of State to give redress; and that as the defendant is found by the jury on reasonable evidence to have presented the memorial to the Secretary of State *bona fide* for the purpose of obtaining redress, we are bound to say that he is not a libeller, and to give judgment in his favour.—p. 358.

Harrison v. Bush, applied.

Whiteley v. Adams (1863) 33 L. J. C. P. 89; 15 C. B. (N.S.) 392; 10 Jur. (N.S.) 470; 9 L. T. 483; 12 W. R. 155.—C.P.

Harrison v. Bush, considered and applied.

Brown v. Houston (1901) 70 L. J. K. B. 802; [1901] 2 K. B. 855; 85 L. T. 160.—C.A. SMITH, M.R., WILLIAMS and STIRLING, L.J.

WILLIAMS, L.J.—The result, therefore, of the rule in *Harrison v. Bush* is that where a man has gone down to trial to prove untrue allegations to be true, he is to receive the costs of the witnesses whom he adduced to prove that falsehood. Nevertheless, as I have said, I think that

we ought not to alter a rule of such a standing, more especially since it is one of such a kind that the order of the judge at *nisi prius* who tries the action can remedy any injustice to which it may give rise. It is quite true that in *Harrison v. Bush* the judges say that the general question of the truth or falsehood of the alleged defamatory words is material on the issue of express malice. I say that that is not so. It may be or it may not be. It depends on the circumstances of the case.

Brown v. Houston, inapplicable.

Wright, Crossley & Co., in re (1902) 86 L. T. 280.—C.A. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

Somerville v. Hawkins (1850) 10 C. B. 583; 20 L. J. C. P. 131; 15 Jur. 450; and **Spill v. Maule** (1860) 38 L. J. Ex. 138; L. R. 4 Ex. 232; 20 L. T. 675; 17 W. R. 805.—EX CH. *followed*.

Whiteley v. Adams (1863) 15 C. B. (N.S.) 392; 33 L. J. C. P. 89; 10 Jur. (N.S.) 470; 9 L. T. 483; 12 W. R. 153; and **Wright v. Woodgate** (1835) 2 C. M. & R. 573, 1 Tyr. & G. 12; 1 Gale 329.—EX. *approved*.

Laughton v. Socol and Man (Bishop) (1872) 42 L. J. P. C. 11; L. R. 4 P. C. 495; 28 L. T. 377; 21 W. R. 204. 9 Moore P. C. (N.S.) 318.—P.C.

Wright v. Woodgate and Clark v. Molyneux (1877) 17 L. J. Q. B. 230; 3 Q. B. D. 237; 37 L. T. 694; 26 W. R. 104, 14 Cox C. C. 10.—C.A., *observations approved*.

Jenoure v. Delmege (1890) 60 L. J. P. C. 11; [1891] A. C. 73; 63 L. T. 814; 39 W. R. 388; 55 J. P. 500.—P.C. LORD MACNAGHTEN, SIR B. PEACOCK, SIR R. COUCH and LORD SHAND.

Pullman v. Hill & Co. (1890) 60 L. J. Q. B. 299; [1891] 1 Q. B. 524; 64 L. T. 691; 39 W. R. 263.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.; *reversing* DAY, J., *distinguished*.

Boxsius v. Goblet (1891) 63 L. J. Q. B. 401; [1894] 1 Q. B. 842; 9 R. 224; 70 L. T. 368; 42 W. R. 392; 58 J. P. 670.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

ESHER, M.R.—In *Pullman v. Hill & Co.* this Court held that if a merchant dictates to a clerk in his office matter concerning a customer or any one else which, if sent by the merchant himself to a customer, would be sent on a privileged occasion, the communication so made to the clerk is a publication of that matter to the clerk on an occasion which would not be a privileged occasion. The ground of that decision was that it was not the ordinary business of a merchant to write libels to or about his customers, and that if he does write what is libellous it is not reasonably necessary in the ordinary course of business to give it to be copied by a clerk in his office. . . . The case of solicitors, however, is very different from that of merchants. . . . the letter which was so sent to the plaintiff would, if it had been written and sent to her by the solicitors' clients, have been sent on a privileged occasion, and the solicitors are entitled to claim that it is privileged. . . . If it was the duty of a solicitor to write such a letter on behalf of his client on a privileged occasion, does it not follow that it is his duty to do so in an

ordinary and reasonably necessary way for the purpose of enabling him to perform that duty to his client. . . . I think that where the occasion would be privileged as between himself and the person to whom he writes the letter, upon the ground that if it had been written by his client it would be privileged, the occasion on which it is communicated to his clerks for the purpose of being copied into the letter book, that being a necessary and reasonable way of carrying out his duty to his client, would also be a privileged occasion, and he would not be liable in an action for libel unless malice in fact were proved.—pp 402, 403, 404

Tuson v. Evans (1840) 12 A. & E. 738, *overruled*.

Cooke v. Wildes (1855) 5 El. & Bl. 328; 3 C. L. R. 1090; 24 L. J. Q. B. 367; 1 Jur. (N.S.) 610; 3 W. R. 158.

GAMPBELL, C.J. (for the Court).—We are next to consider whether the rule ought to be simply discharged, so as that the verdict for the plaintiff should stand. It was certainly held in *Tuson v. Evans*, where there was a communication by letter, to which the occasion afforded privilege, that, there being a comment in excess of the privilege, the judge was justified in directing the jury that it was a libel, and leaving to them only the question of damages. But, upon referring to other authorities, we are of opinion that, wherever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine. This has been the universal course where extrinsic evidence of malice has been adduced. . . . These authorities, we think, outweigh the decision in *Tuson v. Evans*, which passed only on refusing a rule for a new trial, the defendant's counsel rather arguing that there had been no excess than that the question should have been left to the jury.—p. 341.

Lewis v. Clement (1820) 3 B. & Ald. 702; 22 R. R. 530; **S. C. nom. Clement v. Lewis** (in error) 7 Moore 200; 3 Br. & B. 297, 10 Price 181; 22 R. R. 533

Macdougall v. Knight (1886) 55 L. J. Q. B. 464; 17 Q. B. D. 636; 55 L. T. 274; 34 W. R. 727; 51 J. P. 38.—C.A., *discussed and approved*.

Macdougall v. Knight (1890) 59 L. J. Q. B. 517; 25 Q. B. D. 1; 63 L. T. 43; 38 W. R. 553; 54 J. P. 788; 6 Times L. R. 276.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Lewis v. Levy (1858) E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. (N.S.) 970; 6 W. R. 629, *applied*.

Macdougall v. Knight (1889) 58 L. J. Q. B. 537, 14 App. Cas. 194; 60 L. T. 762, 38 W. R. 44; 53 J. P. 691.—H.L. (2) LORDS HALSBURY, L.C., WATSON, BRANWELL, FITZGERALD and MACNAGHTEN.

Lewis v. Levy and Uaill v. Hales (1878) 47 L. J. C. P. 323; 3 C. P. D. 319; 38 L. T. 65; 26 W. R. 371, 14 Cox C. C. 61, *applied*.

Kimber v. Press Association (1892) 62 L. J. Q. B. 152; [1893] 1 Q. B. 65, 4 R. 95; 67 L. T. 515; 41 W. R. 17; 57 J. P. 247.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

3. PRACTICE AND PROCEDURE.

Williams v Beaumont (1833) 10 Bing 260, 3 M. & Sc. 705; 3 L. J. C. P. 31; **Metropolitan Saloon Omnibus Co. v Hawkins** (1859) 4 H. & N. 87; 28 L. J. Ex. 201; 5 Jur. (N.S.) 226; 7 W. R. 265. and **Manchester Corporation v Williams** (1890) 60 L. J. Q. B. 23; [1891] 1 Q. B. 94, 96; 63 L. T. 805; 39 W. R. 302; 54 J. P. 712—**DAY and LAWRENCE, JJ., followed**
South Hetton Coal Co. v. North Eastern News Association (1893) 63 L. J. Q. B. 293; [1894] 1 Q. B. 134; 9 R. 240; 69 L. T. 844; 42 W. R. 322; 58 J. P. 196.—C.A. **ESHER, M.R., LOPES and KAY, L.JJ.**

Nelson v. Dixie (1736) Cas. temp. Hardw. 305, *dicta* **disapproved**.

Cook v. Cox (1814) 3 M. & S. 110.

ELLENBOROUGH, C.J. (for the Court).—Ten judges in *Dr. Sutherland's Case* (5 State Trials, 328) delivered an unanimous opinion (no others being present) that "by the law of England and constant practice, in all prosecutions by indictment or information, for crimes or misdemeanours by writing or speaking, the particular words, supposed to be criminal, ought to be expressly specified in the indictment or information." There seems to be no reason for any difference in this respect between civil and criminal cases, the action arises *ex delicto*. The words supposed to be used by Lord Hardwicke in *Nelson v. Dixie*, were merely thrown out by Nisi Prius, and not material to the point ruled by him in that cause, and they are evidently founded on a mistake; as there are no such precedents in Rastall as he supposes. Unless the very words are set out by which the charge is conveyed, it is almost, if not entirely, impossible to plead a recovery in one action in bar of a subsequent action for the same cause.—p. 116.

Davis v. Lewis (1796) 7 Term Rep. 17; 4 R. R. 373, **disapproved**.

Northampton's (Lord) Case (1612) 12 Coke 134, **questioned**.

McPherson v. Daniels (1829) 10 B. & C. 263; 5 M. & Ry. 251; 8 L. J. (O.S.) K. B. 14.

BAYLEY, J.—Upon the great point, viz., whether it is a good defence to an action for slander, for a defendant to show he heard it from another, and at the same time named the author, I am of opinion that it is not. *Lord Northampton's Case* was undoubtedly mentioned without disapprobation by Lord Kenyon (in *Davis v. Lewis*), a man of very powerful mind, acute discrimination, and great learning. But whatever respect I may feel for the memory of that noble and learned judge, I cannot carry that respect so far as to surrender my own judgment.—p. 269.

Northampton's (Lord) Case, referred to.

Tidman v. Ashlie (1854) 10 Ex. 63.

POLLOCK, C.B. (for the Court).—The doctrine of *Lord Northampton's Case*, assuming it to be law, has never been applied to written slander, in which the repetition, by being more largely circulated, produces a greater injury to the individual slandered.—p. 66.

Johnson v. Stuart (1787) 1 Term Rep. 748;

1 R. R. 392; and **Hickinbotham v. Leach** (1842) 11 L. J. Ex. 341; 10 M. & W. 361; 2 D. (N.S.) 270, **considered and applied**.

Zierenberg v. Labouchere (1893) 63 L. J. Q. B.

89; [1893] 2 Q. B. 183; 4 R. 461; 69 L. T. 172; 11 W. R. 675; 57 J. P. 711.—C.A. **ESHER, M.R., BOWEN and KAY, L.JJ.** See judgments.

Lane v. Applegate (1815) 1 Stark. 97; 18 R. R. 750, **approved**.

Boosey v. Wood (1865) 3 H. & C. 484; 34 L. J. Ex. 65; 11 Jur. (N.S.) 181; 11 L. T. 639; 13 W. R. 317.

Roselle v. Buchanan (1886) 55 L. J. Q. B.

376; 16 Q. B. D. 656; 34 W. R. 488.—

GROVE and STEPHEN, JJ., distinguished.

Gouraud v. Fitzgerald (1888) 37 W. R. 265.—C.A. **ESHER, M.R. and LOPES, L.J.**

The above case distinguished as applicable only to actions for slander.

Baldwin v. Elphinstone (1775) 2 W. Bl. 1037.—

EX. CH., disapproved.

Watts v. Fraser (1837) 7 A. & E. 223. See S. C. (1835) 7 Car. & P. 369.

LORD DENMAN, C.J.—One authority (*Baldwin v. Elphinstone*) was cited, where the Court of Exchequer Chamber held that printing must, *prima facie*, be understood to be a publishing, because the matter must be delivered to a compositor and other workmen; but it does not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workmen. We cannot, therefore, act upon that case.—p. 233.

Scott v. Sampson (1882) 51 L. J. Q. B. 380;

8 Q. B. D. 491; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.—**MATHEW and CAVE, JJ., distinguished.**

Wood v. Durham (Earl) (1888) 57 L. J. Q. B. 547; 21 Q. B. D. 501; 59 L. T. 142; 37 W. R. 222.—**MANISTY and HAWKINS, JJ.**

Emmens v. Pottle (1885) 55 L. J. Q. B. 51;

16 Q. B. D. 354; 53 L. T. 808; 34 W. R. 116; 50 J. P. 228.—C.A. **ESHER, M.R., COTTON and BOWEN, L.JJ., explained.**

Vizetelly v. Mudie's Select Library (1900) 69 L. J. Q. B. 645; [1900] 2 Q. B. 170—C.A.

A. L. SMITH, VAUGHAN WILLIAMS and ROMER, L.JJ.

A. L. SMITH, L.J.—That was a case in which the defendants sold a newspaper containing the libel complained of, and the jury, in answer to questions put by the judge, found that the defendants did not know that the newspaper contained the libel; that it was not by negligence that they did not know that there was a libel in the newspaper; and that they did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have so known. Judgment having been entered for the defendants upon these findings, the plaintiff appealed, and upon the appeal the M.R. (Lord Esher), after stating that the sale of the newspaper made the defendants *prima facie* liable, and called upon them to show some circumstances absolving them from liability, continued: "I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more, that they ought not to have known

this, which must mean that they ought not to have known it, having used reasonable care, the case is reduced to this—that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel." Were the circumstances in this case similar? . . . It seems to me that there was ample evidence to satisfy the jury in finding that there was a want of due care in the way in which the defendants carried on their business, by reason of which they failed to discover that the book contained the libel. The result is that the defendants did not obtain from the jury the finding which was necessary to establish the plea which was established in *Emmens v. Pottle* that the defendants did not publish the libel.—pp. 647, 648.

4. DAMAGES.

Viears v. Wilcocks (1806) 8 East 1; 9 R.R. 361, *commented on*.

Ashley v. Harrison (1793) Peake 194; 1 Esp. 48; 3 R.R. 686, *questioned*.
Lumley v. Gye (1853) 2 El. & Bl. 216; 22 L.J. Q.B. 463; 17 Jur. 827; 1 W.R. 432.

WIGHTMAN, J.—The case of *Viears v. Wilcocks*, which, though it has been much brought into question, has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground suggested by Tindal, L.C.J., in *Ward v. Weeks* (7 Bing 211; 9 L.J. (o.s.) C.P. 6; 4 M. & P. 796), that the damage in that case, as well as in *Viears v. Wilcocks*, was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorised communications made by those to whom the words were uttered by the defendants (p. 237). Two cases, however, were cited for the defendant, as direct authorities against the maintenance of the present action. The first was that of *Ashley v. Harrison*, in which the plaintiff declared that he had retained Madame Mara to sing publicly for him in certain musical performances which he exhibited for profit at Covent Garden Theatre, but that the defendant, contriving to lessen his profits and to deter Madame Mara from singing, published a libel concerning her which deterred her from singing, as she could not sing without danger of being assaulted and ill-treated in consequence of the libel. Lord Kenyon held at Nisi Prius, that the action was not maintainable, as the injury was too remote. The case does not appear to have undergone much discussion; it was only a decision at Nisi Prius; but it is clearly distinguishable from the present, as Madame Mara was deterred from singing, not directly in consequence of anything done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill-treat her. The injury in that case may have been well held to be too remote; but it does not at all resemble this, where the loss is the direct consequence of the defendant's act.—p. 248.

Viears v. Wilcocks, *commented on*.

Allsop v. Allsop (1860) 29 L.J. Ex. 315; 5 H. & N. 534; 6 Jur. (N.S.) 433, *approved*.
Lynch v. Knight (1861) 9 H.L. Cas. 577; 8 Jur. (N.S.) 724; 5 L.T. 291.

CAMPBELL, L.C.—From some expressions of Lord Ellenborough in *Viears v. Wilcocks*, it is argued that such an action will not lie, where the act is wrongful as between the party who does the act and the party to whom it is done. But if there be any error in that case, I think it was in supposing that the offence imputed to the servant, even if he had been guilty of it, would not have justified his master in dismissing him from his service. I do not consider Lord Ellenborough to have held that, although the imputation, if true, would have justified the dismissal, the action would not lie, because the imputation was false, and the dismissal was wrongful.—p. 590.

Lynch v. Knight, *followed*.

Chamberlain v. Boyd (1833) 52 L.J. Q.B. 277; 11 Q.B. D. 407; 45 L.T. 328; 31 W.R. 572; 47 J.P. 872.—C.A. **COLERIDGE, C.J.**, **BRETT** and **BOWEN, L.JJ.**

Allsop v. Allsop (*supra*), *considered*.

Wilkinson v. Downton (1897) 66 L.J. Q.B. 493; [1897] 2 Q.B. 57; 76 L.T. 493; 45 W.R. 525.—**WRIGHT, J.**

Ward v. Weeks (1830) 7 Ding. 211; 4 M. & P. 796, 9 L.J. (o.s.) C.P. 6, *followed*.

Parkins v. Scott (1862) 31 L.J. Ex. 331; 1 H. & C. 153; 8 Jur. (N.S.) 593; 6 L.T. 394; 10 W.R. 562.—**EX.**

Ward v. Weeks and **Dixon v. Smith** (1800) 5 H. & N. 450; 29 L.J. Ex. 125; 8 W.R. C.L. Dig. 43, *observed upon*.

Riding v. Smith (1876) 1 Ex. D. 91; 45 L.J. Ex. 281; 34 L.T. 500; 24 W.R. 487.

KELLY, C.B.—The cases of *Dixon v. Smith* and *Ward v. Weeks* clearly show that an action is not maintainable for slander of a man in his trade without proof of special damage directly arising from the speaking of the words, and not merely from their repetition. I am bound to say that I hope myself that those cases may be brought before the Court of last resort to see if a person is not liable for the natural consequences arising from the repetition of slander uttered by him in the presence of a number of other persons. I cannot doubt that he who is the original author of a slanderous statement is responsible on all principles of justice. But those cases decide that he is not and we are bound by them.—p. 488.

Ward v. Weeks and **Parkins v. Scott**, *affirmed*.

Clarke v. Morgan (1877) 38 L.T. 354.—**Q.B.D.**

DISCOVERY.

1. DOCUMENTS.
2. INTERROGATORIES.
3. OBJECTIONS TO DISCLOSURE.

1. DOCUMENTS.

Johnson v. Smith (1877) 36 L.T. 741; 25 W.R. 539.—**EX.**; and **Healy v. Smith** (1878) 4 L.R. Ir. 72.—**C.A.**, *discussed*.
Powell v. Heffernan (1879) 4 L.R. Ir. 703.—**PALLES, C.B.** and **FITZGERALD, B.**

Peru (Republic) v. Weguelin (1875) L. R. 20 Eq. 140—*v.-c., explained and applied.*
Costa Rica (Republic) v. Erlanger (1875) 45 L. J. Ch. 115; 1 Ch. D. 171; 35 L. T. 752; 24 W. R. 151.—*C.A.* JAMES and MELLISH, L.J., and BLACKBURN, J. : *reversing* 33 L. T. 632; 24 W. R. 103.—*MALINS, v.-c.*

Costa Rica (Republic) v. Erlanger, *principle applied.*
 Willis & Co. v. Baddeley (1892) 61 L. J. Q. B. 769; [1892] 2 Q. B. 324; 67 L. T. 206; 40 W. R. 577.—*C.A.* ESHER, M.R., BOWEN and A. L. SMITH, L.J.J. : *reversing* 67 L. T. 60. *See post*, col. 855.

MacAllister v. Rochester (Bishop) (1880) 49 L. J. C. P. 443; 5 C. P. D. 194; 42 L. T. 181; 28 W. R. 584.—*LINDLEY and LOPES, JJ., distinguished.*

Molloy v. Kilby (1880) 15 Ch. D. 162; 29 W. R. 127.—*C.A.* JESSEL, M.R., COTTON and THESIGER, L.J.J.

THESIGER, L.J.—The parties there had obtained a rule making them parties, and there was a litigation between them and the plaintiff.—p. 165.

MacAllister v. Rochester (Bishop), followed.
Molloy v. Kilby, distinguished.

Eden v. Wearside Iron and Coal Co. (1887) 34 Ch. D. 223; 56 L. J. Ch. 178; 55 L. T. 860; 35 W. R. 235.—*C.A.*

COTTON, L.J.—In the latter case there was no issue between the plaintiff and the third party in the original action. It was a case of counterclaim to which the plaintiff and the third party were co-defendants.—p. 226. *LINDLEY and LOPES, L.J.J., concurred.*

Brown v. Watkins (1885) 55 L. J. Q. B. 126; 16 Q. B. D. 125; 53 L. T. 726; 34 W. R. 293.—*MATHEW and SMITH, JJ., explained.*

Shaw v. Smith (1886) 18 Q. B. D. 193; 56 L. J. Q. B. 174; 56 L. T. 40; 35 W. R. 188; 3 Times L. R. 168.—*C.A.*

ESHER, M.R.—I think that *Brown v. Watkins* was rightly decided, though there is a phrase used in the judgments in that case, which, if unexplained, might possibly lead to a misapprehension. I think, however, that the meaning which I should give to that phrase is perfectly consistent with the decision. The judges there use the expression "opposite party." That may be construed to mean that the application must be as against plaintiff and defendant. But in the Chancery Division it may often be necessary to adjust rights in the action between two plaintiffs or two defendants, and I should construe the passages of the judgments in *Brown v. Watkins*, where it is said that the application must be against an opposite party, as meaning not that it must in all cases be by plaintiffs against defendants or *vice versa*, but that it must be by and against parties between whom there is some right to be adjusted in the action.—p. 197.

LINDLEY and LOPES, L.J.J. to the same effect.

Shaw v. Smith, applied. *Alcove and Gandia Ry. v. Greenhill* (No. 2) (1896) 74 L. T. 945.—*STIRLING, J. : distinguished.* *Spokes v. Grosvenor Hotel Co.* (1897) 66 L. J. Q. B. 572; [1897] 2 Q. B. 124; 76 L. T. 679; 45 W. R. 546.—*C.A.*

Hancock v. Guerin (1878) 4 Ex. D. 3; 27 W. R. 112.—*EX, considered.*

Union Bank of London v. Masby (1879) 18 Ch. D. 239; 48 L. J. Ch. 106; 41 L. T. 393; 28 W. R. 23.—*C.A.*

JAMES, L.J.—I do not think that it is necessary for us to examine minutely *Hancock v. Guerin*. There is a great deal to be said in support of the proposition that it ought not to be a matter of course for a plaintiff to rush in at once with an application for production as soon as his statement of claim has been delivered. The Court ought to have the power of saying that it will refuse production, and I do not say that it was wrong to refuse it in *Hancock v. Guerin*.—p. 241.

BAGGALLAY, L.J.—As regards *Hancock v. Guerin*. . . I am not prepared to say whether I should have concurred in the decision, but I certainly cannot assent to the general proposition stated in the headnote to that case.—*Id.*
 THESIGER, L.J.—There is no occasion to decide whether the general rule in *Hancock v. Guerin* was rightly laid down, but as at present advised I am not prepared to dissent from that case.—p. 242.

Hancock v. Guerin and New British Mutual Investment Co. v. Peed (1878) 3 C. P. D. 196; 26 W. R. 354.—*C.P.D., referred to.*

Phillips v. Phillips (1878) 48 L. J. Q. B. 185; 4 Q. B. D. 127; 39 L. T. 558; 27 W. R. 136.—*C.A., discussed and explained.*
 Phillips v. Phillips (1879) 40 L. T. 815; 27 W. R. 339.—*DENMAN and LINDLEY, JJ.*

New British Mutual Investment Co. v. Peed, discussed.

Powell v. Hefferman (1879) 4 L. R. Ir. 703.

New British Mutual Investment Co. v. Peed, followed.

Wrentham v. Hagley (1882) 46 L. T. 741.—*FIELD and GAVE, JJ.*

New British Mutual Investment Co. v. Peed, not followed.

Daniel v. Ford (1882) 47 L. T. 575.—*CHITTY, J.*

Webster v. Whewall (1880) 49 L. J. Ch. 704; 15 Ch. D. 129; 42 L. T. 868; 28 W. R. 951.—*DENMAN, J., observed on.*

Quilter v. Healy (1882) 28 Ch. D. 42; 48 L. T. 973; 31 W. R. 381.—*C.A.; varying CHITTY, J.*

JESSEL, M.R.—*Webster v. Whewall* has been referred to, but I think only on account of a dictum contained in it. Speaking for myself I do not pay much attention to the dicta of modern judges, as I consider it my duty to decide for myself. This, of course, does not apply to decisions of modern judges, nor to old recognised dicta by eminent judges. In *Webster v. Whewall* there is nothing but a dictum to help the plaintiff. I think no judge on the bench would have excluded in evidence the deed there in question, though he might not have given the same reasons for admitting it. I have not the least doubt that the judgment arrived at was right, though there are in the judgment one or two dicta which had better have been differently worded.—p. 49.

LINDLEY and BOWEN, L.J.J. to the same effect.

Cashin v. Cradock (1876) 2 Ch. D. 140; 34 L. T. 52.—*BACON v. G., commented on.*
Costa Rica (Republic) v. Strousberg (1879) 11 Ch. D. 823, 40 L. T. 401, 27 W. R. 512.—*C.A. reversing FRY, J.*
BAGGALLAY, L.J.—I desire to guard myself against expressing any opinion that there is no right, under the new rules, to apply for the production of documents previously to the delivery of the statement of claim. Bearing in mind the decision of the V.-C. in *Cashin v. Cradock*, I desire an opportunity of considering for myself whether I should take the same view as was taken by the V.-C. in that case.—p. 326. **JAMES and BRAMWELL, L.JJ.** concurred.

Costa Rica (Republic) v. Strousberg, discontinued.

Whitwain v. Moss (1895) 73 L. T. 57.

NORTH, J.—There are, I think, two grounds on which that case [*Republic of Costa Rica v. Strousberg*] can be distinguished from the present one. There the defendant had no opportunity of making his defence, he had not even appeared. Here I have heard a full statement of what the defendant calls his case. And, secondly, in that case the documents had come properly into the possession of the defendant during his employment as agent for the Republic. His employment had ceased, and then the Republic tried to get the documents back from him, but his possession was originally lawful and proper. In this case it is not even alleged that the documents were ever in the defendant's possession at all, except in the sense that he was a clerk in the office in which they were, and produced them to persons having a right to see them.—p. 58

Hardwick v. Wright (1865) 11 Jur. (N.S.) 297; 12 L. T. 138; 13 W. R. 560, 590.—*V.-C. discontinued.*

Crowe v. Bank of Ireland (1871) 19 W. R. 910; 1r. R. 5 Eq. 578.—*O'HAGAN, L.G.*

Republic of Liberia v. Royle (1870) 43 L. J. Ch. 297; 1 App. Cas. 139; 34 L. T. 143; 24 W. R. 967.—*L.L. (C.) applied.*

Higginson v. Hall (1879) 48 L. J. Ch. 250; 10 Ch. D. 235; 39 L. T. 608, 27 W. R. 469.—*MALINS, V.-C.*

Higginson v. Hall and Crowe v. Bank of Ireland, dissented from

Dyke v. Stephens (1885) 30 Ch. D. 189; 55 L. J. Ch. 41; 53 L. T. 561; 33 W. R. 932.

PEARSON, J.—*Higginson v. Hall*, in which **Malins, V.-C.** made an order that the next friend of a lunatic should make an affidavit as to documents; all I have to remark on that case is that counsel for the lunatic consented and almost invited the order, and I cannot help thinking that, if the case had been properly argued the V.-C. would have seen that the order ought not to have been made. The next case was one before Lord O'Hagan, *Crowe v. Bank of Ireland*. I have . . . the highest respect for the judgment of Lord O'Hagan. I do not know under what circumstances the order in that case was asked for; all I can say is, that if the judgment is correctly reported, I cannot agree with him in thinking that the case of a company is the same as that of an infant. A company is perfectly responsible in every sense. And the reason of

making an order that an officer shall make an affidavit, is for the benefit of the company from whom discovery is required. The ordinary course would be that the corporation should make an affidavit, but a corporation cannot make an affidavit. If a corporation did not comply with the order, the proper consequence would be that the goods of the corporation should be sequestered. The corporation then says to the Court, Will you accept the affidavit of an officer? and the officer is put in the place of the corporation, and in that way makes an affidavit for the corporation. That is not the case against an infant; certainly I cannot make an order against the next friend who does not represent the infant, and is not within the terms of the rule.—p. 191.

Corsellis, In re. Lawton v. Elwes (1883) 52 L. J. Ch. 899; 48 L. T. 425; 31 W. R. 414.—*KAT, J., applied.*

Jugram v. Little (1883) 11 Q. B. D. 251; 31 W. R. 858.—**COLERIDGE, C.J., DENMAN and MANISTY, JJ.**

Whyte v. Ahrens (1884) 54 L. J. Ch. 145; 26 Ch. D. 717, 50 L. T. 344; 32 W. R. 649.—*C.A. COTTON, L.J.; FRY, L.J. dissenting; affirming BACON, V.-C. dismissed.*

Leitch v. Abbott (1886) 81 Ch. D. 374; 55 L. J. Ch. 460, 54 L. T. 258; 34 W. R. 506; 50 J. F. 441.—*C.A.; reversing CHITTY, J.*

COTTON, L.J.—The contention of the defendant comes to this, that the judge is to decide whether he did or did not act in violation of his duty before he gives the discovery. It is said that *Whyte v. Ahrens* is an authority for this proposition. The defendant cannot, however, well rely on my judgment in that case, for, if the judge had a discretion, I think it has been wrongly exercised here. But, no doubt, **Fry, L.J.** did in that case think that fraud being alleged by the plaintiff, particulars of the fraud ought to have been given before he could be entitled to discovery. Is that the effect of rule 6 of Ord. XIX? There is here a general allegation of fraud, and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. I do not, however, think that that case applies, for there is here a statement of the nature of the fraud alleged.—p. 376.

BOWEN, L.J., who concurred, said: Then arises the question on which **Cotton, L.J.** and **Fry, L.J.** are not entirely at one, and I am, therefore, obliged to state my own view. I do not think it necessary to say anything in order to show that the old rule of pleading is a good rule—that, in order to open a settled account, specific errors in the account must be stated. In *Bartholomew v. Hanbury* (L. R. 2 H. L. 1), Lord Cranworth added to what Lord Westbury said: "I think without wishing to hold parties strictly or technically to the rule, the substance of it, ought always regularly and rigidly to be insisted upon." Without expressing any opinion which of the two learned lords stated the rule more accurately, I think rule 6 of Ord. XIX. is only a rule of pleading, and I believe that this has been so decided by the C. A.—p. 378.

FRY, L.J. doubted.

Whyte v. Ahrens and Leitch v. Abbott, *discussed and applied*.

Thompson v. Birkley (1882) 17 L. T. 700; 81 W. R. 231.—HAWKINS and W. WILLIAMS, *aff.*, *followed*.

Sachs v. Spielman (1887) 57 L. J. (Ch. 658; 37 Ch. D. 295; 58 L. T. 102; 36 W. R. 489.—NORTH, J.

Thompson v. Birkley, *followed*.

Knight v. Engle (1889) 61 L. T. 780.—COLLIERIDGE, C.J. and MATHEW, J.

Leitch v. Abbott, Edleston v. Russell (1888) 57 L. T. 927.—KEKEWICH, J.; and **Sachs v. Spielman**, *distinguished*.

Woolfe v. Automatic Picture Gallery (1902) 19 Rep. Pat. Cas. 161.—KEKEWICH, J.

Noel v. Noel (1803) 1 De G. J. & S. 468; 32 L. J. Ch. 676; 2 N. R. 294; 9 Jur. (N.S.) 589; 8 L. T. 555; 11 W. R. 791.—L.J.J., *observed on*.

Wright v. Pitt (1868) L. R. 3 Ch. 809; 16 W. R. 1073.

WOOD, L.J.—If, indeed, as in *Noel v. Noel*, you can show that the deponent has made on oath a statement which is inconsistent with his affidavit, then his affidavit is proved by himself to be insufficient, and the Court will compel him to make a further affidavit. It is now attempted, by force of *Turner*, L.J.'s expression of "reasonable suspicion," to carry the rule far beyond anything that was decided in that case. It is urged that a man cannot have land without having title-deeds, but that is not so: his ancestor may have mortgaged the land, so that he may never have had any deeds in his possession. My opinion has always been, that in order to make the principle of *Noel v. Noel* applicable, it must be shown that the party has made some admission throwing discredit on the sufficiency of his affidavit.—p. 810.

SELYN, L.J.—Even if we were to adopt the expression "reasonable suspicion" used in *Noel v. Noel*, which I do not think a very happy one, such suspicion must, I think, be one founded on the pleadings and affidavits.—p. 811.

Noel v. Noel, *referred to*.

Lyell v. Kennedy (1884) 53 L. J. Ch. 937; 27 Ch. D. 1; 50 L. T. 730.—C.A. (*see* col. 870).

Phelps v. Olive (1835) 4 Beav. 549, n.; and **Fortescue v. Fortescue** (1876) 31 L. T. 847; 24 W. R. 945.—HALL, V.-C., *explained*.

Taylor v. Batten (1878) 48 L. J. Q. B. 72; 4 Q. B. D. 85; 39 L. T. 408; 27 W. R. 106.—C.A.

COTTON, L.J. (for self, BRAMWELL and BRETT, L.J.J.).—It [*Phelps v. Olive*] amounts to this, that the mere statement, "I have seen a bundle of letters," is not sufficient identification. But here we have much more than that. We have the papers numbered 50 to 76 in a bundle marked and initialed. . . . The affidavit there [*Fortescue v. Fortescue*] was with regard to certain deeds, which it described merely as a bundle of deeds relating to the defendant's title, and the V.-C. held that the affidavit was not sufficient. This is within the principle of our decision. It is true that in ordering a better affidavit the V.-C. says that the plaintiff is entitled to a proper discovery of the instrument which would take away his title, and that he is entitled to know whether that instrument is in the possession of the defendant, and that giving a proper schedule would

show that. If the decision was that the plaintiff was entitled to a detailed schedule showing the nature of the defendant's title, we should not agree with it. But that is not the decision.—p. 74. *And see post*, col. 855.

Taylor v. Batten, *approved*.

Gardner v. Irvin (1878) 48 L. J. Ex. 228; 4 Ex. D. 49; 40 L. T. 35; 27 W. R. 142.—C.A. BRAMWELL, BRETT and COTTON, L.J.J.

Taylor v. Batten and Jones v. Monte Video Gas Co. (1880) 49 L. J. Q. B. 627; 5 Q. B. D. 556; 42 L. T. 639; 28 W. R. 758.—C.A.

BRETT, COTTON and THESIGER, L.J.J., *followed*.

Mansell v. Feeney (1861) 2 J. & H. 320; 4 L. T. 437; 9 W. R. 610.—WOOD, V.-C., *commented on*.

Bewicke v. Graham (1880) 50 L. J. Q. B. 396; 7 Q. B. D. 400; 44 L. T. 371; 29 W. R. 436.—C.A. COLLIERIDGE, C.J., BAGGALLAY and BRAMWELL, L.J.J.

Jones v. Monte Video Gas Co., *followed*, **Ross v. Dublin United Tramways Co.** (1881) 8 Ir. L. R. 213.—PALLES, C.B. and FITZGERALD, B.; *discussed*, **Compagnie Financière du Pacifique v. Peruvian Guano Co.** (1882) 52 L. J. Q. B. 181; 11 Q. B. D. 55; 48 L. T. 22; 31 W. R. 395.—C.A. BAGGALLAY and BRETT, L.J.J.

Compagnie Financière du Pacifique v. Peruvian Guano Co., *applied*, **Dinn v. Brandon** (1885) 1 Times L. R. 598.—GROVE and DENMAN, J.J.; *distinguished*, **Emmerson v. Ind. Coope & Co.** (1886) 55 L. J. Ch. 903; 33 Ch. D. 323; 55 L. T. 422; 34 W. R. 636, 778.—C.A. COTTON, LINDLEY and LOPES, L.J.J.; *reversing* 54 L. T. 757.—CHITTY, J. *And see* col. 875.

Jones v. Monte Video Gas Co., *explained*.

Hall v. Truman, Hanbury & Co. (1885) 29 Ch. D. 307; 54 L. J. Ch. 717; 52 L. T. 586.—C.A.; *affirming* KAY, J.

COTTON, L.J.—*Jones v. Monte Video Gas Co.* was relied upon for the plaintiff. But there the question was not whether the administration of interrogatories should be permitted, and nothing which was then said by the judges of this Court was intended to support, or, in my opinion does support, the contention of the appellant, that an interrogatory such as this can be allowed.—p. 820. FRY, L.J. to the same effect.

Jones v. Monte Video Gas Co. and Hall v. Truman, Hanbury & Co., *followed*.

Nicholl v. Wheeler (1886) 55 L. J. Q. B. 231; 17 Q. B. D. 101; 34 W. R. 425.—C.A. LINDLEY and LOPES, L.J.J.; *affirming* MATHEW and A. L. SMITH, J.J.

Jones v. Monte Video Gas Co., *considered*.

White v. Spafford & Co. (1901) 70 L. J. K. B. 658; [1901] 2 K. B. 241; 84 L. T. 574.—C.A.; *reversing* DAY, J.

COLLINS, L.J.—Sub-sect. 3 of r. 19, A. of Ord. XXXI. was framed to meet what was thought to be a blot on the existing law as settled by *Jones v. Monte Video Gas Co.*, and the rights of the parties on this application must be ascertained by reference to that rule.—p. 659. STIRLING, L.J. concurred.

Newall v. Telegraph Construction and Maintenance Co. (1866) 35 L. J. Ch. 827;

L. R. 2 Eq. 756; 14 W. R. 914.—WOOD, V.-C., *discussed*.

Att.-Gen. v. Emerson (1882) 52 L. J. Q. B. 67; 10 Q. B. D. 191; 48 L. T. 18; 31 W. R. 191.—C.A. BAGGALLAY, BRETT and LINDLEY, L.JJ.

Att.-Gen. v. Emerson, distinguished.

Bulman v. Young (1883) 49 L. T. 736.—C.A. BRETT, M.R. and BOWEN, L.J.; *affirming* 31 W. R. 761.—DENMAN and MANISTY, JJ.

Att.-Gen. v. Emerson, distinguished.

Roberts v. Oppenheim (1884) 26 Ch. D. 724; 53 L. J. Ch. 1148; 50 L. T. 729, 32 W. R. 654.—C.A.; *affirming* KAY, J.

COTTON, L.J.—As I understand that case, the Court held that there was protection unless the Court was satisfied that the effect of the documents was misconceived. In that case there were court-rolls extending over many years, and the Court was able to see, from the nature of the questions in the action, and of the documents, that the effect of the documents was misunderstood. So far that case is an authority. But I think that we ought not to speculate in order to get rid of the protection claimed, and that we ought to accept the affidavit as conclusive unless the Court can see distinctly that the oath of the party cannot be relied on.—p. 734.

FRY, L.J. to the same effect.

Hall v. Truman, Hanbury & Co. (supra), explained.

Morris v. Edwards (1890) 60 L. J. Q. B. 292; 15 A. C. 309; 63 L. T. 26.—H.L. (E.). HALSBURY, L.C., LORDS HERSCHELL, MACNAGHTEN, MORRIS and FIELD; *affirming* 37 W. R. 721.—C.A. ESHER, M.R., COTTON and LINDLEY, L.JJ. LORD HERSCHELL.—The first objection taken by Mr. Brown is that the answer is insufficient, inasmuch as it does not contain the further statement that the deeds and documents do not tend to impeach the defendant's own title. He has produced no authority to show that any such statement is necessary. It is true that in *Att.-Gen. v. Emerson* (supra), Baggallay, L.J. quoted the statement by Knight Bruce, L.J. in *Combe v. London Corporation* (post, col. 877), of the allegations sufficient to support the claim to protection, amongst which was the allegation that the documents did not contain anything impeaching the defence. But I do not understand it to have been there laid down in terms that it was essential that those words should appear in the answer in addition to such words as are to be found in the present case. In *Emmerson v. Dud, Coupe & Co. (supra)* the words were similar to those which are used in the present case, and they were held by the C.A. to be sufficient. It appears to me, therefore, that *prima facie* this affidavit, according to the authorities, is absolutely sufficient. But then Mr. Brown insists that although cross-examination upon such an affidavit is not permissible, there may be cases in which an interrogatory relating to a particular document might be allowed, and he relies upon expressions used in *Hall v. Truman, Hanbury & Co.* (supra), to show that that is so. I doubt whether he does not seek to attribute too much weight to those expressions of opinion. They seem to me to have been used in the case in question only to guard the learned judges who were then delivering judgment, from being supposed to indicate that there never could be any case or

any circumstances in which such a question might be admissible. I do not think they amounted to more than that.—p. 294.

Att.-Gen. v. Emerson, applied.

Frankenstein v. Gavin's Cycle Cleaning and Insurance Co. (1897) 66 L. J. Q. B. 668; [1897] 2 Q. B. 62; 76 L. T. 747; 45 W. R. 547.—C.A. ESHER, M.R., A. L. SMITH and CHITTY, L.JJ.; *Att.-Gen. v. Newcastle-upon-Tyne Corporation* (1897) 66 L. J. Q. B. 593; [1897] 2 Q. B. 384; 77 L. T. 203.—C.A. LOPES and RIGBY, L.JJ.; *affirming* WILLS, J.

Berkeley v. Standard Discount Co. (1879)

49 L. J. Ch. 1; 18 Ch. D. 97; 41 L. T. 388; 28 W. R. 125.—C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.JJ.; *reversing* 48 L. J. Ch. 797; 12 Ch. D. 295; 41 L. T. 29; 27 W. R. 835.—FRY, J., *referred to*.

Tannetta, Walker & Co. v. Newport (Alexandra) Dock Co. (1890) 6 Times L. R. 325.—GRANTHAM and V. WILLIAMS, JJ.

Morris v. Edwards (supra), followed.

Att.-Gen. v. Newcastle-upon-Tyne Corporation (1899) 68 L. J. Q. B. 1012; [1899] 2 Q. B. 478; 81 L. T. 311; 48 W. R. 38.—C.A. A. L. SMITH and V. WILLIAMS, L.JJ.; *carrying* DAY and LAWRENCE, JJ.; *Milbank v. Milbank* (1900) 69 L. J. Ch. 287; [1900] 1 Ch. 376.—C.A. (post, col. 855).

Central News Co. v. Eastern News Tele-

graph Co. (1884) 53 L. J. Q. B. 236; 50 L. T. 235; 32 W. R. 493.—COLERIDGE, C.J. and W. WILLIAMS, J.; and **Rishdown v. White** (1888) 5 Times L. R. 59.—POLLOCK, B. and MANISTY, J., *commented on*.

Straker v. Reynolds (1889) 58 L. J. Q. B. 180; 22 Q. B. D. 262; 60 L. T. 107; 37 W. R. 370.—HUDDLESTON, B. and WILLS, J.

Central News Co. v. Eastern News Telegraph Co., approved.

Elder v. Carter, Shide and Spur Gold Mining Co., Ex parte (1890) 59 L. J. Q. B. 81; 25 Q. B. D. 194; 62 L. T. 516; 38 W. R. 612; 54 J. P. 692.—C.A. LINDLEY and BOWEN, L.JJ.; *reversing* HUDDLESTON, B. and GRANTHAM, J.

Elder v. Carter, referred to.

Gardner v. Irvin (1878) 48 L. J. Ex. 223; 4 Ex. D. 49; 40 L. T. 357; 27 W. R. 442.—C.A. (supra, col. 852), *followed*.

O'Shea v. Wood (1891) 60 L. J. P. 82; [1891] P. 237, 286; 65 L. T. 30.—C.A. LINDLEY, BOWEN and KAY, L.JJ.; *partly reversing* JEUNE, P.

Hill v. Hart-Davis (1884) 53 L. J. Ch. 1012;

26 Ch. D. 470; 51 L. T. 279.—C.A. COTTON, BOWEN and FRY, L.JJ., *approved*. Cooke v. Smith (1891) 60 L. J. Ch. 573; [1891] 1 Ch. 509; 64 L. T. 484; 39 W. R. 273.—C.A. LINDLEY and KAY, L.JJ.

Bewicke v. Graham (1881) 50 L. J. Q. B.

396; 7 Q. B. D. 400; 44 L. T. 371; 29 W. R. 436.—C.A. COLERIDGE, C.J., BAGGALLAY and BRAMWELL, L.JJ., *followed*. Bulman v. Young (1883) 49 L. T. 736.—C.A. BRETT, M.R. and BOWEN, L.J.; *affirming* 31 W. R. 766.

Bewicke v. Graham and Bulman v. Young (*supra*), *observed on*.
McLean Bros. v. Jones (1892) 66 L. T. 653.—
LAWRANCE and WRIGHT, JJ.; *affirmed on*
different grounds, C.A. LINDLEY and KAY, L.J.

Taylor v. Batten (*supra*, col. 851) and **Bewicke v. Graham**, *followed*.

McLean Bros. v. Jones, *not followed*.
Budden v. Wilkinson (1893) 63 L. J. Q. B. 32;
[1893] 2 Q. B. 432; 4 R. 525; 69 L. T. 427;
41 W. R. 657.—C.A.

LINDLEY, L.J. (for self and LOPES, L.J.)—I may
add that *Bewicke v. Graham* appears to us both
to be quite inconsistent with *McLean v. Jones*,
in the Divisional Court.—p. 34.

Taylor v. Batten and Budden v. Wilkin-
son, *followed*.

Milbank v. Milbank (1900) 69 L. J. Ch. 287;
[1900] 1 Ch. 376; 82 L. T. 63; 48 W. R. 339.—
C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS,
L.J.; *reversing in part KEKEWICH, J.*

Willis & Co. v. Baddeley (col. 847), *disting-*
uished.

China Traders' Insurance Co. v. Royal Ex-
change Assurance Corporation (1898) 67
L. J. Q. B. 736; [1898] 2 Q. B. 187; 78 L. T.
783; 46 W. R. 497; 8 Asp. M. C. 409.—C.A.
L. R. SMITH, CHITTY, and WILLIAMS, L.J.;
reversing MATHEW, J.

Walburn v. Ingilby (1833) 3 L. J. Ch. 21;
1 Myl. & K. 61; Coop. v. Brough, 270.—
L.C., *commented on*. *And see* col. 857.
Murray v. Walter (1839) Cr. & Ph. 114; 3
Jur. 719.—COTTENHAM, L.C.

Murray v. Walter, *distinguished*.
Dundas v. Blake (1847) 10 Ir. Eq. R. 260.—
L.C.; *carrying 9 Ir. Eq. R. 640*.—M.R.

Murray v. Walter, *followed*.

Walburn v. Ingilby; Hutchinson v. Glover
(1875) 45 L. J. Q. B. 120; 1 Q. B. D. 138;
33 L. T. 605.—Q.B.; *affirmed*, (1876) 33
L. T. 834.—C.A., **Reid v. Langlois** (1849)
19 L. J. Ch. 337; 1 Mac. & G. 627.—L.C.;
Edmonds v. Foley (Lord) (1862) 31 L. J. Ch.
384; 30 Beav. 282.—M.R.; and **Mertons v.**
Haigh (1868) 3 De G. M. & G. 528.—
TURNER, L.J., KNIGHT-BRUCE, L.J., *dis-*
senting, affirming WOOD, v.-c. discussed.
Kearsley v. Philips (1882) 10 Q. B. D. 36; 485;
52 L. J. Q. B. 8; 269; 48 L. T. 468; 31 W. R.
467; *affirmed*, (1883).—C.A. BRETT, COTTON and
BOWEN, L.J.

FIELD, J.—If that case [*Walburn v. Ingilby*]
had remained unquestioned, it is possible we
might have felt bound to act upon it, but since
that case, the matter has been much discussed,
and there have been various decisions. In
Murray v. Walter, the L.C. said, "It is perfectly
true that if documents are in the hands of an
agent, the principle of the Court is that the
possession of the defendant's agent is the pos-
session of the defendant against whom the
order is made. But here the agent is the agent
not only for the defendant against whom the
order is prayed, but also for other defendants.
The defendant against whom the order is prayed,
has not the possession of the documents either
personally or through an agent. I have
always understood the rule to be that under such

circumstances the Court would not make an
order for the production." *Walburn v. Ingilby*,
as reported, no doubt seems to infringe on that
rule. All I can say is, that I never considered
that the practice was altered by that case.
There must have been some peculiarity in that
case which does not appear in the report." It
would certainly seem, therefore, that in 1839, the
L.C. thought that *Walburn v. Ingilby* had not
altered the practice, and that it was inconsistent
with the practice to order production of docu-
ments in a case like the present. *Murray v.*
Walters seems to me to decide this question.
As I read the decision, it does not depend on
any such ground as the want of parties, but on
the principle that the Court will not compel a
man to disclose another man's deed. It seems
to me that the true ground of the decision is that
you cannot in an action against a man who has
possession of a deed conjointly with another,
that is to say, whose possession, there being a
joint title, is in law the possession of himself and
another, compel production by him of the deed
which belongs to another man as well as himself.
Reid v. Langlois and *Edmonds v. Foley* are to
the same effect. . . . There was no question of
possession in that case [*Mertons v. Haigh*].
The defendant was the sole owner of the documents,
but they were in the possession of a clerk of his
at New Orleans, and the Court said that the
answer was insufficient, for not showing that the
defendant had tried to procure the information
required. No such question arose there as in this
case.—p. 41.

STEPHEN, J.—On the one hand *Reid v. Lang-*
lois and *Murray v. Walter* seem to be expressly
in point. . . . Those most nearly in point are
Walburn v. Ingilby and *Hutchinson v. Glover*.
My brother Field has dealt with the former case,
and I agree with what he has said about it. It
is sufficient to refer to the observations of the
L.C. in *Murray v. Walter*, with regard to the
effect of that decision.—p. 42. [His lordship
then discussed *Hutchinson v. Glover* at length.]

Hutchinson v. Glover, *distinguished*.

Vivian v. Little (1883) 52 L. J. Q. B. 771; 11
Q. B. D. 370; 48 L. T. 793; 31 W. R. 891; 47
J. P. 566.—POLLOCK, B. and LOPES, J.

Murray v. Walter, Kearsley v. Philips and
Vivian v. Little, *distinguished*.

London and Yorkshire Bank v. Cooper (1885) 15
Q. B. D. 7; 473; 54 L. J. Q. B. 495; 33 W. R.
751.—COLERIDGE, C.J. and FIELD, J.; *affirmed*,
C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.J.
COLERIDGE, C.J.—I have no desire to infringe
the doctrine of *Murray v. Walter* and *Vivian v.*
Little, which decisions appear to me founded on
excellent sense. The principle of them is that
production of documents should not be required
where the interests of persons not parties to the
action might be affected. But here the company
is gone; no shred of interest remains. Why
should not the Court under those circumstances
order inspection of documents when good sense
would obviously seem to demand it?—p. 8.
FIELD, J. to the same effect.

Kearsley v. Philips, *distinguished*.

Hennessy v. Wright (No. 1) (1888) 57 L. J. Q. B.
530; 21 Q. B. D. 509; 59 L. T. 823; 53 J. P. 52;
4 Times L. R. 597.—FIELD and WILLS, JJ.

Walburn v. Ingilby (col. 855), *not applied*.
Williams v. Ingram (1900) 16 Times L.R. 434,
 451.—BYRNE, J., *affirmed*, C.A. ALVERSTONE,
 M.R., RIGBY and COLLINS, L.JJ.

Kearsley v. Phillips (*supra*), *not applied*.
 London and Provincial Marine and General
 Insurance Co. v. Chambers (1900) 5 Com. Cas.
 241.—KENNEDY, J.

Williams, In re (1860) 30 L. J. Ch. 609; 6
 Jur. (N.S.) 908.—M.R.; *reversed*, (1861) 30 L. J.
 Ch. 610, 7 Jur. (N.S.) 323; 4 L. T. 103; 9 W. R.
 393.—L.JJ.

Latimer v. Neate (1837) 4 Cl. & F. 570; 11
 Bl. (N.S.) 112.—R.L. (B.); *affirming* S. C. *non*.
Neate v. Latimer (1836) 2 Y. & C. 257.—EX. *See*
 47 R. L. 413, n.; *distinguished*, **Browne v. Lockhart**
 (1840) 9 L. J. Ch. 167; 10 Sim. 421; 4 Jur.
 167.—V.-C.; **Taylor v. Rundell** (1841) Cr. & Ph.
 104; 11 Sim. 591; 4 Jur. 426.—L.C. *And see* S. C.
 (1843) 13 L. J. Ch. 20; 1 Ph. 222.—L.C.

Hardman v. Ellames (1835) 2 Myl. & K. 732;
 Coop. t. Brough. 351; 5 Sim. 640; 4
 L. J. Ch. 181.—L.C. and V.-C. (*and see* 3
 L. J. Ch. 74.—LORDS COMMISSIONERS).
and Latimer v. Neate, applied.

Taylor v. Rundell, *distinguished*.
Dundas v. Blake (1847) 10 Ir. Eq. R. 260.—L.C.;
varying (1846) 9 Ir. Eq. R. 640.—M.R.

Bate v. Bate (1841) 7 Beav. 528; 8 Jur. 232,
 M.R. *followed*

Taylor v. Heming (1841) 10 L. J. Ch. 369;
 4 Beav. 235; 5 Jur. 766.—M.R. *commented on*.

Turner v. Burkinshaw (1863) 4 Giff. 399; 2
 N. R. 414; 9 Jur. (N.S.) 866; 8 L. T. 569; 11
 W. R. 851.—STUART, V.-C.

Hardman v. Ellames, *not applied*.
Taylor v. Heming; Princess of Wales v. Liverpool (Earl) (1818) 1 Swanst. 114; 1
 Wils. 113; 19 R. R. 282. *and Halliday v. Temple* (1856) 8 De G. M. & G. 96.—L.JJ.,
referred to.

Fitzgerald v. Simpson (1866) 17 Ir. Ch. R. 141.
 —M.R.

Hardman v. Ellames, *disapproved*.
Bulder v. Bridges (1885) 54 L. J. Ch. 798; 29
 Ch. D. 29 (*just*, col. 868)

Two Sicilies (King) v. Willcox (1851) 20 L. J.
 Ch. 417, 1 Sim. (N.S.) 301; 15 Jur. 214.
 —V.-C. *observed on and distinguished*.

United States of America v. **McRae** (1867) 37
 L. J. Ch. 129; 1 L. R. 3 Ch. 79; 17 L. T. 428; 16
 W. R. 377.—L.C.; *affirming in part* 36 L. J. Ch.
 722; 1 L. R. 3 Eq. 724; 16 L. T. 691.—WOOD, V.-C.
CHELMERSON, L.C.—They [the plaintiffs] say
 that this protection from answering applies only
 where a person might expose himself to the
 peril of a penal proceeding in this country, and
 not to the case where the liability to penalty or
 forfeiture is incurred by the breach of the laws
 of a foreign country. In support of this distinction
 the plaintiffs rely upon the opinion of
 Lord Cranworth, when V.-C., in *Two Sicilies*
(King) v. Willcox. That case has a very close
 resemblance to the present. . . I quite agree in
 the general principles stated by Lord Cranworth,
 and in their application to the particular case
 before him. There was nothing on the face of
 the proceedings to inform the mind of the judge
 whether there was any, and if any, what foreign

law applicable to the case, or whether the defendants had incurred any penalty or forfeiture by acting in this country as the agents of the revolutionary government in Sicily. The only ground upon which the defendants objected to produce the documents in their possession was stated in their answer to be, that they believed and had been advised that the production of them would "expose and render them subject to criminal prosecution, punishment and penalties in Sicily." This did not furnish the least information what the foreign law was upon the subject, which it was necessary for the judge to know with certainty before he could say whether the acts done by the persons who objected to answer had rendered them amenable to punishment by that law or not. Upon the particular circumstances of the case [*Two Sicilies (King) v. Willcox*] I have no doubt that it was most correctly decided. But in giving judgment Lord Cranworth went beyond the particular case, and expressed his opinion that the rule upon which the defendants relied to protect them from answering was one which existed merely by virtue of our own municipal law, and which must have reference exclusively to matters penal by that law. It was unnecessary to lay down so broad a proposition to support the judgment which he pronounced, and he certainly could not have contemplated a case where the presumed ignorance of the judge as to foreign law is completely removed by the admitted statements upon the pleadings, where the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated, and where the plaintiffs calling for an answer are the sovereign power by whose authority and in whose name the proceedings for the forfeiture are instituted and who have the property to be forfeited within their reach. What would have been Lord Cranworth's opinion upon such a state of circumstances, it is impossible for me to conjecture; but it is so different from what was before his mind in *Two Sicilies (King) v. Willcox* that I cannot feel that there is any judgment of his which ought to influence my decision upon the present occasion. . . It is a case entirely distinguishable from *Two Sicilies (King) v. Willcox*. There it was not shown that the defendants had not rendered themselves liable to criminal prosecution. Here the particular ground of liability to forfeiture is expressly alleged and proved, and proceedings have actually been taken and are pending to enforce it. There it was doubtful whether the defendants would ever be within the reach of a prosecution, and their being so depended on their voluntary return to their own country. Here the subject of the forfeiture is within the power of the United States, and the proceedings against the defendant will be equally effectual, whether he remains here or returns to the country where his property is situate.—p. 131.

Draper v. Manchester, Sheffield and Lincolnshire Ry. (1860) 30 L. J. Ch. 95; 6 Jur. (N.S.) 1239; 3 L. T. 402; 9 W. R. 117.—V.-C.; *reversed*, (1861) 30 L. J. Ch. 236; 3 De G. F. & J. 23, 7 Jur. (N.S.) 86; 3 L. T. 685; 9 W. R. 216.—L.JJ.

Bonnardet v. Taylor (1861) 30 L. J. Ch. 523; 1 J. & H. 383; 7 Jur. (N.S.) 328; 3 L. T. 884; 9 W. R. 452.—WOOD, V.-C.: *referred to*, **Prestney v. Colchester Corporation** (1888) 52 L. J. Ch. 877; 24 Ch. D. 376; 48 L. T. 749; 31 W. R. 757.—C.A.

BAGGALLAY and COTTON, L.JJ : *followed*,
Gilmey v. Clayton (1891) 27 L. R. Ir. 75.—M.R.

Boyd v. Petrie, 37 L. J. Ch. 344; L. R. 5 Eq.
290.—M.R.; *reversed*, (1868) L. R. 3 Ch. 818—
L.JJ.

Tebbutt v. Ambler (1839) 7 D. P. C. 674.—
COLLIERIDGE, J., *followed*.

Hunter v. Dublin, Wicklow and Wexford Ry
(1891) 28 L. R. Ir. 489.—C.A. ASHBOURNE, L.C.,
O'BRIEN, C.J. and FITZGIBBON, L.J.

Lockett v. Cary (1864) 10 Jur. (N.S.) 144.—
M.R., *not followed*.

Pratt v. Pratt (1882) 51 L. J. Ch. 838; 47
L. T. 249; 30 W. R. 837.—BACON, V.-C.

Brown v. Sewell (1880) 16 Ch. D. 517; 44
L. T. 41; 29 W. R. 295.—C.A. JESSEL,
M.R., COTTON and LUSH, L.JJ.; *affirming*,
BACON, V.-C., *explained*.

Wicksteed v. Biggs (1885) 54 L. J. Ch. 967. 52
L. T. 428.

PEARSON, J.—But, as I understand the rule
laid down by the C. A. in *Brown v. Sewell*,
where there is an inspection of documents in the
office of the solicitor to whose client they belong,
no costs can be allowed on either side. The
M.R. certainly says so, and I think that Mr.
Henderson is right in saying that his statement
applies to the costs of both sides. I have been
referred, on the other hand, to an order and a
schedule which appear at first sight to be inconsis-
tent with this rule, but I think that on a
narrower examination they appear to refer only
to the costs which ought to be charged as between
solicitor and client, and not to refer to those
which will be allowed as between party and
party.—p. 967.

Wicksteed v. Biggs, *approved*.

Collins v. Worley (1889) 60 L. T. 748.—CHITTY, J.

Brown v. Perkins (1843) 2 Hare 549; 8
Jur. 186.—WIGAM, V.-C., *discussed and*
explained.

Dadswell v. Jacobs (1887) 56 L. J. Ch. 233;
34 Ch. D. 278; 55 L. T. 857; 35 W. R.
361.—C.A. COTTON, LINDLEY and LOPES,
L.JJ., *applied*.

West Devon Great Consols Mine, *In re*
(1884) 27 Ch. D. 106; 51 L. T. 841; 32
W. R. 890.—C.A. BAGGALLAY, COTTON
and LINDLEY, L.JJ.; and Cameron
v. McMurray (1855) 17 Ct. of Sess. Cas.
(2nd ser.) 1142, *commented on*.

Bevan v. Webb (1901) 70 L. J. Ch. 536; [1901]
2 Ch. 59; 84 L. T. 609; 49 W. R. 548.—C.A.
COLLINS and STIRLING, L.JJ.; *reversing* [1901]
1 Ch. 724.—JOYCE, J. *See judgments at length*.

Ranger v. G. W. Ry. (1859) 28 L. J. Ch. 741.
4 De G. & J. 74; 5 Jur. (N.S.) 1191; 7 W. R. 426.
—L.JJ.; *varying v.-c.*; *applied*. Crowe v. Bank
of Ireland (1871) 19 W. R. 910; Ir. R. 5 Eq. 578.
—O'HAGAN, L.C.; *followed*. Liberia (Republic) v.
Imperial Bank (1873) 42 L. J. Ch. 574; L. R.
16 Eq. 179; 25 L. T. 866.—MALINS, V.-C.

Pelle v. Stoddart (1849) 1 Mac. & G. 192;
1 Hall & T. 207; 13 Jur. 373.—L.C., *not*
applied.

Manby v. Bewicke (1856) 8 De G. M. & G. 476;
2 Jur. (N.S.) 671; 4 W. R. 737.—L.JJ.

Adams v. Fisher (1838) 7 L. J. Ch. 289; 3
Myl. & Cr. 526; 2 Keen 753; 2 Jur. 508.—L.C.;
discussed. Lancaster v. Evors (1844) 13 L. J. Ch.
269. 1 Ph. 349; 8 Jur. 133.—L.C., *distinguished*,
Edwards v. Jones (1844) 14 L. J. Ch. 62; 1 Ph.
501.—LYNDHURST, L.C., *reversing* 13 L. J. Ch.
371; 8 Jur. 416.—SHADWELL, V.-C.

Adams v. Fisher, *questioned*.

Swinborne v. Nelson (1853) 22 L. J. Ch. 331.
16 Beav. 416; 1 W. R. 155.

ROMILLY, M.R.—I am disposed also to think
that it was not intended by Lord Cottenham [in
Adams v. Fisher] to carry his decision to the
extent it has been considered to cover. Accord-
ing to the principles supposed to be established
by it, if an executor should dispute the right of
legatee or the debt of a creditor suing on behalf
of himself and others, he might reset setting
forth the accounts of his testator, which is a
proposition at variance with the uniform and
settled practice and decisions of the Court; but
I am disposed to believe that the decision of
Adams v. Fisher was intended by the L.C. to be
limited to withholding only the production of
the documents which could not assist the plaintiff
in making out his title to the relief sought; at
least the observations made by his lordship
respecting the admission of counsel to the question
put by the Court seemed to point to this result.
However this may be, the authorities which
relate to the subject were not commented on nor
brought to the attention of the Court; and after
the most careful consideration which I am able
to give to this subject, I am of opinion that if
Adams v. Fisher goes beyond the point I have
last suggested, it is not in accordance with the
long line of authorities before decided in this
Court; and therefore, if I have to choose between
that case and other cases decided by equally high
authority, I feel myself compelled to follow those
which are alone, in my opinion, consistent with
the principle on which pleadings in equity can
be safely and clearly established.—p. 336.

Henslip v. Kitton, 8 L. T. 197.—V.-C.; *reversed*,
(1863) 32 L. J. Ch. 662; 1 De G. J. & S. 440;
2 N. R. 145; 9 Jur. (N.S.) 482; 8 L. T. 370; 11
W. R. 762.—L.JJ.

Herschfeld v. Clarke (1856) 25 L. J. Ex. 113;
11 Ex. 712; 2 Jur. (N.S.) 239.—EX., *con-*
firmed.

Christopheron v. Lotinga (1864) 33 L. J. C. P.
121; 15 C. B. (N.S.) 809; 10 Jur. (N.S.) 180; 9
L. T. 688; 12 W. R. 410.—C.P.

Christopheron v. Lotinga, *distinguished*.

Kingsford v. G. W. Ry. (1864) 16 C. B. (N.S.)
761; 33 L. J. C. P. 807; 10 Jur. (N.S.) 804; 10
L. T. 722; 12 W. R. 1059.—C.P.

ERLE, C.J.—The plain distinction between that
case and this has already been pointed out, viz.,
that there, there was a possibility of the affidavit
being made by the party himself, and no power
of dispensing with it; whereas, here, the making
of an affidavit by the corporation is an impossi-
bility.—p. 768.

Bettison v. Farrington (1735) 3 P. Wms.
363.—L.C., *questioned*.

Princess of Wales v. Liverpool (Earl) (1818)
1 Swanst. 114; 2 Wils. Ch. 29; 19 R. R. 282.

ELDON, L.C.—In *Bettison v. Farrington*, to a
bill for relief, the defence was, that a recovery
had been suffered which barred the plaintiff's

right, and the answer referred to a lease and release making a tenant to the *precipe*, and leading the uses of the recovery; on motion, Lord Talbot ordered the production of the deed, merely on the ground of that reference in the answer, assuming as his reason, that as it must be produced at the hearing, it ought to be produced on motion. Subsequent cases appear to question that doctrine on both its points.—p. 121.

Warwick (or Warwick) v. Queen's College, Oxford (1867) 36 L. J. Ch. 505; L. R. 3 Eq. 683.—M. R., *distinguished*.

Owen v. Wynn (1878) 9 Ch. D. 29; 38 L. T. 445, 623; 26 W. R. 644.—C. A.; *reversing* BACON, V.-C.

JESSEL, M. R.—There the plaintiff alleged that he was a tenant of the manor; the only dispute was as to the extent of the customary rights, as to which the court rolls might furnish material evidence.—p. 33. JAMES and BRAMWELL, L.JJ. concurred.

Owen v. Wynn, *referred to*.
Att.-Gen. v. Newcastle-upon-Tyne Corporation (1899) 68 L. J. Q. B. 1012; [1899] 2 Q. B. 478.—C. A. (*supra*, col. 854).

Steadman v. Arden (1846) 15 L. J. Ex. 310; 15 M. & W. 587; 4 D. & L. 16; 10 Jur. 553.—B. X., *followed*.

Ley (or Lee) v. Barlow (1848) 17 L. J. Ex. 105; 1 Ex. 800; 5 Railw. Cas. 1; 5 D. & L. 375.—EX.

Ley v. Barlow, *approved*
Hawkes, In re: Ackerman v. Lockhart (1898) 67 L. J. Ch. 284; [1898] 2 Ch. 1; 78 L. T. 336; 46 W. R. 445.—C. A. LINDLEY, M. R., RIGBY and V. WILLIAMS, L.JJ.

Action for Discovery.

Gait v. Osbaldeston (1820) 5 Madd. 428.—V.-C.; *reversed*, (1826) 1 Russ. 158.—L. C.

Crowe v. Del Rio (1769) 9 Sim. 185, n., *explained*.
Bent v. Young (1838) 7 L. J. Ch. 151; 9 Sim. 180; 2 Jur. 202.—V.-C.

Bent v. Young, *considered and followed*.

Crowe v. Del Rio, *observed on*.

Dreyfus v. Peruvian Guano Co. (1889) 58 L. J. Ch. 471; 41 Ch. D. 151; 60 L. T. 216; 37 W. R. 394.—KAY, J. See judgment at length.

Fenton v. Hughes (1802) 7 Ves. 287.—L. C., *discussed*.

Whitworth v. Davies (1813) 1 V. & B. 545.—V.-C.

Fenton v. Hughes, *approved*.

London (Bishop) v. Fytche (1781) 1 Bro. C. C. 96.—L. C., *explained*.

Glyn v. Soares (1835) 5 L. J. Ex. Eq. 49; 1 Y. & C. 644.—ALEXANDER, C. B.; S. C. 3 Myl & K. 450.—M. R., *reversed*.

Portugal (Queen) v. Glyn (1837) 7 Cl. & F. 466; West. 258.—H. L. (B.). COTTENHAM, L. C., LORDS LYNCHURST and BROUGHAM; LORD WYNDFORD dissenting.

Glyn v. Soares, *discussed*.

London (Bishop) v. Fytche and Fenton v. Hughes, *observed on and the reports of those cases corrected*.

Iyving v. Thompson (1839) 8 L. J. Ch. 357; 9 Sim. 17; 3 Jur. 1071.—V.-C.

2. INTERROGATORIES.

Swansea Corporation v. Quirk (1879) 49 L. J. C. P. 157; 5 C. P. D. 106; 41 L. T. 758; 28 W. R. 371; 44 J. P. 378.—GROVE and LOPES, JJ., *distinguished*.

Salford Corporation v. Lever (1890) 24 Q. B. D. 695; 59 L. J. Q. B. 248; 62 L. T. 424; 54 J. P. 515.—C. A.

ESHER, M. R.—There is a clear distinction between this case and that of *Swansea Corporation v. Quirk*, for in that case the corporation had the option of answering by their town clerk, or other proper officer, and chose to answer by their town clerk; here the plaintiffs were compelled to answer by their town clerk, and by no one else.—p. 691. FRY, L. J. concurred.

Mercier v. Cotton (1876) 46 L. J. Q. B. 184; 1 Q. B. D. 442; 35 L. T. 79; 24 W. R. 566.—C. A., *limited*.

Harbord v. Monk (1878) 9 Ch. D. 616; 38 L. T. 411; 27 W. R. 164.

JESSEL, M. R.—*Mercier v. Cotton* is obviously limited to actions in the nature of common law actions. It has no application to actions in the Chancery Division. In a common law action, if a plaintiff exhibits interrogatories at the time of delivering his statement of claim, under Ord. XXXI., rule 1, he must justify them, if required, under rule 5 (1883, rule 7); but in an ordinary action in the Chancery Division the interrogatories justify themselves.—p. 617.

Zierenberg v. Labouchere (1893) 63 L. J. Q. B. 89; [1893] 2 Q. B. 183; 4 R. 464; 69 L. T. 172; 41 W. R. 675; 57 J. P. 711.—C. A. ESHER, M. R., BOWEN and KAY, L.JJ., *dictum explained*.

Waynes Merthyr Co. v. Badford (1895) 65 L. J. Ch. 140; [1896] 1 Ch. 29; 73 L. T. 624; 44 W. R. 108.

CHITTY, J.—The argument for the defendants was founded chiefly on the judgment of Kay, L. J. in *Zierenberg v. Labouchere*, and was to the effect that, unless there was some fiduciary relation between the parties, the rule was that particulars should precede discovery. I am unable to deduce any such proposition from the judgment of Kay, L. J. He did explain that the right to discovery in the case before him differed from that against a person standing in a fiduciary position, and he put the distinction on the ground not only of the trustee or agent necessarily having knowledge of any funds, but also because the *cestui que trust* or principal was entitled to the knowledge in the possession of his trustee or agent. He did not lay down any such proposition as is contended for by the defendants, and, in my opinion, there was no such rule that particulars, except where there is fiduciary relationship, should precede discovery.—p. 141.

Hall v. Liardet, W. N. 1883, pp. 165, 194.—

FIELD, J., *approved and followed*.
Martin v. Spicer (1886) 32 Ch. D. 592; 34 W. R. 589; 54 L. T. 598.—BACON, V.-C.

Hall v. Liardet, *approved*.

Aste v. Stumore (1888) 53 L. J. Q. B. 82; 13 Q. B. D. 326; 49 L. T. 742; 32 W. R. 219; 5 Asp. M. C. 175.—C. A. BRETT, M. R., and BOWEN, L. J.

Aste v. Stumore, *followed*.

Boarder v. Lindsay (1886) 34 W. R. 473.—GROVE and STEPHEN, JJ.

Boarder v. Lindsay (*supra*), not followed.
Newman v. L. & S. W. Ry. (1890) 59 L. J. Q. B. 341; 24 Q. B. D. 454; 62 L. T. 290; 38 W. R. 848.

DENMAN, J.—It is perfectly clear that in *Aste v. Sumner* the C. A. did not agree with the decision of the Divisional Court that there was no discretion in any case to dispense with the deposit, although it was unnecessary for the purposes of that case for the C. A. to decide the point. We find, therefore, two judges in the C. A. expressing their dissent from a decision of a Divisional Court, although not in terms overruling it, and under those circumstances I think this Court is left at large to give its own interpretation to these rules.—p. 455. V. WILLIAMS, J. concurred.

Smith v. Reed, W. N. (1883) 196.—FIELD, J., distinguished.

Campbell v. Poulett (Lond), W. N. (1884) 48.—FIELD, J.

Smith v. Reed, distinguished.
Campbell v. Poulett (Lord), followed.

Eder & Co. v. Attenborough (1889) 58 L. J. Q. B. 311; 23 Q. B. D. 130; 60 L. T. 452; 37 W. R. 307.—POLLOCK, B. and FIELD, J.

Smith v. Reed, followed.

Eder & Co. v. Attenborough, distinguished.
Liverpool and Manchester Aerial Broom and Café Co. v. Firth (1890) [1891] 1 Ch. 367; 60 L. J. Ch. 153; 63 L. T. 677; 39 W. R. 269.

STIRLING, J.—That action [*Eder & Co. v. Attenborough*] was brought against many defendants for several causes of action; but the defendants appeared jointly and delivered a joint defence, and it was held that the decision in *Smith v. Reed* ought not to be applied, and it was ordered that *5l* only should be paid into Court before the delivery of interrogatories. Now, did the two learned judges intend to overrule the decision in *Smith v. Reed*? I think that they did not. They distinguished that case. Pollock, B., in giving judgment, said: "This is not a case of different defendants defending by separate solicitors, and each having independent rights;" and Field, J. said: "The defendants rely on my decision in the case in which I held that payment of *5l* was not enough. But in that case the party had delivered separate and distinct sets of interrogatories, one set to A., one to B., and so on, and I thought, and still think, that I was right in holding that a deposit in respect of each set was necessary." . . . Whether the decision in *Eder & Co. v. Attenborough* was quite consistent with that in *Smith v. Reed* I need not discuss; as I have said, I think I ought to follow that in *Smith v. Reed*, unless it has been overruled.—p. 371.

Liverpool and Manchester, &c. Co. v. Firth, commented on.

Joyce v. Beall [1891] 1 Q. B. 459; 60 L. J. Q. B. 242; 64 L. T. 137; 39 W. R. 316; 55 J. P. 183.—V. WILLIAMS and CAVE, JJ.

CAVE, J.—I am authorised by Stirling, J. to say that in *Liverpool, &c. Co. v. Firth* he did not intend to decide anything inconsistent with the decision in *Eder v. Attenborough*, by which he was bound.—p. 462.

Seowers Commissioners v. Glasse (1873) 42 L. J. Ch. 345; 1 L. R. 15 Eq. 802; 28 L. T. 433; 21 W. R. 520.—M.R., distinguished.

Saunders v. Jones (1877) 47 L. J. Ch. 440;

7 Ch. D. 435; 37 L. T. 895, 769; 26 W. R. 226.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ. THESIGER, L.J.—There the plaintiff had set up a particular right. Part of his evidence to establish that right would be to show that the right had been actually enjoyed, and the defendant asked to be allowed to interrogate as to specific instances in which that right had been exercised or enjoyed. Lord Romilly decided that that could not be done for this obvious reason—the acts themselves were not at issue, but were only evidence bearing on the issues which were raised between the parties. But in this case, when the defendant has pleaded in most general terms acts of misconduct, he might set up any particular act of misconduct as one of the issues in the action. If that be so, the plaintiff is entitled to know what that specific issue is.—p. 448. And see cols. 866, 867.

Anderson v. Bank of British Columbia (1876) 45 L. J. Ch. 449; 2 Ch. D. 644; 35 L. T. 76; 24 W. R. 624.—C.A.; affirming M.R., *advised*.

Atherley v. Harvey (1877) 46 L. J. Q. B. 518; 2 Q. B. D. 524; 36 L. T. 551; 25 W. R. 727.—MELLOR, FIELD and LUSH, JJ.

Atherley v. Harvey, observed on

Fisher v. Owen (1878) 8 Ch. D. 645; 47 L. J. Ch. 681; 38 L. T. 577; 26 W. R. 417, 581.—C.A. JESSEL, M.R., COTTON and THESIGER, L.JJ.; reversing 47 L. J. Ch. 477; 38 L. T. 252; 26 W. R. 417.—BACON, V.-C.

COTTON, L.J.—Reliance was placed on the observations of Baggallay, L.J., in *Saunders v. Jones* (*supra*), but that was merely a doubt, not a decision, and if it is necessary for the C. A. to lay that ghost, I may say that there is no foundation for the opinion that a person who has a ground for refusing to answer is precluded from availing himself of that ground because he has not applied to have the interrogatory struck out, his right to decline answering being expressly reserved to him by the 8th rule. Then it is said there is an authority in favour of the order of the V.-C. In my opinion, *Atherley v. Harvey* is no authority in its favour, and even if it were, if we thought it was wrong it would be the duty of this Court, not being bound by that decision (although perhaps the V.-C. would be), to lay down the correct principle. When, however, we come to look at *Atherley v. Harvey*, it appears that the judges thought they were following the rule in equity in ordering the interrogatories to be struck out. In my opinion, they erroneously applied a rule which did exist in equity, namely, that a bill of discovery in aid of an action for tort was demurrable. That rule has no application where an action is properly brought in a Court which has power to enforce discovery by means of interrogatories.—p. 654.

Fisher v. Owen, followed, *Allhusen v. Labouchere* (1878) 47 L. J. Q. B. 819; 39 L. D. 664; 39 L. T. 207; 27 W. R. 12.—C.A. JAMES, BRETT and COTTON, L.JJ.; explained, *Humblings v. Williams* (1883) 52 L. J. Q. B. 273; 10 Q. B. D. 450 (*post*, col. 874).

Dunn v. Coates (1738) 1 Atk. 288.—L.C., discussed.

Euston v. Smith (1884) 9 P. D. 57; 32 W. R. 596.—HANNEN, P.; and *Allhusen v. Labouchere*, applied.

Harvey v. Lovekin (1884) 54 L. J. P. 1; 10

P. D. 122; 33 W. R. 188.—C.A. BRETT, M.R. and LINDLEY, L.J.

Mayor v. Collins (1890) 59 L. J. Q. B. 199; 24 Q. B. D. 361; 62 L. T. 326; 38 W. R. 349.—C.A. LINDLEY, DOWEN and FRY, L.J.J.; *distinguished*.

Harvey v. Lovekin, *approved*.

Redfern v. Redfern (1890) 60 L. J. P. 9; [1891] P. 139; 64 L. T. 68; 39 W. R. 212; 55 J. P. 37.—C.A. LINDLEY, DOWEN and FRY, L.J.J.; *affirming on different grounds*, BUTT, J.

McIlroy v. Duncane, W. N. (1884) p. 48.—FIELD, J., *disapproved*.

Sammons v. Bailey (1890) 59 L. J. Q. B. 342; 24 Q. B. D. 727; 38 W. R. 605.—GRANTHAM and V. WILLIAMS, J.J.; *reversing HAWKINS, J., overruled*.

Allhusen v. Labouchere (*supra*), *discussed*.

Oppenheim v. Sheffield (1892) [1893] 1 Q. B. 5, 62 L. J. Q. B. 167; 41 R. 111; 67 L. T. 606; 41 W. R. 65.—C.A.

ESHER, M.R.—I cannot help thinking that in *McIlroy v. Duncane*, Field, J. must have been applying the new rule on the subject on the supposition that it was identical in effect with the former rule. If he really had in view the terms of the existing rule, then I cannot agree with his decision. . . . In the case cited [*Sammons v. Bailey*], GRANTHAM, J. seems to have thought that the judge must strike out all [the interrogatories] or none. In that I cannot agree with him. . . . *Allhusen v. Labouchere* seems to me to take the very distinctions which I have taken. It was held there, no doubt, that a party who objects to some of a set of interrogatories, on the ground that they are objectionable, must state to which of them he objects; but there is nothing to show that the judge may not look at the interrogatories as a whole—pp. 10–12.

LOPES and KAY, L.J.J. to the same effect.

Allhusen v. Labouchere, *followed*.

Redfern v. Redfern, *distinguished*.

Spokes v. Grosvenor and West End Hotel Co. (1897) 66 L. J. Q. B. 598; [1897] 2 Q. B. 124; 67 L. T. 677; 45 W. R. 345.—C.A.

ESHER, M.R.—That case [*Allhusen v. Labouchere*], therefore, is a distinct authority that objection to one of the parties putting a question by way of discovery to his opponent must be taken on oath. If the party to whom the question is put is prepared to say that his answer might tend to criminate him, he is entitled to do so and to object to answer, but the time for him to take the objection is in his answer. But it is said that the decision in *Allhusen v. Labouchere* is overruled by *Redfern v. Redfern*. That case was decided in reference to the special practice of the Divorce Court and upon the Divorce Acts. It is not a decision upon the general law of discovery, and *Allhusen v. Labouchere* was not referred to either in the arguments or in the judgments. *Allhusen v. Labouchere* is untouched by *Redfern v. Redfern*—p. 599.

A. L. SMITH and CHITTY, L.J.J. to the same effect.

Ashley v. Taylor, 37 L. T. 522.—MALINS, V.-C.; *reversed*, (1878) 38 L. T. 44.—C.A. JESSEL, M.R., JAMES and FRESHER, L.J.J.

Moore v. Craven (1870) L. R. 7 Ch. 94, n.—HATHERLEY, L.C. and GIFFARD, L.J., *distinguished*.

Parnell v. Walter (1890) 24 Q. B. D. 441; 59 O.C.

L. J. Q. B. 125; 62 L. T. 75; 38 W. R. 270; 54 J. P. 311; 6 Times L. R. 138.—DENMAN and WILLS, JJ.

DENMAN, J.—That case is distinguishable from the present, for in an action for libel it is obvious that the extent of the circulation is important, and therefore the defendants should give some information as to this question.—p. 451.

Parnell v. Walter, *followed but questioned*.

Rumney v. Walter (1891) 61 L. J. Q. B. 149; 65 L. T. 737; 40 W. R. 174.—COLERIDGE, C.J. and MATHEW, J.

Parnell v. Walter, *overruled on one point*.

Rumney v. Walter and James v. Carr (1890) 7 Times L. R. 4.—MATHEW and GRANTHAM, JJ., *approved*.

Whittaker v. "Scarborough Post" Newspaper Co. (1896) 65 L. J. Q. B. 564; [1896] 2 Q. B. 148; 74 L. T. 753; 44 W. R. 657.—C.A.

ESHER, M.R.—In my opinion *Parnell v. Walter*, which, if rightly decided, is an authority that, in the case of an action for libel against the proprietors of *The Times* or any of the great London or country newspapers, such an interrogatory [as to the number of copies in circulation] is a proper one, was wrongly decided. I agree with the view expressed by Mathew, J., and substantially by Coleridge, C.J. in the subsequent case of *Rumney v. Walter*, that the interrogatories administered in *Parnell v. Walter* were frivolous and vexatious, and that no further answer to them should have been required.—p. 150.

KAY, L.J. to the same effect.

A. L. SMITH, L.J.—In my opinion, the decision in *Parnell v. Walter* was wrong. . . . So far as the current of authority subsequent to *Parnell v. Walter* is concerned, I wish to point out that in *James v. Carr* in 1890, and *Rumney v. Walter* in 1891, it appears that the judges who decided those cases would not have decided as they did unless they had thought themselves bound by the decision in *Parnell v. Walter*.—p. 152.

Parnell v. Walter, *distinguished*.

Blhott v. Garrett (1902) 71 L. J. K. B. 415; [1902] 1 K. B. 870.—C.A. See col. 871.

Saunders v. Jones, col. 863, *doubt in, overruled*.

Fisher v. Owen (1878) 47 L. J. Ch. 681; 8 Ch. D. 645; 38 L. T. 577; 26 W. R. 581.—C.A. See *supra*, col. 864.

Eade v. Jacobs (1877) 47 L. J. Ex. 74; 3

Ex. D. 385; 37 L. T. 621; 26 W. R. 159.

—C.A. COTTON, BRAMWELL and BRETT, L.J.J., *observed on*.

Johns v. James (1879) 13 Ch. D. 370.

BACON, V.-C.—As to the persons in whose presence the conversation took place, Mr. Romer gives up the contention. In the presence of the decision in *Eade v. Jacobs*, I desire to say nothing more on this point. It has been removed from the case, and it has become unnecessary that I should decide it, but it is a matter which at another time and in another place must, I think, receive more attention than appears to have been yet bestowed upon it.—p. 374.

Saunders v. Jones, *followed*.

Eade v. Jacobs, *observed on*.

Lyon v. Tweedell (1879) 13 Ch. D. 375.—BACON, V.-C.

Saunders v. Jones (col. 863), explained.

Bentley v. Low (1889) 16 Ch. D. 93; 50 L. J. Ch. 35; 44 L. T. 119; 29 W. R. 265.—C.A.

JESSEL, M.R.—Before parting with this case, I should like to say a word or two upon the decision in *Saunders v. Jones*, in the Appeal Court, as I was not a party to that decision, although I have acted upon it very often. As I understand that decision, the main portion of it applied to the four first interrogatories, and it amounts simply to this. Whereas at common law, in an action for wrongful dismissal, if the defendant pleaded that he dismissed the plaintiff for misconduct, the plaintiff would have a right to the particulars of the misconduct, so that he might be able to show at the trial that there was no misconduct, and could obtain that under a summons for better particulars; but there being a practice coming to the Chancery Division from the old Court of Chancery, not as a rule to give better particulars, although of course it could be done, but to allow the particulars to be obtained by interrogatories, especially when you have to interrogate for other purposes, there was no reason, then, for departing from the practice, it being a cheaper course of procedure and better; and therefore where there was among the interrogatories one or more simply asking for better particulars, those interrogatories should be allowed without putting the applicant to the trouble of taking out a summons for better particulars. That is all that was decided, and it is as plain as possible, because when you look at the observations of the late lamented Thesiger, L.J. (p. 447), and of James, L.J. on the same page, they are directed to the point that the plaintiff is to have the particulars of the alleged misconduct; and when you look at the judgment of James, L.J. (p. 449), he says: "He is entitled to particulars like the particulars of breaches or infringement, and it is no sufficient answer to say, 'You have not taken the right course, you ought to have applied to the V.-C. for particulars, which is not according to the practice of the Chancery Division. The only mode in which those particulars could have been got in Chancery was by administering interrogatories, and I am of opinion that a party may still adopt that course'—not 'must' but 'may'—and that the interrogatories must be answered." If he is interrogated for other purposes, an interrogatory may be added for this purpose, and that is all that is decided on the point.—p. 97.

COTTON, L.J. to the same effect. JAMES, L.J. concurred.

Eade v. Jacobs (*supra*), explained.

Att.-Gen. v. Gaskill (*nr* Gaskill) (1882) 51 L. J. Ch. 870; 20 Ch. D. 519; 46 L. T. 180; 30 W. R. 558.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.J.; reversing BACON, V.C.

LINDLEY, L.J.—The extent to which such power of interrogating goes is to be found in *Eade v. Jacobs*, which shows that a party is not to be compelled by means of interrogatories to give discovery of the evidence which he is going to adduce at the trial. So understood the case is a guide as to the extent to which the interrogatories as to the conversation are to be answered.—p. 874.

Ivy v. Kokewick (1795) 2 Ves. 679.—L.C.;

Eade v. Jacobs v. Hoffmann v. Postill (1869)

L. R. 4 Ch. 673; 20 L. T. 893; 17 W. R. 901.—L.J.J.: Lowndes v. Davies (1834) 6 Sim. 468—V.-C.; and Att.-Gen. v. Gaskill, *discussed*.

Bidler v. Bridges (1885) 29 Ch. D. 29; 54 L. J. Ch. 798; 52 L. T. 455; 33 W. R. 792.

KAY, J.—As to *Lowndes v. Davies*, I will only say this, that it is a case which is discussed in Wigram, V.-C.'s book (p. 289), where he points out that it stands really alone, and is not consistent with the previous authorities he refers to; and elsewhere in the book he refers to the fact that Shadwell, V.-C. had shown in many cases a determination as far as he could to assist discovery in almost every case. But he also refers to another case which came before the same learned judge when he was a lord commissioner, namely, *Hardman v. Ellames* (col. 857), in which the decision seems to have been not entirely consistent with that in *Lowndes v. Davies*. However, he disputes the authority of *Lowndes v. Davies*, and I cannot find any case in which that has been followed unless it be *Hoffmann v. Postill*. That is a case which to my mind, as far as the decision goes, is very clear and simple. There the bill had been filed by the owners of a patent against the defendant for infringement, and the defendant, having answered the bill, filed a concise statement and interrogatories for the examination of the plaintiff. In his answer he had set up that the patent was void for want of novelty. Everybody familiar with patent cases knows that that is an issue the affirmative of which is on the defendant. He has a perfect right to interrogate as to the want of novelty to any extent he likes, because that is his case, and not the plaintiff's case, and accordingly Selwyn, L.J. and Giffard, L.J. thought that interrogatories which went to that part of the case ought to be answered. And Giffard, L.J. is reported to have said: "As regards *Duro v. Elley* (*post*, col. 871), it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was there held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case, and there the defendant has a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement, is not an infringement." As to the first branch of that proposition, there could not be, for the reason I have given, the least doubt. It was not the plaintiff's case but the defendant's case that the patent is void for want of novelty. The defendant had a perfect right to search the conscience of the plaintiff, and to make that out if he could from the admissions of the plaintiff. But if this is to be understood as stating a general proposition that in every case whatever a defendant who does not set up any substantial case of his own, but merely meets the case of the plaintiff by a traverse, is entitled, to use these words, to destroy the plaintiff's case, and to ask all the questions he possibly can to effect that purpose, that is simply a contradiction of the well-settled rule that the questions which either plaintiff or defendant can ask must be confined to those which establish his own substantive case, and do not embrace questions relating to the evidence by which or the manner in which his adversary

means to establish his case. I am quite satisfied that so great a judge as Giffard, L.J. never intended in those words, which seems to have been cited in subsequent cases (for instance, in *Seivers Commissioners v. Glasse*, *supra*, col. 863), to lay down the proposition that a defendant has a larger right of discovery than a plaintiff. I feel satisfied that he was only dealing with the case before him. . . . The plaintiffs [*Att.-Gen. v. Gaskill*] were seeking to search the conscience of the defendant, not as to the defendant's case but as to their own case. They said there was a right of way, and they were interrogating the defendant to try and obtain from him admissions that such was the case. . . . And Cotton, L.J., with reference to his own judgment in *Bade v. Jacobs*, says, "I think it has been somewhat misunderstood. In that case the defence had set up a parol agreement which was said to be material, and what I held was this, that the interrogatories ought to some extent to be limited so as to ask the defendant to give discovery of the substance only of the conversation on which he relied as a defence, and that the person interrogated was not bound to set forth the names of the witnesses or the details of the conversations. That was expressed in this passage of the judgment, 'I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce,' and the rest of the judgment, modifying in some slight way the interrogatory, has reference to what was laid down as the principle of the decision." I think that what the learned judge decided was only this. The defendant has not pleaded these conversations as strictly as according to practice in Chancery he ought to have done, and therefore he is bound to answer this interrogatory to the extent to which it seeks that statement from you which ought to be contained in your pleadings—pp. 40—42.

Bade v. Jacobs, explained.

Marriott v. Chamberlain (1886) 55 L. J. Q. B. 448; 17 Q. B. D. 154.—C.A. See *post*, col. 870.

Att.-Gen. v. Rees (1849) 12 Beav. 50.—M.R., *approved*.

Parker v. Wells (1881) 18 Ch. D. 477; 45 L. T. 517; 30 W. R. 392.—C.A. JESSEL, M.R. and BRETT, L.J.; COTTON, L.J. *dis-senting on one point, confirmed*.

Bolekow, Vaughan & Co. v. Fisher (1882) 52 L. J. Q. B. 12; 10 Q. B. D. 161; 47 L. T. 724; 31 W. R. 285; 5 Asp. M. C. 20.—C.A. BAGGALLAY, BRETT and LINDLEY, L.JJ.

Bolekow, Vaughan & Co. v. Fisher, distinguished, *Vivian v. Little* (1888) 52 L. J. Q. B. 771; 11 Q. B. D. 370 (*supra*, col. 856); *Rasbotham v. Shropshire Union Railways and Canal Co.* (1883) 53 L. J. Ch. 327; 24 Ch. D. 110; 48 L. T. 902; 32 W. R. 117.—NORTH, J.

Bolekow, Vaughan & Co. v. Fisher, distinguished.

London, Tilbury and Southend Ry. v. Kirk (1884) 51 L. T. 599.

MATHEW, J.—It seems to me that the foundation of that case is, that the knowledge of the agent is the knowledge of the principal, and that all that case says is that, if you say you are not informed, you are bound to inform yourself from

your agents or servants. That case is different from the present, where the reports have been held to be privileged.—p. 600.

A. L. SMITH, J. to the same effect.

Parker v. Wells (*supra*), *applied*.

Lister v. Norton Bros. (1885) 2 Rep. Pat. Cas. 68.—CHITTY, J.

Parker v. Wells, distinguished.

Howell Morgan, in re, *Owen v. Morgan* (1888) 39 Ch. D. 316; 60 L. T. 71; 37 W. R. 343.—C.A. COTTON, L.J.—*Parker v. Wells* was relied on by the appellant, but that was a very different case. The plaintiff there asked for an account and payment of the profits made by the employment of a sum in trade, and no one who had practised in the Court of Chancery could imagine the possibility of such admissions being made as would enable the Court to make at the hearing an order for payment without any further accounts or inquiries.—p. 320

FRY and LOPES, L.JJ. *concurrent*, but differed from Cotton, L.J. on one point.

Bolekow, Vaughan & Co. v. Fisher (*supra*),

and *Chaddock v. British South Africa Co.* (1890) 65 L. J. Q. B. 635; [1896] 2 Q. B. 153; 74 L. T. 755; 44 W. R. 658.—C.A. ESHER, M.R., KAY and A. L. SMITH, L.JJ., *discussed and applied*.

Welsbach Incandescent Gaslight Co. v. New Sunlight Incandescent Co. (1900) 69 L. J. Ch. 546; [1900] 2 Ch. 1; 83 L. T. 58; 48 W. R. 595.—C.A. WEBSTER, M.R., BIGBY and COLLINS, L.JJ., *reversing* BYRNE, J.

Storey v. Lennox (Lord) (1836) 1 Keen 341.—

M.R.; *affirmed*, 6 L. J. Ch. 99; 1 Myl. & C. 525.—L.C., *discussed*.

Wright v. Vernon (1858) 22 L. J. Ch. 447; 4 Drew, 344; 1 W. R. 138.—v.-c.

Wright v. Vernon; Storey v. Lennox (Lord),

and *Baiguy v. Broadhurst* (1850) 1 Sim. (N.S.) 111; 14 Jur. 1105.—CRANWORTH, L.J., *discussed*.

Peyton v. Harting (1873) 43 L. J. C. P. 10;

L. R. 9 Q. P. 9; 29 L. T. 478; 22 W. R. 61.—KEATINGE, BRETT and DENMAN, JJ., *approved*.

Lyell v. Kennedy (1884) 53 L. J. Ch. 937; 27 Ch. D. 1; 60 L. T. 730.—C.A. COTTON, BOWEN and FRY, L.JJ.

Storey v. Lennox (Lord), *approved*.

Marriott v. Chamberlain (1886) 17 Q. B. D. 154; 55 L. J. Q. B. 448; 54 L. T. 714; 34 W. R. 783.—ESHER, M.R., BOWEN and FRY, L.JJ.

BOWEN, L.J.—*Storey v. Lennox* (Lord), cited by my brother Fry, appears to me to show that the mere fact that the discovery sought will involve the disclosure of the names of witnesses is not a sufficient reason for refusing such discovery. *Bade v. Jacobs* (col. 866) is not at all inconsistent with our present decision. What was there asked for was evidence; not information as to a material fact which could be proved at the trial, but mere evidence by which material facts were to be proved.—p. 165.

Marriott v. Chamberlain, applied.

Humphries v. Taylor Drug Co. (No. 1) (1888) 39 Ch. D. 699; 59 L. T. 177; 37 W. R. 192.—KEKEWICH, J.

Chesterfield and Boythorpe Colliery Co. v. Black (1876) 24 W. R. 783.—HALL, V.-C., *followed*.
Anstey v. North and South Woolwich Subway Co. (1879) 48 L. J. Ch. 776; 11 Ch D. 439. 40 L. T. 393; 27 W. R. 575.—FRY, J.

Higginson v. Blockley (1855) 25 L. J. Ch. 74. 1 Jur. (N.S.) 1104.—V.-C. *disapproved*.
Daw v. Eley (1865) 2 H. & M. 725.—WOOD, V.-C., *discussed*.
Hoffmann v. Postill (1869) L. R. 4 Ch. 673, 20 L. T. 893; 17 W. R. 901.—L.J.; *carrying v.-C.*
GIFFARD, L.—With respect to the other exceptions, I cannot assent to the principle which was laid down by *Kindersley, V.-C.* in *Higginson v. Blockley*, that because an exception is laid in part, therefore it is laid in the whole (q. 681). *And see (supra)*, col. 867.

Martin v. British Museum Trustees (1893) 10 Times L. R. 215.—C.A. MATHEW and COLLINS, JJ., *followed*.
Elcott v. Garrett (1902) 71 L. J. K. B. 415; [1902] 1 K. B. 870; 86 L. T. 441, 50 W. R. 504.—C.A. V. WILLIAMS, ROMER and MATHEW, L.JJ.

White v. Barker (1852) 5 De G. & Sm. 746; 17 Jur. 174.—V.-C., *followed*.
Lockett v. Lockett (1869) 38 L. J. Ch. 290; L. R. 4 Ch. 386; 17 W. R. 476.—SELWYN and GIFFARD, L.JJ.

Bird v. Malzy (1856) 1 C. B. (N.S.) 308.—C.P., *commented on*.
Rew v. Hutchins (1861) 10 C. B. (N.S.) 829.—C.P.
ERLE, C.J.—No general principle was laid down in that case.—p. 857.

Rew v. Hutchins, distinguished.
Stern v. Sevastopulo (1863) 14 C. B. (N.S.) 737, 32 L. J. C. P. 268; 10 Jur. (N.S.) 317; 8 L. T. 538; 11 W. R. 862.—C.P.
ERLE, C.J.—That was an action of contract, and the matter to which the interrogatories pointed was very specific, and within the ordinary principle of a bill of discovery. Here, the interrogatories are very general.—p. 740.

Osborn v. London Dock Co. (1855) 24 L. J. Ex. 140; 10 Ex. 698; 3 C. L. R. 313; 1 Jur. (N.S.) 93; 3 W. R. 238.—EX., *followed*.
Chester v. Wortley (1856) 25 L. J. C. P. 117; 17 C. B. 410; 2 Jur. (N.S.) 287; 4 W. R. 825.—C.P.

Osborn v. London Dock Co., approved, Reg. v. Boyes (1861) 30 L. J. Q. B. 301; 2 F. & F. 137; 1 B. & S. 311; 7 Jur. (N.S.) 1158; 5 L. T. 147, 9 W. R. 690; 9 Cox C. C. 32.—Q.B.

Osborn v. London Dock Co. and Chester v. Wortley, followed.
Tupling v. Ward (1861) 30 L. J. Ex. 222; 6 H. & M. 749; 7 Jur. (N.S.) 314; 4 L. T. 20; 9 W. R. 482.—EX., *commented on*.
Bartlett v. Lewis (1862) 31 L. J. C. P. 230; 12 C. B. (N.S.) 249; 9 Jur. (N.S.) 202; 6 L. T. 388.
ERLE, C.J.—In *Tupling v. Ward*, Martin, B., who delivered the judgment of the Court, does not advert to *Osborn v. London Dock Co.*, and the Court say they do not wish to lay down any

general rule on the subject, but to confine their decision to the case before them.—p. 233.
WILLES, BYLES and KEATINGE, JJ. to the same effect.

Short v. Mercier (1851) 3 Mac. & G. 205; 20 L. J. Ch. 289. 15 Jur. 93.—L.C.; *affirming*, 18 L. J. Ch. 490; 2 De G. & Sm. 635.—V.-C., *followed*.
Billing v. Flight (1816) 1 Madd. 230.—V.-C., *observed on*.
Bartlett v. Lewis (1862) 9 Jur. (N.S.) 202; 31 L. J. C. P. 230; 12 C. B. (N.S.) 249; 6 L. T. 388.—C.P.
WILLES, J.—*Billing v. Flight* is inconsistent with *Short v. Mercier* before the lords justices.—p. 204.

Osborn v. London Dock Co., followed.
Baker v. Lane (1865) 34 L. J. Ex. 57; 3 H. & C. 544; 11 Jur. (N.S.) 311; 4 L. T. 20; 9 W. R. 482.—EX., *explained*.
Bickford v. D'Arcy (1866) 35 L. J. Ex. 202; L. R. 1 Ex. 354; 12 Jur. (N.S.) 816; 4 H. & C. 534; 14 L. T. 629; 14 W. R. 900.
POLLOCK, C.B.—In the judgment in *Baker v. Lane* we did not state our reasons at length; but the real ground discussed among ourselves was, that the interrogatories were not *bond fide*. Now, I believe that these interrogatories are put *bond fide*.—p. 203.

MARTIN, B. to the same effect.
CHANNELL, B.—I do not think, looking at the particular circumstances of *Baker v. Lane*, that we ought to consider the decision of this Court in that case interferes with the fair inference to be drawn from *Osborn v. London Dock Co.* and *Chester v. Wortley*. . . . On the question of whether the interrogatories ought to be allowed, we ought to be governed by the decision in *Osborn v. London Dock Co.*—p. 204.

Att.-Gen. v. London Corporation (1849) 19 L. J. Ch. 314; 2 Mac. & G. 247; 2 Hall & Tw. 1; 14 Jur. 705.—L.C.; *affirming*, 12 Beav. 171.—M.R., *followed*.
Flitcroft v. Fletcher (1856) 25 L. J. Ex. 94; 11 Ex. 543; 2 Jur. (N.S.) 191; 4 W. R. 263.—EX.

Att.-Gen. v. London Corporation, principle applied.
Att.-Gen. v. Newcastle-upon-Tyne Corporation (1897) 66 L. J. Q. B. 593; [1897] 2 Q. B. 384; 77 L. T. 203.—C.A. LOPES and RIGBY, L.JJ.; *affirming WILLES, J.*

Flitcroft v. Fletcher; Selby v. Selby (1792) 4 Bro. G. C. 11; and **Att.-Gen. v. London Corporation, distinguished.**
Horton v. Bots (1857) 26 L. J. Ex. 367; 2 H. & N. 249; 3 Jur. (N.S.) 568; 5 W. R. 792.—EX. *And see post*, col. 873.

Flitcroft v. Fletcher, commented on.
Stoate v. Rew (1863) 32 L. J. C. P. 160; 14 C. B. (N.S.) 209; 11 W. R. 595.—C.P.

Flitcroft v. Fletcher, commented on.
Stoate v. Rew, applied.
Pearson v. Turner (1864) 33 L. J. C. P. 224; 16 C. B. (N.S.) 157; 10 Jur. (N.S.) 731; 10 L. T. 461; 12 W. R. 801.—C.P.

Stoate v. Rew and Pearson v. Turner, approved.
Finney v. Forward (1865) 35 L. J. Ex. 42;

L. R. 1 Ex. 6: 11 Jur. (N.S.) 878; 4 H. & C. 38; 13 L. T. 296; 13 W. R. 83.—EX.

Finney v. Forward, distinguished.

Derby Commercial Bank v. Lumsden (1870) L. R. 5 C. P. 107; 39 L. J. C. P. 72; 21 L. T. 673; 18 W. R. 526.—C.P.

BOVILL, C.J.—The ground upon which the decision in the case referred to proceeded was, that the defendant laid no ground for the discovery he sought. Here, however, the defendants admit that the plaintiffs have a *prima facie* case under a bill of lading properly indorsed, and a *prima facie* liability by their negligent delivery of the barley to Stephenson without receiving the bill of lading. They seek to invalidate the plaintiffs' claim by showing that a fraud has been practised upon them, and showing some connivance or complicity of the plaintiffs with the persons who committed the fraud. They are seeking the means of proving their own case, not to inquire into that of the plaintiffs.—p. 110

M. SMITH and BRETT, JJ. to the same effect.

Stoate v. Rew and Pearson v. Turner (supra), applied.

Flitcroft v. Fletcher (supra), questioned.

Wallon v. Forrest (1879) L. R. 7 Q. B. 289; 41 L. J. Q. B. 96; 25 L. T. 290.

QUAIN, J.—*Flitcroft v. Fletcher* has been very much doubted; and, if law at all, only applies to such a state of facts as is referred to in *Stoate v. Rew* by ERLE, C.J., who says: "If a man has been long in possession of an estate, and a stranger comes to dispossess him, the defendant may call for some general information as to the nature of the title which is to be made against him." That is the only principle upon which *Flitcroft v. Fletcher* can be supported.—p. 243.

Horton v. Bott (supra), discussed and approved.

Lyell v. Kennedy (1888) 52 L. J. Ch. 385; 8 App. Cas. 217; 48 L. T. 585; 31 W. R. 618.—H.L. (B): *reversing*, (1882) 51 L. J. Ch. 409; 20 Ch. D. 484; 46 L. T. 752; 30 W. R. 493.—C.A. JESSEL, M.R., BRETT and HOLKER, J.J.

SELBORNE, L.C.—Reference was also made to a case at law of *Horton v. Bott*, in which a discovery of matters relevant only to the defendant's title was, very properly, refused. It does not, however, appear to me to follow from these principles, or from *Horton v. Bott*, that a plaintiff in an action of ejectment, suing upon a legal title, ought to be denied that discovery of matters within the defendant's knowledge, and tending to support, not the defendant's but the plaintiff's case, to which a plaintiff at law would be entitled in any other kind of action. In the argument before your lordships the appellant's counsel produced a series of authorities which, if they had been cited in the C. A., might, not improbably, have satisfied that Court (as I believe they have satisfied all your lordships) that bills of discovery in aid of the title of plaintiffs at law in actions of ejectment were neither unknown to the Court of Chancery nor excluded by any rule or practice of that Court; on the contrary, that they were dealt with in the same manner and on the same principles as similar bills in other cases.—p. 390. [His lordship then discussed the earlier authorities.] LORDS WATSON, BRAMWELL and FITZGERALD concurred.

Lyell v. Kennedy, principle applied

Holloway, *In re*, Young v. Holloway (1887) 56 L. J. P. 81; 12 P. D. 167; 57 L. T. 515.—C.A. COTTON, LINDLEY and BOWEN, J.J.

Hawkins v. Carr (1863) 35 L. J. Q. B. 81; L. R. 1 Q. B. 89; 12 Jur. (N.S.) 334; 6 B. & S. 995; 13 L. T. 321; 14 W. R. 138.

—Q.B., *followed*.

Hills v. Wates (1874) 43 L. J. C. P. 380; L. R. 9 C. P. 688; 31 L. T. 407.—C.P.

Wright v. Goodlake (1865) 34 L. J. Ex. 82; 3 H. & C. 540; 12 Jur. (N.S.) 14; 13 L. T. 120; 13 W. R. 349.—EX., *commented on*.

Jourdain v. Palmer (1866) L. R. 1 Ex. 102; 35 L. J. Ex. 69; 4 H. & C. 171; 12 Jur. (N.S.) 283; 13 L. T. 600; 14 W. R. 283.—EX.

POLLOCK, C.B.—I agree with my brother Martin in doubting whether *Wright v. Goodlake* would be followed upon every occasion to which it might be apparently applicable. It is sufficient at present to say of that case that it was an action of tort for infringement of a copyright, whereas the present case is one of contract.—p. 105.

Wright v. Goodlake, approved.

Clarke v. Bennett (1884) 32 W. R. 350.—DAY and A. L. SMITH, JJ.

3. OBJECTIONS TO DISCLOSURE.

Turney v. Bayley (1864) 33 L. J. Ch. 499; 4 De G. J. & S. 332; 3 N. R. 695; 10 L. T. 115; 12 W. R. 633.—L.J.; *reversing* 34 Bev. 105.—M.R.

Paxton v. Douglas (1809) 16 Ves. 239; (1812) 19 Ves. 225; 12 R. R. 175.—L.C., *dicta questioned*.

Green v. Weaver (1827) 1 Sim. 404; 6 L. J. (O.S.) Ch. 1; 27 R. R. 214.—HART, V.-C.

Stainton v. Chadwick (1851) 3 Mac & G 575; 15 Jur. 1139.—L.C.; *affirming*, 13 Bev. 320.—M.R., *commented on and not applied*.

Paxton v. Douglas, explained.

Chadwick v. Chadwick (1852) 22 L. J. Ch. 329.—TURNER, V.-C.

May v. Hawkins (1855) 24 L. J. Ex. 309; 11 Ex. 210; 3 C. L. R. 895; 1 Jur. (N.S.) 600; 3 W. R. 550.—EX., *followed*.

Pye v. Butterfield (1864) 34 L. J. Q. B. 17; 5 B. & S. 829; 11 Jur. (N.S.) 220; 11 L. T. 448; 13 W. R. 178.—Q.B. *And see post*

Chadwick v. Chadwick, followed.

Humblings (or Hinnings) v. Williams (or Williamson) (1883) 52 L. J. Q. B. 278; 10 Q. B. D. 459; 48 L. T. 392; 31 W. R. 336; 47 J. P. 390.—MANISTY and STEPHEN, JJ. *And see* S. C. 52 L. J. Q. B. 400; 48 L. T. 581; 31 W. R. 924.—W. WILLIAMS and MATHEW, JJ.

Orme v. Crookford (1824) 13 Price 376; 1 C. & P. 537; McClell. 185; 27 R. R. 719.—EX., *discussed and explained*.

Martin v. Treacher (1886) 55 L. J. Q. B. 209; 16 Q. B. D. 507; 54 L. T. 7; 34 W. R. 315; 50 J. P. 356.—C.A. ESHER, M.R., LINDLEY, L.J. and LOPES, J. *See judgments*.

Martin v. Treacher (supra), explained.

Adams v. Batley (1887) 18 Q. B. D. 625; 56 L. J. Q. B. 393; 56 L. T. 770; 35 W. R. 437.—C.A.; *affirming*, DAY and WILLS, JJ.

ESHER, M.R.—*Martin v. Treacher* only establishes that there is no rule of law or ethical principle to prevent interrogatories being administered in this class of cases, except the rule which is founded on the old doctrine of Courts of equity that they would not assist a common informer to obtain discovery. I do not say that the decisions of Courts of equity have not gone further, but that was the foundation of the doctrine.—p. 630. BOWEN and FRY, L.J.J. concurred.

Pye v. Butterfield (*supra*), referred to.
Adams v. Batley, applied.

Jones v. Jones (1889) 58 L. J. Q. B. 178; 22 Q. B. D. 425; 60 L. T. 421; 37 W. R. 479.—COLERIDGE, C.J. and HAWKINS, J. And see col. 877.

Martin v. Treacher; Hunnings v. Williamson (*supra*, col. 874); and **Pye v. Butterfield**, explained and approved.

Ind. Coope & Co. v. Emmerson (1887) 56 L. J. Ch. 989; 12 App. Cas 300; 56 L. T. 778; 36 W. R. 243.—H.L. (E) SELBORNE, L.C. LORDS WATSON, FITZGERALD and HERSHELL; affirming S. C. *in* Emmerson v. Ind. Coope & Co.—C.A. (col. 852).

Merrick v. Hundred of Ossulston (1737) Rep. temp. Hardwicke 4, explained.

Adams v. Batley, distinguished.

Nanders v. Wiel [1892] 2 Q. B. 321; 62 L. J. Q. B. 87; 4 R. 1; 67 L. T. 207; 40 W. R. 594.—C.A.; affirming, 61 L. J. Q. B. 597; [1892] 2 Q. B. 18.—DAY and CHARLES, JJ.

ESHER, M.R.—The only sensible interpretation of the statute [Patents, &c. Act, 1883] is that the two sections (secs. 58 and 59) apply to two distinct remedies, the one by way of penalty, the other by way of damages. It is said, however, that we ought to hold otherwise; because Lush, L.J., in *Robinson v. Curry* [7 Q. B. D. 465. See "LIMITATIONS, STATUTES OF,"], quoted *Merrick v. Hundred of Ossulston*, and said that in that case it was stated, "the Court held that where an Act of Parliament only gives a remedy to the party grieved, that is not to be considered a penal action." Put in that way it would seem that that was the holding of the Court in that case; but that is not so, for it is a statement of what was said by Lee, C.J., in giving judgment, as to the decision reported in *Strange* [*Smith v. Phillips*, Stra. 136]. I cannot think that it is a sufficient authority, especially since, as my brother Bowen points out, it has never been accepted as law. Mr. James relied principally upon *Adams v. Batley*, decided on 3 & 4 Will. 4, c. 15, s. 2. The statute is wholly different from the one we are considering, and we arrived at a conclusion that the action in that case was not to recover a penalty, but for damages. That conclusion was arrived at by looking at the context, which, though the word "offender" was used, took away from it its *prima facie* meaning and left the action one for damages.—p. 323.

Martin v. Treacher; Pye v. Butterfield; and

Ind. Coope & Co. v. Emmerson, explained

Seaward v. Dennington (1896) 41 W. R. 696

—A. L. SMITH and RIGBY, L.J.J., overruled.

Mexborough (Earl) v. Whitwood Urban Council (1897) 66 L. J. Q. B. 637; [1897] 2 Q. B. 111; 76 L. T. 765; 45 W. R. 564.—C.A.

ESHER, M.R.—But with regard to actions for penalties it was expressly laid down in *Martin v. Treacher* by each member of the Court that there is a rule of law which prevents the application of any of the procedure of the Court with regard to discovery to an action for a penalty by a common informer. That decision is not based upon any equitable doctrine of the Courts of equity, but upon the ground that the Courts, whether of law or equity, will not assist the plaintiff in an action for a penalty. The decision applies both to discovery by affidavit of documents and to discovery by the administration of interrogatories; and the principle asserted was that the whole law of discovery including both these things, was inapplicable to a defendant in an action for a penalty. Now I come to actions brought to insist upon a forfeiture of land. . . . That [*Pye v. Butterfield*] was an action to recover possession of a house held on lease on the ground of forfeiture, and there the Court discharged a rule calling upon the defendant to show cause why the plaintiff should not be at liberty to deliver to the defendant interrogatories in writing, and why the defendant should not answer them. It has been contended that the case turned upon the particular interrogatories delivered, but each of the judges who decided the case affirmed the contrary. No doubt in the reports of the case the interrogatories are set out, but the Court ignored them. The decision was not that those particular interrogatories would not be allowed, but that no interrogatories would be allowed. . . . Unhappily there is *Seaward v. Dennington*. That was an appeal from an order of a judge at chambers ordering the defendant to make the common form affidavit of documents. The action was brought by a lessor against a lessee to recover possession of the demised premises on a forfeiture for breach of covenant. There A. L. Smith, L.J., says: "I agree that it has been the practice ever since the time of Lord Hardwicke that in an action for penalties the Court will not assist the plaintiff by ordering the defendant to make discovery. This case, however, is not an action for a penalty, but is an action to recover possession of demised premises after a breach of covenant, and though the defendant is not bound to disclose to the plaintiff circumstances which will enable the plaintiff to make out a case of forfeiture, nevertheless the defendant is bound to make an affidavit of documents. But when he does so he can do so by covering particular documents."

. . . After hearing the arguments in this case and examining the law, I am bound to say that I think that that part of the judgment is wrong, and I believe that A. L. Smith, L.J. will agree with me. We must therefore act on our present view, and decide that that case is not correct. . . . That [*Ind. Coope & Co. v. Emmerson*] was an action for the forfeiture of land, and the decision was that the defendant could not escape production of documents by setting up the defence of purchase for valuable consideration without notice. I do not think that the H. L. meant to say that the two rules of procedure I have mentioned were done away with by the Judicature Act, 1873. I hold therefore that that decision did not do away with the rule for the protection of defendants against common informers, and there is a long series of authorities that actions for forfeiture stand upon the same footing as actions for penalties.—p. 640.

A. L. SMITH and CHITTY, L.JJ. to the same effect.

Jones v. Jones (*supra*, col. 875), *followed*.
Hobbs v. Hudson (1890) 59 L. J. Q. B. 562; 25 Q. B. D. 232. 63 L. T. 215; 38 W. R. 682, 6 Times L. R. 381.—C.A. **ESHER, M.R.** LINDLEY and LOPES, L.JJ.; *affirming* 54 J. P. 360, 520.—GRANTHAM and CHARLES, JJ.

Howe v. McKernan (1862) 30 Beav. 547.—*M.R.*, *not followed*.
Carver v. Pinto Leite (1871) 41 L. J. Ch. 92; L. R. 7 Ch. 90, 25 L. T. 722; 20 W. R. 134.—L.JJ.

Benyon v. Nettlefold (1849) 18 L. J. Ch. 445; 17 Sim. 51; 13 Jur. 798.—V.C.; *reversed*, (1850) 20 L. J. Ch. 186; 3 Mac. & G. 94; 15 Jur. 209.—L.C.

Hughes v. Biddulph (1827) 4 Russ. 190; 28 R. R. 46.—L.C., and **Bolton v. Liverpool Corporation** (1832) 1 L. J. Ch. 166, 1 Myl. & K. 88.—L.C., *discussed but followed*.
Walsingham (Lord) v. Goodricke (1843) 3 Hare 122.—V.C. See judgment, where the earlier cases are discussed. *And see post*, col. 878.

Bolton v. Liverpool Corporation, applied.
Flight v. Robinson (1844) 13 L. J. Ch. 423; 8 Beav. 22; 8 Jur. 888.—M.R.

Knight v. Waterford (Marquis) (1836) 10 L. J. Ex. Eq. 57, 2 Y. & C. 37.—EX. EQ.; and **Combe v. London Corporation** (1842) 1 Y. & Coll. C. C. 631; 6 Jur. 571, *approved*. *And see col.* 879.

Bolton v. Liverpool Corporation and Hughes v. Biddulph, discussed.
Holmes v. Baddeley (1844) 14 L. J. Ch. 113; 1 Ph. 476; 9 Jur. 289.—L.C.; *reversing* 6 Beav. 521.—M.R. *And see col.* 884.

Bolton v. Liverpool Corporation, explained.
Nias v. Northern and Eastern Ry. (1838) 3 Myl. & Cr. 355; 7 L. J. Ch. 170; 2 Jur. 295.—L.C. *affirming*; 2 Keen 76.—M.R., **Radcliffe v. Furman** (1730) 3 Bro. P. C. 514.—H. L. (L.C.); and **Richards v. Jackson** (1812) 18 Ves. 472.—L.C., *discussed*.
Pearse v. Pearse (1846) 16 L. J. Ch. 153; 1 De G. & Sm. 12; 11 Jur. 52.—V.C. See judgment at length. *And see col.* 879.

Hughes v. Biddulph, followed.
Steel v. Stewart (1844) 14 L. J. Ch. 34; 1 Ch. 471; 9 Jur. 121.—L.C.; *affirming*. (1843) 12 L. J. Ch. 473; 13 Sim. 533.—V.C., *distinguished*.
Goodall v. Little (1851) 20 L. J. Ch. 132; 1 Sim. (N.S.) 155; 15 Jur. 309.—V.C.

Goodall v. Little, approved.
Glyn v. Caulfield (1851) 3 Mac. & G. 468; 15 Jur. 807.—L.C.

Walsingham (Lord) v. Goodricke (*supra*), *followed*.
Hawkins v. Gathercole (1851) 20 L. J. Ch. 303; 1 Sim. (N.S.) 150; 15 Jur. 186.—L.C.

Walsingham (Lord) v. Goodricke, distinguished.
Pearse v. Pearse (*supra*), *followed*.
Flight v. Robinson (*supra*), *discussed*.
Manser v. Dix (1855) 24 L. J. Ch. 497. 1

K. & J. 451; 1 Jur. (N.S.) 466; 3 Eq. R. 650; 3 W. R. 313.—V.C. *And see cols.* 879, 882.

Curling v. Perring (1835) 4 L. J. Ch. 80; 2 Myl. & Cr. 380.—M.R.; and **Steel v. Stewart** (*supra*), *principle applied*.
Walsham v. Stanton (1803) 2 H. & M. 1; 3 N. R. 241; 9 L. T. 603; 12 W. R. 119.—WOOD, V.C.

Walsingham (Lord) v. Goodricke and Hawkins v. Gathercole (*supra*, col. 877), *followed*.

Wilson v. Northampton and Banbury Junction Ry. (1872) L. R. 14 Eq. 477; 27 L. T. 507; 20 W. R. 938.—MALINS, V.C.

Bolton v. Liverpool Corporation (*supra*), *considered*.
Walsingham (Lord) v. Goodricke, held overruled.

Pearse v. Pearse and Lawrence v. Campbell (1850) 4 Drew. 485.—V.C., *followed*.
Minet v. Morgan (1873) L. R. 8 Ch. 361; 42 L. J. Ch. 627; 28 L. T. 573; 21 W. R. 467.

SELBORNE, L.C.—In **Bolton v. Liverpool Corporation**, Lord Cottenham, affirming a decision of the V.C., refused production of documents upon a statement much less complete than that in this case. The very argument which we have heard here to-day was urged, and is thus dealt with by Lord Cottenham.—“The plaintiff here does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title; they are the corporation's title, and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, ‘Prove me liable, if you can.’ The corporation have certain documents which they say prove his liability. He cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are.” The position of the parties was there reversed, and some of Lord Cottenham's expressions relate to that fact, but I apprehend that the principle is the same. However, I should be very sorry to be understood to mean that it would be safe for any one to content himself with saying what was said there, which was simply that the documents related to his own title. There can be no doubt that, according to the present practice of the Court, a party is expected to go further, and at least to say negatively that the documents do not prove or tend to prove the title of his adversary . . . **Bolton v. Liverpool Corporation** and **Hughes v. Biddulph** were supposed to have laid down a narrower rule, namely, that the communications must have been in anticipation of the particular litigation. But I cannot see that anything was there said tending to the establishment of the narrower rule, though reference was made to some earlier cases, supposed to be authorities for the doctrine that cases laid before counsel for their opinions must be produced, though the opinions might not be.

... Then followed *Walsingham (Lord) v. Goodrich*, and it is evident that the very learned and accurate judge, Sir J. Wigram, who decided it, felt himself embarrassed by the conflicting state of *dicta* and perhaps authority, which he found in existence, and, yielding to what he thought was the preponderance of authority, he limited the protection much more than he would have done if he had proceeded on what was his view of the sound principle. That case, therefore, without any disrespect to the learned judge who decided it, may well be regarded as one that will not bind, unless subsequent authorities are found equally to have failed to emancipate the Court from the supposed fetters of earlier *dicta*, or earlier cases. But in *Pearse v. Pearce* a great stride was made towards the emancipation of the Court from any limits inconsistent with the just extension and application of the principle. Knight Bruce, V.-C., in one of the ablest judgments of one of the ablest judges who ever sat in this Court, examined *Ridcliffe v. Furman* (*supra*, col. 877), and said that the notion that the H. L. had established any such principle of limitation was really ill-founded: and what is more important, he practically overruled the distinction by what he did in that case. It is said that in *Janney v. Dix* (col. 878), Wood, V.-C. did not go the whole length of *Pearse v. Pearce*. I confess I do not see any ground for supposing that he differed from anything that was said in *Pearse v. Pearce*. But there is a later authority by that most accurate and learned judge, Sir R. Kindersley—*Laurence v. Campbell*—which contains a statement of the V.-C.'s view of the principle and also of the rule which in 1859 had come to be well settled and established in this Court on the foundation of that principle. He says: "It is not now necessary, as it formerly was, for the purpose of obtaining production, that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity." I can only say that I entirely agree with the views both of the principle and of its proper extension taken in these later authorities.—pp. 365—367. MELLISH, L.J., concurred. *And see* cols. 882, 884, 885.

Combe v. London Corporation (*supra*, col. 877), *discussed*.

Att.-Gen. r. Emerson (1882) 52 L. J. Q. B. 67; 10 Q. B. D. 191; 48 L. T. 18; 81 W. R. 191.—C.A. BAGGALLAY, BRETT AND LINDLEY, L.JJ.

Combe v. London Corporation, *explained*.

Morris r. Edwards (1890) 60 L. J. Q. B. 292; 15 A. C. 309; 63 L. T. 26.—H.L. (E.). *See (supra)*, col. 853.

Warde v. Ward (1851) 20 L. J. Ch. 36; 1 Sim. (N.S.) 13.—V.-C. r. *reversed*, 21 L. J. Ch. 90; 3 Mac. & G. 365; 15 Jur. 759.—L.C.

Talbot v. Marshfield (1865) 2 Dr. & Sm. 549; 6 N. R. 288; 12 L. T. 761; 13 W. R. 885.—V.-C., *followed*. *And see* 11 Jur. (N.S.) 901; 13 L. T. 424.

Mason, in re, Mason r. Cattley (1883) 52 L. J. Ch. 478; 22 Ch. D. 609; 48 L. T. 631.—FRY, J.

Hunt v. Hewitt (1852) 21 L. J. Ex. 210; 7 Ex. 236; 16 Jur. 503.—POLLOCK, C.B. (for the Court), *followed*.

Chartered Bank of India, Australia and China

r. Rich (1863) 32 L. J. Q. B. 300; 4 B. & S. 73; 8 L. T. 454; 11 W. R. 830.—Q.B.

Chartered Bank of India, Australia and China v. Rich, *distinguished*.

Daniel v. Bond (1841) 9 C. B. (N.S.) 716; 3 L. T. 700; 9 W. R. 313.—C.P., *followed*.
Baker r. L. & S. W. Ry. (1867) 37 L. J. Q. B. 53; 13 L. R. 3 Q. B. 91; 8 B. & S. 645; 16 L. T. 126.—Q.B.

Chartered Bank of India, &c. v. Rich, *approved*.

Woolley r. North London Ry. (1869) 38 L. J. C. P. 317; 13 R. 4 C. P. 602; 20 L. T. 813; 17 W. R. 797.—C.P.

Woolley v. North London Ry. and Ross v. Gibbs (1869) 39 L. J. Ch. 61; 13 R. 8 Eq. 522.—V.-C., *approved*. *And see* cols. 881, 882.

Baker v. L. & S. W. Ry., *distinguished*.

Cossey r. L. B. & S. C. Ry. (1870) 13 R. 5 C. P. 146; 39 L. J. C. P. 174; 22 L. T. 19; 18 W. R. 493.

BOVILL, C.J.—Rebance is placed, on the part of the plaintiffs, on *Baker v. L. & S. W. Ry.*, where production of reports of a similar description was ordered. It is to be observed, however, that the point now made on behalf of the defendants was not raised there. The resistance to the production of the reports was not rested on the ground of impending litigation, but on the ground that "they were confidential communications made to the defendants by their agents or their servants in the course of their duty." A ground which this Court, in *Woolley v. North London Ry.*, held to be untenable. Independently of that, the case was one of a peculiar character. The injured person had settled his claim with the company, and afterwards died, in consequence, as was said, of the shock he had sustained, and the action was brought by his executors. The Court considered that the ground of privilege failed, and it is difficult to see what other course they could have adopted. Furthermore, we are informed by counsel that the accord and satisfaction there set up was resisted on the ground of fraud. If that be so, it makes the decision consistent with the other cases; because, fraud being alleged in the settlement with the deceased, the reports might be material to show what knowledge the company or their representatives had of the matters in question. I observe, too, that Cockburn, C.J., in his judgment, expressly states that he adheres to the decision in *Chartered Bank of India, &c. v. Rich*. Therefore, as the principle clearly laid down in that case confines the right to communications which are privileged on the ground that they have reference to impending or actual litigation, I think *Baker v. L. & S. W. Ry.* is distinguishable from the present case. There is nothing here to suggest that the reports in question were made otherwise than with a view to anticipated litigation.—p. 151.

M. SMITH and BRETT, JJ. to the same effect. They expressed approval of *Ross v. Gibbs*.

Woolley v. North London Ry., *followed*.

Fenner r. L. & S. E. Ry. (1872) 41 L. J. Q. B. 313; 13 L. R. 7 Q. B. 767; 26 L. T. 971; 20 W. R. 820.—Q.B.

Cossey v. L. B. & S. C. Ry., *followed*.

Wilson v. Northampton and Banbury Junction Ry. (1872) 13 R. 14 Eq. 477; 27 L. T. 507; 20 W. R. 938.—V.-C.

Cossey v. L. B. & S. C. Ry., followed.

Fenner v. L. & S. E. Ry., not followed.

Skinner v. G. N. Ry. (1874) 43 L. J. Ex. 150; 1 L. R. 9 Ex. 298; 32 L. T. 233; 23 W. R. 7.—EX.

Fenner v. L. & S. E. Ry., adhered to.

Malden v. G. N. Ry. (1871) L. R. 9 Ex. 300—EX. *And see post.*

Cossey v. L. B. & S. C. Ry. and Skinner v. G. N. Ry., followed.

Fenner v. L. & S. E. Ry., explained.

McCorquodale v. Bell (1876) 45 L. J. C. P. 320; 1 C. P. D. 471; 35 L. T. 261; 23 W. R. 399.

BRETT, J.—I think the plaintiffs ought not to be called upon to produce them [certain documents], because they were questions asked and answers given with a view of an anticipated litigation, and for the purpose of enabling the plaintiffs to guide themselves as to the mode of carrying on that litigation successfully. It seems to me that that is the rule which after a consideration of almost all the cases was so laid down by this Court in *Cossey v. L. B. & S. C. Ry.* and which was adopted by the Court of Ex. in *Skinner v. G. N. Ry.* and which seems also to be the rule which had been laid down in the Court of Ch. in *Rosa v. Gibbs* (*supra*, col. 880). It is said that *Fenner v. L. & S. E. Ry.* in the Court of Q. B. is at variance with those cases. Now, I should be very sorry if I thought that it was so, but considering the point which was taken in the argument of that case, and the mode in which that case was dealt with, I do not think that it is at all at variance with *Cossey v. L. B. & S. C. Ry.* and *Skinner v. G. N. Ry.* The point which seems to me to be really decided in *Fenner v. L. & S. E. Ry.*, is that which was expressed by Blackburn, J., who, in the course of his judgment, says: "I thought that the documents specified in the schedule were obviously relevant to the question in dispute, and therefore fell within the general rule, and that the only question was whether they fell within any exception." Now he states what he was forced to decide in that case: "Mr. Willis contended broadly that as they were answers to questions put by the defendants after litigation was impending, they were necessarily privileged, and if I had thought that there was any such general rule I should have refused to make the order." . . . Blackburn, J. goes on to say, "It occurred to me that there might be a distinction between the earlier documents and the later ones; for I thought it almost certain from the materials before me that the first letter from the manager in town to the local officer would be something to this effect: 'We have a complaint as to the delay in delivering cattle at your station, report to us the circumstances'; and I thought the report sent in answer to such an inquiry would not be privileged. But I thought it almost possible that some of the later letters might be something to this effect. 'It seems probable that if we resist this claim much will depend on the evidence of some particular person as to some particular fact; please to learn from him what his evidence will be, and communicate to us the result.'" There he puts a case of anticipated litigation, and of the question asked in order to guide the party whether he will resist it or not, and then he says, "And if such had been the fact, I should, in the exercise of the discretion which I think is vested in a judge, have refrained from ordering the inspection of the answer to that

letter without determining whether I had power to order it or not." That seems to me to be no departure from the rule laid down in *Cossey v. L. B. & S. C. Ry.* Moreover, in *Malden v. G. N. Ry.* (*supra*), Blackburn, J. says: "If it appears that there is a letter from the attorney in a cause to a man who may very probably be called as a witness at the trial, that letter being written after the litigation had commenced (which is the case with all these letters), it is not *prima facie* a privileged communication, unless you show some reason to the contrary." Quain, J. says "confidential communications are not necessarily privileged, but if they are made not only as confidential communications but with a view to or in contemplation of a litigation, they are privileged." That is the doctrine of *Cossey v. L. B. & S. C. Ry.*, and therefore, although Blackburn, J. afterwards, in his judgment in *Malden v. G. N. Ry.* says: "We adhere to the principles laid down in *Fenner v. L. & S. E. Ry.*," all I can say is, so also do I adhere to those principles, for as I understand *Fenner v. L. & S. E. Ry.* those principles do not differ from those established by *Cossey v. L. B. & S. C. Ry.* and *Skinner v. G. N. Ry.*—p. 351.

DENMAN and LINDLEY, JJ. to the same effect. *And see post*, col. 884.

Harvey v. Clayton (1675) 2 Swanst. 221, n; 19 R. R. 66, *followed*.

Jones v. Pugh (1812) 11 L. J. Ch. 323; 1 Ph. 96; 6 Jur. 616.—L.C. *reversing* 12 Sim. 470.—V.-C.

Manser v. Dix (*supra*, col. 877), *followed*.

Macfarlan v. Rolt (1872) 41 L. J. Ch. 649; 1 R. 14 Eq. 580; 27 L. T. 305; 20 W. R. 945.—WICKENS, V.-C.

Minet v. Morgan (*supra*, col. 878), *followed*.

And see col. 884.

Hastings (Corporation) v. Ivall (1878) 42 L. J. Ch. 883; L. R. 8 Ch. 1017; 21 W. R. 899.—C.A. JAMES and MELLISH, L.J.; *Turton v. Barber* (1874) 43 L. J. Ch. 468; L. R. 17 Eq. 329; 22 W. R. 438.—HALL, V.-C.; *Mostyn v. West Mostyn Coal & Co.* (1876) 34 L. T. 531.—C.P. *And see post*, col. 884.

Rosa v. Gibbs (*supra*, col. 880), *explained*.

Anderson v. Bank of British Columbia (1876) 2 Ch. D. 644; 45 L. J. Ch. 449; 35 L. T. 76; 24 W. R. 624.—C.A. JAMES and MELLISH, L.J.; and RAGGALLAT, J.A.; *affirming* JESSEL, M.R.

JAMES, L.J.—The old rule was that every document in the possession of a party must be produced if it was material or relevant to the cause, unless it was covered by some established privilege. It was established that communications that had passed directly or indirectly between a man and his solicitor were privileged, and the privilege extended no further. It is now contended that that rule was entirely altered by an expression of Stuart, V.-C. in *Rosa v. Gibbs*. I am quite sure that the V.-C. did not intend, by a mere casual and hasty generalisation not called for at all by the facts of the case, to depart from the whole tradition and course of this Court with respect to the production of documents. If the rule had been as was supposed to be laid down in that case, all that is said in text books by learned authors with regard to the origin of the principle, and with regard to the justification of the privilege—all

that is said about its being confined to lawyers and not extending to doctors and priests—all that has been said by learned judges in Chancery, in the particular circumstances of the cases that came before them, to show how they might be brought within that general principle—the whole of that would be, to my mind, puerile nonsense if there had been that law which is supposed to have been laid down, that any communication made by a person with a view to litigation, who ever the person is, must be protected. As to the cases at law, it is not necessary to go through them, as they seem to have been brought, apparently, now at least, very much into conformity with the cases in equity, and it is needless to go through them for the purpose of seeing whether in each of them, if the same state of circumstances came before the Court, the same decision would be arrived at. Looking at the *dicta* and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief. But that seems to me to have no application whatever to a communication between a principal and his agent in the matter of the agency, giving information of the facts and circumstances of the very transaction which is the subject-matter of the litigation. Such a communication is, above all others, the very thing which ought to be produced.—p. 656.

Anderson v. Bank of British Columbia (*supra*), *followed*.

Southwark and Vauxhall Water Co. v. Quick (1878) 47 L. J. Q. B. 258; 3 Q. B. D. 315; 38 L. T. 28; 26 W. R. 341.—C.A.

Wilson v. Northampton and Banbury Junction Ry. (1872) L. R. 14 Eq. 477; 27 L. T. 507; 20 W. R. 938.—V.C. commented on.

Wheeler v. Le Marchant (1881) 17 Ch. D. 675; 50 L. J. Ch. 798; 44 L. T. 632; 45 J. P. 728.—C.A. JESSEL, M.R., BRETT and COTTON, L.J.

BRETT, L.J.—The proposition had before us for approval is, that where one of the parties to an action has in his possession or control documents which passed between his solicitor and third parties, they are protected in his hands from inspection, on the ground that they were documents which passed between the solicitor and the third party for the purpose of enabling the solicitor to give legal advice to his client, although such information was obtained by the solicitor for that purpose at a time when there was no litigation pending between the parties, nor any litigation contemplated. It seems to me that that proposition cannot be acceded to. It is beyond any rule which has ever been laid down by the Court, and it seems to me that it is beyond the principles of the rules which have been laid down. The rule as to the non-production of communications between solicitor and client, is a rule which has been established upon grounds of general or public policy. It is confined entirely to communications which take place for the purpose of obtaining legal advice from professional persons. It is confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case. It was said, however, that there were two cases

which supported, although they were not absolute decisions in favour of the proposition. One was *Mostyn v. West Mostyn Coal and Iron Co.* (*supra*, col. 882), which, when looked at, gives no support at all to the present contention. The other case was *Wilson v. Northampton and Banbury Junction Ry.* I think that probably some documents were shut out from production in that case which were of such a character that, if the decision really intended to shut them out, it might give colour to the proposition contended for. But if that is so, then, with deference, I think that decision was wrong. There is no authority, and there is no principle which obliges us to extend the doctrine to the extent now contended for.—p. 683.

Anderson v. Bank of British Columbia and McCorquodale v. Bell (col. 881), *followed*.

Norden v. Defries (1882) 51 L. J. Q. B. 415; 8 Q. B. D. 508; 30 W. R. 612; 46 J. P. 566.—MATHEW and CAVE, JJ.

Wheeler v. Le Marchant (*supra*), *approved*.

Kennedy v. Lyell (1883) 23 Ch. D. 387; 48 L. T. 455; 31 W. R. 691.—C.A. BAGGALLAY and COTTON, L.J.: *affirmed*, *non*. Lyell v. Kennedy (1883) 53 L. J. Ch. 449; 9 App. Cas. 81; 50 L. T. 227; 32 W. R. 497.—ILL (E) LORDS BLACKBURN, WATSON and BRAMWELL. *See* judgments.

Bullock v. Corry (1878) 47 L. J. Q. B. 352; 3 Q. B. D. 556; 38 L. T. 102; 36 W. R. 330

—COCKBURN, C.J. and MELLOR, J., *followed*.

Wheeler v. Le Marchant, *approved*.

Pearce v. Foster (1885) 15 Q. B. D. 114; 54 L. J. Q. B. 432; 52 L. T. 886; 33 W. R. 919; 50 J. P. 4.—C.A.

BRETT, M.R.—The judgment of Cockburn, C.J. in *Bullock v. Corry*, lays down a most valuable principle on this subject. There the documents in question were being inquired about in a different action from that in relation to which they originally came into existence, and the L.C.J. said, "The privilege which attaches by the invariable practice of our Courts to communications between solicitor and client ought to be carefully preserved. In my opinion the rule is, once privileged always privileged. This will apply *a fortiori* where the succeeding action is substantially the same as that in which the documents were used." This is a clear intimation of opinion that, if a document is once so privileged, the fact that it is another action in which it is being inquired about will not destroy the privilege. It seems to me that the expressions used by Lord Lyndhurst, in *Holmes v. Baddeley* (*supra*, col. 877) really imply that he was of the same opinion. On principle I agree with the opinion so expressed.—p. 119.

BAGGALLAY, L.J.—The expressions used in *Wheeler v. Le Marchant* appear to me to indicate very correctly the limits of the professional privilege with regard to communications passing between solicitor and client.—p. 120.

BOWEN, L.J. to the same effect. *And see* col. 888.

Wheeler v. Le Marchant and Pearce v. Foster, *principle applied*.

Proctor v. Smiles (1886) 55 L. J. Q. B. 467.—FIELD and WILLS, JJ.; *affirmed*, C.A.

Proctor v. Smiles, *distinguished*.

Proctor v. Wolff (1886) 8 Times L. R. 229.—MANISTY and GRANTHAM, JJ.

Minet v. Morgan (*supra*, col. 882), *applied*.

Wheeler v. Le Marchant, *commented on*.

Lowden v. Blakey (1889) 58 L. J. Q. B. 617; 23 Q. B. D. 332; 61 L. T. 251; 38 W. R. 64. 54 J. P. 41.—DENMAN, J.

Anderson v. Bank of British Columbia (*supra*), and **Wheeler v. Le Marchant**, *discussed*.

Leahey v. Halifax Joint Stock Banking Co (1893) 62 L. J. Ch. 509; [1893] 1 Ch. 686. 3 R. 252, 58 L. T. 158; 41 W. R. 344.—STIRLING, J.

Minet v. Morgan (*supra*), *followed*.

Wheeler v. Le Marchant, *explained*.

Lloyd v. Mostyn (1842) 12 L. J. Ex. 1; 10 M. & W. 478; 2 D. (N.S.) 476; 6 Jur. 974.—EX., *followed*.
Calcraft v. Guest (1898) 67 L. J. Q. B. 505; [1898] 1 Q. B. 759; 78 L. T. 283; 46 W. R. 420.—C.A.

LINDLEY, M.R.—I take it that, as a general rule, one may say that a document once privileged is always privileged. I do not mean to say that privilege cannot be waived, but the mere fact that documents are held, and have not been destroyed, does not amount to a waiver of the privilege. I think, therefore, that, speaking generally, the case comes within *Minet v. Morgan*. It was said that *Wheeler v. Le Marchant* is contrary to this view. I do not think so. It seems to me that that case has been a little misunderstood. I think that the decision there was perfectly right. An attempt was made to extend the doctrine of privilege to documents which were not covered by it upon any proper understanding of the doctrine. I think that will be seen from Cotton, L.J.'s judgment in that case and the form of order that he suggested. No doubt *Wheeler v. Le Marchant* has given rise to a little controversy, and Cotton, L.J., has referred to it in *Kennedy v. Lyell* (*supra*, col. 884), where he says, what is plain enough when the case is studied, "All that was decided was that communications between the solicitors and the survivor of the client before any litigation was contemplated, were not protected." The case was again referred to in *Lowden v. Blakey* (*supra*, col. 884), before Denman and Charles, J.J., and it was again pointed out that there was nothing in *Wheeler v. Le Marchant* inconsistent with the decision in *Minet v. Morgan*, nor is there. The case was again very carefully examined into by Stirling, J., in *Leahey v. Halifax Joint Stock Banking Co*, explained and he came to the conclusion, which is inevitable to any one who studies the two cases, that *Wheeler v. Le Marchant* was right and that *Minet v. Morgan* was right too. That is to say, they do not conflict. Therefore, so far, *Minet v. Morgan* may be prayed in aid as protecting these privileged documents.—p. 506. RIGBY and V. WILLIAMS, J.J., concurred.

Wheeler v. Le Marchant, *explained*.

Bullivant v. Att.-Gen. for Victoria (1901) 70 L. J. K. B. 645; [1901] A. C. 196; 84 L. T. 737; H. L. (2); *reversing* S. C. *nom. Reg. v. Bullivant* (1900) 69 L. J. Q. B. 657; [1900] 2 Q. B. 163; 82 L. T. 493.—C.A. See *post*, col. 888.

Bramwell v. Lucas (1824) 2 B. & C. 745; 2 L. J. (O.S.) K. B. 161; 4 D. & R. 367.—K.N., *discussed*.

Greenough v. Gaskell (1833) 1 Myl. & K. 98;

Coop. v. Brough, 96.—L.C. See judgment, where the earlier cases are discussed.

Bramwell v. Lucas and **Spenceley v. Schulerburgh** (1806) 7 East 357; 3 Smith 325.—K.B., *followed*.

Sawyer v. Birchmore (1835) 3 Myl. & K. 572.—M.R.

Sawyer v. Birchmore, *explained*.

Greenough v. Gaskell, *discussed*.

Deshborough v. Rawlins (1858) 7 L. J. Ch. 171; 3 Myl. & Cr. 515; 2 Jur. 125.—L.C.

Greenough v. Gaskell, *not followed*.

Gore v. Harris (1851) 21 L. J. Ch. 10. 15 Jur. 1168; S. C. *nom. Gore v. Bowser*, 5 De G. & Sm. 80.—V.C., *explained*.
Ford v. Tennant (1863) 32 L. J. Ch. 465; 32 Beav. 162; 9 Jur. (N.S.) 292; 1 N. R. 308; 7 L. T. 732; 11 W. R. 324.—M.R.

Greenough v. Gaskell, *discussed*.

Answoth v. Wilding (1900) 69 L. J. Ch. 695; [1900] 2 Ch. 315; 48 W. R. 539.—STIRLING, J.

Bustros v. White (1876) 45 L. J. Q. B. 642; 1 Q. B. D. 423; 34 L. T. 835; 24 W. R. 721.—C.A.; and *Pacey v. London Tramways Co.* (1876) 2 Ex. D. 440, n.—C.A., *followed*.

Friend v. L. C. & D. Ry (1877) 46 L. J. Ex. 696; 2 Ex. D. 437; 36 L. T. 729; 25 W. R. 735.—C.A. COCKBURN, C.J., BRAMWELL and BRETT, L.J.J.

Bustros v. White, *distinguished*.

Johnson v. Smith (1877) 36 L. T. 741; 25 W. R. 539.—KELLY, C.B. and HAWKINS, J.

Bustros v. White and *Friend v. L. C. & D. Ry*, *distinguished*.

Southwark and Vauxhall Water Co. v. Quick (1878) 47 L. J. Q. B. 258; 3 Q. B. D. 315; 38 L. T. 28; 26 W. R. 341.—C.A. BRAMWELL, BRETT and COTTON, L.J.J.

Southwark and Vauxhall Water Co. v. Quick, *followed*.

The Theodor Korner (1878) 47 L. J. P. 85; 3 P. D. 162; 38 L. T. 818; 27 W. R. 307.—STR R. PHILLIMORE.

Bustros v. White, *referred to*.

Webb v. East (1880) 49 L. J. Ex. 250; 5 Ex. D. 108; 41 L. T. 715; 28 W. R. 336; 41 J. P. 200.—C.A. JESSEL, M.R., BAGGALLAY and COTTON, L.J.J. And see *post*, col. 887.

Southwark, &c. Water Co. v. Quick, *followed*.

Novlon v. Defries (1882) 51 L. J. Q. B. 415; 8 Q. B. D. 508; 30 W. R. 612; 46 J. P. 566.—MATHEW and CAVE, J.J. And see col. 887.

Bustros v. White, *principle applied*, *Holloway*,

In re, Young v. Holloway (1887) 56 L. J. P. 81; 12 P. D. 167; 57 L. T. 515.—C.A. COTTON, LINDLEY and BOWEN, L.J.J.; McLean Bros. v. Jones (1892) 66 L. T. 653.—LAWRENCE and WRIGHT, J.J.

Hennessy v. Wright (No. 2) (1888) 57 L. J.

Q. B. 594; 24 Q. B. D. 445 n.; 36 W. R. 879.

4 Times L. R. 662.—C.A. *ESHER, M.R., LINDLEY and LOPES, L.J.s., followed.*

Bustros v. White (*supra*), *considered*.
Hope v. Brash [1897] 2 Q. B. 188; 66 L. J. Q. B. 653; 76 L. T. 823; 45 W. R. 659.—C.A. *ESHER, M.R.*—Therefore in that case [*Hennessey v. Wright*] the C. A. recognised the existence of a general rule that inspection of such a document [an original manuscript contribution] should not be given to the plaintiff in an action of libel.—p. 191.

A. L. SMITH, L.J.—That case [*Bustros v. White*] was decided, not upon the rule now in question, but upon Ord. XXXI. r. 11 of the old rules, which corresponds to Ord. XXVI. r. 14 of present rules. But since that decision additions have been made to rr. 12 and 18 of Ord. XXXI. for the express purpose of making it not compulsory on the Court to order discovery or inspection if the Court does not think it necessary. Therefore, as the matter now stands, I am of opinion that it is not obligatory to order inspection.—p. 192.

HIGHY, L.J.—All that was decided there [*Bustros v. White*] was that, where a document is plainly relevant, it must, in the absence of privilege, be produced.—p. 193

Hope v. Brash, not applied.
Webb v. East (*supra*, col. 886), *discussed*.
Kelly v. Colbourn [1899] 2 Ir. R. 199.—MURPHY and KELLY, JJ.

Hennessey v. Wright (No. 2) (*supra*), *distinguished*.
Elliott v. Garrett (1902) 71 L. J. K. R. 415; [1902] 1 K. B. 870.—C.A. (*supra*, col. 871).

Nicholl v. Jones (1865) 2 H. & M. 588; 5 N. R. 61; 13 W. R. 451.—V.-C.; and **Rawstone (or Rawstorne) v. Preston Corporation** (1885) 54 L. J. Ch. 1402; 30 Ch. D. 116; 52 L. T. 922; 33 W. R. 795.—KAY, J., *followed*.

Norden v. Defries (*supra*), *observed on*.
Worswick, In re, Robson v. Worswick (1887) 38 Ch. D. 370; 58 L. J. Ch. 31; 59 L. T. 839; 36 W. R. 625.

NORTH, J.—I do not think the learned judges [in *Norden v. Defries*] intended to depart from the view taken by the V.-C. in the previous case; and neither the arguments nor the judgment deal with the real question, whether a record of what is taken in open Court can be privileged at all: and there is nothing in that case which ought to prevent me from following the earlier case of *Nicholl v. Jones* and the late case of *Rawstone v. Preston Corporation*.—p. 372. *And see post*.

North Australian Territory Co. v. Goldsbrough (1898) 62 L. J. Ch. 603; [1898] 2 Ch. 381; 2 R. 397; 69 L. T. 4; 41 W. R. 501.—C.A. *ESHER, M.R., LINDLEY and BOWEN, L.J.s., applied*.

The Palermo (1883) 53 L. J. P. 6; 9 P. D. 6; 49 L. T. 551; 32 W. R. 403; 5 Asp. M. C. 165.—BUTT, J.; *affirmed*. C.A. *BRETT, M.R., BAGGALLAY and BOWEN, L.J.s., distinguished*.
Goldstone v. Williams Deacon & Co. (1898) 68 L. J. Ch. 21; [1899] 1 Ch. 47; 79 L. T. 373; 47 W. R. 91.

STIRLING, J.—It must be taken that the accounts were in the first instance privileged, for they were prepared at the instance of the

plaintiffs' professional advisers with a view to a former litigation, after that litigation had commenced. That alone would be sufficient to confer privilege, even if they had not been prepared also with a view to the present litigation. On this, *Walsham v. Stanton* (*supra*, col. 884) is a direct authority. It has also been held that, as a general rule, a document once privileged is always privileged.—*Bullock v. Corry* (*supra*, col. 884). *Pearce v. Foster* (*supra*, col. 884), and the very recent case of *Culcroft v. Gued* (*supra*, col. 885) . . . These decisions appear to be based on the necessity of allowing full and free communication for the purposes of litigation not only between a solicitor and his client, but between the solicitor and persons whose assistance he requires or with whom he communicates in order to enable him properly to conduct the litigation. But there is another line of decisions under which it is sought to bring the present case. It has been decided that notes of proceedings in open Court—*Nicholl v. Jones* and *Worswick, In re, Robson v. Worswick*—or before an arbitration—*Rawstone v. Preston Corporation*—are as a rule not privileged, but must be produced. These decisions proceed on the ground, as I understand them, that the administration of justice in this country is a matter of public interest and to be conducted (again as a general rule) in public, and consequently that there can be nothing privileged or confidential which passes in open Court. . . . The depositions have been filed in the usual way. They seem to me to have become *publici juris* within the meaning of the decisions in *Nicholl v. Jones* and the cases which followed it, and to be liable to production accordingly. Some reliance was placed on *The Palermo*, but there the depositions of which copies were sought were not *publici juris*.—p. 26.

Follett v. Jefferyes (1850) 20 L. J. Ch. 65; 1 Sim. (N.S.) 3; 15 Jur. 118.—V.-C.; **Russell v. Jackson** (1851) 9 Hare 387.—V.-C.; and **Gartside v. Outram** (1856) 26 L. J. Ch. 113; 3 Jur. (N.S.) 39; 5 W. R. 35.—V.-C., *approved*.

Reg. v. Cox and Railton (1884) 54 L. J. M. C. 41; 14 Q. B. D. 153; 52 L. T. 25; 33 W. R. 396.—C.C.T. GROVE, J. (for the Court). *See judgment*.

Follett v. Jefferyes and Russell v. Jackson, *applied*.

Postlethwaite, In re, Rickman, In re, Postlethwaite v. Rickman (1887) 56 L. J. Ch. 1077; 35 Ch. D. 722; 56 L. T. 733; 36 W. R. 563.—NORTH, J.

Reg. v. Cox and Railton, *considered*.
Williams v. Quebrada Ry. Land and Copper Co. (1895) 65 L. J. Ch. 68; [1895] 2 Ch. 751; 73 L. T. 397; 44 W. R. 76.—KEKEWICH, J.

Worswick, In re, Robson v. Worswick (*supra*, col. 887); and **Reg. v. Cox and Railton**, *discussed and applied*.
Ainsworth v. Wilding (1900) 69 L. J. Ch. 695; [1900] 2 Ch. 315; 48 W. R. 532.—STIRLING, J.

Simms v. Registrar of Probates (1900) 69 L. J. P. C. 51; [1900] A. C. 323; 82 L. T. 433.—P.C. HALSBURY, L.C., LORDS HOBHOUSE, MACNAGHTEN, MORRIS, DAVEY and ROBERTSON; and **Russell v. Jackson** (*supra*), *explained*.

Bulivant v. Atk.-Gen. for Victoria (1901) 70

L. J. K. B. 645; [1901] A. C. 196; 84 L. T. 737.—H.L. (E.); *reversing* 8 C. nom. Reg. v. Bullivant (1900) 69 L. J. Q. B. 657; [1900] 2 Q. B. 163; 82 L. T. 493.—C.A. COLLINS and ROMER, L.Js.

HALSBRURY, L.C.—In the parallel, but not exactly similar, case in the P. C. where the word "oath" was used, the P. C. held (I myself was a party to that judgment) that it must be understood that where it was intended to be an allegation that a fraud had been committed you must allege it and prove it, and that it was no fraud for a man to make a voluntary conveyance of his estates, not having any secret trust, and not having any arrangement whereby the deed could say one thing and the voluntary arrangement mean another; that the fact that he did intend to make a gift during his lifetime was no offence and no breach of the Act of Parliament, and nothing that could be considered tainted with the character of fraud.—*Simms v. Registrar of Probates*. That being so, it appears to me that it would be an abandonment of the principle which has been held sacred in this country if, when a person has done that which in itself may be innocent, you should simply, because you choose to suggest that it was done with the view of evading the payment of a tax, require the witness to disclose the whole of his affairs, and enable the private communications between himself and his solicitor to be displayed to the Court.—p. 648.

LORDS SHAND and DAVEY to the same effect. LORD BRAMPTON concurred.

LORD LINDLEY.—It is said that, the testator being dead, the privilege is gone. I am satisfied that that answer is insufficient. It struck one at once as curious. I never heard it stated before; but it does appear that in *Russell v. Jackson* it was considered, and in the judgment of Turner, V.-C. there are some passages which have been invoked in favour of that being a good answer; but they are easily explainable when one comes to look at them. The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be weighed, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone—it remains. In the case before Turner, V.-C., for the reasons which were given by counsel for the respondent, and which are apparent in the judgment, the privilege could not be set up. One person was trying to set it up against the other, both claiming under the testator, and the V.-C. held that it could not be set up.—p. 650.

Chichester v. Donegal (Marquis), 18 W. R. 427.—V.-C. *reversed*, (1870) 39 L. J. Ch. 694; L. R. 5 Ch. 497; 22 L. T. 458; 18 W. R. 531.—GIFFARD, L.J.

Dickson v. Wilton (Lord) (1859) 1 F. & F. 419.—CAMPBELL, C.J., *distinguished*.

Beatson v. Skene (1850) 29 L. J. Ex. 430; 5 H. & N. 588; 6 Jur. (N.S.) 780; 2 L. T. 378; 8 W. R. 544.—EX.; MARTIN, D. *dissenting*.

POLLOCK, C.B.—If the head of the department does not attend personally to say that the production of the document will be injurious, but sends the document to be produced or not as the judge may think proper, or as was the case in *Dickson v. Wilton (Lord)*, before Lord Camp-

bell, where a subordinate was sent with the document, with instructions to object, but nothing more; then, indeed, the case may be different, and the judge may compel the production of it.—p. 437.

Dickson v. Wilton (Lord), *referred to*. Dawkins v. Paulet (Lord) (1809) 39 L. J. Q. B. 53; L. R. 5 Q. B. 94; 21 L. T. 584; 18 W. R. 336.—Q.B.

Beatson v. Skene, *followed*. H.M.S. Bellerophon (1875) 44 L. J. Adm. 5; 31 L. T. 756; 23 W. R. 248.—SIR R. PHILLIMORE.

[Followed both in deciding that a state paper was a privileged communication, and that the question whether its production would be injurious to the public service or not must be determined not by the judge, but by the head of the department having custody of the paper.]

Home v. Bentinck (Lord) (1820) 2 Br. & B. 130; 8 Price 225; 22 R. R. 748.—DALLAS, C.J., *applied*.

M'Elveney v. Connellan (1864) 17 Ir. C. L. R. 55.—PIGOT, C.B., FITZGERALD and DEASY, BB.

M'Elveney v. Connellan and Anderson v. Hamilton (1816) 2 Br. & B. 136, n.; 8 Price 241, n.—ELLENBOROUGH, C.J., *approved*.

Stace v. Griffith (1869) 6 Moore P. C. (N.S.) 18; L. R. 2 P. C. 420; 20 L. T. 197.—P.C.

Home v. Bentinck (Lord), *discussed and applied*.

Dickson v. Wilton (Lord), *commented on*. Dawkins v. Rokeby (Lord) (1873) 42 L. J. Q. B. 63; L. R. 8 Q. B. 255.—EX. CH.; *affirmed*, (1875) 45 L. J. Q. B. 8; L. R. 7 H. L. 744; 33 L. T. 196; 23 W. R. 931.—H.L. (E.). CAIRNS, L.C., LORDS CHELMSFORD, HATHERLEY, PENZANCE, O'HAGAN and SELBORNE.

Smith v. East India Co. (1841) 11 L. J. Ch. 71; 1 Ph. 50.—L.C.; and *Home v. Bentinck*, *discussed*.

Beatson v. Skene; *Coorg (Rajah) v. East India Co.* (1856) 25 L. J. Ch. 345; 8 De G. M. & G. 182; 2 Jur. (N.S.) 407; 4 W. R. 421.—L.Js.; and *Anderson v. Hamilton*, *applied*.

M'Elveney v. Connellan; *Stace v. Griffith*; *Dickson v. Wilton (Lord)*; *Kain v. Farrer* (1877) 37 L. T. 469.—GROVE and LINDLEY, J.J., and H.M.S. Bellerophon, *referred to*.

Hennessy v. Wright (No. 1) (1888) 57 L. J. Q. B. 530; 21 Q. B. D. 509; 59 L. T. 323; 53 J. P. 52; 4 Times L. R. 597.—FIELD and WILLS, JJ.

Hennessy v. Wright (No. 1), *followed*. Ford v. Brest (1890) 6 Times L. R. 295.—HULLSTON, B. and GRANTHAM, J.

Anderson v. Hamilton and Home v. Bentinck (Lord), *considered*.

Chatterton v. Secretary of State for India (1895) 64 L. J. Q. B. 676; [1895] 2 Q. B. 189; 14 R. 504; 72 L. T. 858; 59 J. P. 596.—C.A. ESHER, M.R., KAY and SMITH, L.Js.

H.M.S. Bellerophon, and *Hennessy v. Wright* (No. 1), *followed*.

Kain v. Farrer, *explained*. Joseph Hargreaves, Ltd., In re (1900) 69 L. J.

Ch. 183; [1900] 1 Ch. 347; 82 L. T. 132; 48 W. R. 241; 7 Manson 354.—WRIGHT, J., *affirmed*, C.A. LINDLEY, M.R., v. WILLIAMS and ROMER, L.JJ.

V. WILLIAMS, L.J.—There [*Kinn v. Farver*] the Board of Trade put forward the defendant, the secretary of the Board, as the person to represent the Board, and service of the writ had been accepted by the secretary of the Board as representing the Board, and in course of that litigation the production of documents in the ordinary form of discovery was asked for. It is quite plain that the rules which would guide the Court as to what affidavit of documents was necessary from a party to the action representing a department of the State are entirely different from the rules which would be applied in a case where the officer of a department was merely subpoenaed as a witness. The officer of the department is merely the custodian of the documents as the servant of the department, and the department here [Income Tax Commissioners] have not put forward their servant as representing the department.—p. 186.

DISTRESS.

PERSONS DISTRAINING.

Coope v. Johns (1886) 55 L. J. Q. B. 475; 17 Q. B. D. 714; 55 L. T. 290; 35 W. R. 47; 51 J. P. 21.—GROVE and GRANTHAM, JJ., *overruled*.

Phillips v. Rees (1889) 59 L. J. Q. B. 1; 24 Q. B. D. 17; 38 W. R. 53; 61 L. T. 713; 54 J. P. 293.—C.A. ESHER, M.R. LINDLEY and LOPES, L.JJ. Held that in distress for rent under the Agricultural Holdings Act, 1883, the bailiff and not the landlord is entitled to the percentage for levying distress authorised by schedule 2 of the Act.

LORD ESHER, M.R. observed, "The same point that is now raised was before a Divisional Court in 1886, in *Coope v. Johns*, and it was then decided in favour of the landlord. . . . If I had had to decide the point in an appeal in *Coope v. Johns*, I could not have agreed with the decision of the Divisional Court."

Turner v. Lee (1637) Cro. Car. 471, *held overruled*.

Hool v. Bell (1696—1697) 1 Ld. Raym. 172, *approved*.

Prescott v. Boucher (1832) 3 B. & Ad. 849.

Leigh v. Shepherd (1821) 2 Br. & B. 465; 5 Moore 297; 23 R. B. 516.—C.P., *applied*. Hogarth v. Jennings (1892) 61 L. J. Q. B. 601; [1892] 1 Q. B. 907; 66 L. T. 821; 40 W. R. 517; 56 J. P. 485.—C.A. FRY and LOPES, L.JJ.

FOR WHAT RENTS.

Williams v. Cadbury (1867) L. R. 2 C. P. 453; 36 L. J. C. P. 233; 16 L. T. 354, 15 W. R. 905, *approved*. Selby v. Greaves (1868) 37 L. J. C. P. 251; L. R. 3 C. P. 394; 19 L. T. 186; 16 W. R. 1127.—C.P.

Selby v. Greaves, *followed*. Marshall v. Schofield (1882) 52 L. J. Q. B. 58; 47 L. T. 406; 31 W. R. 134.—C.A. BAGGALLAY, BRETT and LINDLEY, L.JJ.

WHAT DISTRAINABLE.

Croser v. Tomlinson (1759) Barnes 172, *questioned*.

Williams v. Holmes (1853) 22 L. J. Ex. 283; 8 Ex. 861; 1 W. R. 391.

POLLOCK, C.B.—If that case were *res nova*, I think it would be decided differently. . . . much different law is to be found in Barnes's Notes.—p. 284.

ALDERSON, B.—That case involves much inconsistency.—p. 285.

Francis v. Wyatt (1764) 3 Burr. 1198; 1 W. Black. 483, *commented on*.

Brown v. Shevil (1834) 4 N. & M. 277; 2 A. & E. 138; 4 L. J. K. B. 50.

Parsons v. Gingell (1847) 4 C. B. 545; 16 L. J. C. P. 227; 11 Jar. 437, *not followed*.

Swire v. Leach (1865) 18 C. B. (N.S.) 479; 34 L. J. C. P. 150; 11 Jar. (N.S.) 179; 11 L. T. 980; 13 W. R. 385, *followed*.

Miles v. Farber (1873) 21 W. R. 262; L. R. 8 Q. B. 77; 42 L. J. Q. B. 41; 27 L. T. 736.

COCKBURN, C.J.—I cannot reconcile the decision in *Parsons v. Gingell* with that in *Swire v. Leach*. I prefer, however, to follow the latter, and the present case clearly falls within it.

Peacock v. Purvis (1820) 2 Br. & B. 262; 5 Moore 79; 23 R. B. 465.—C.P., *applied*.

Foulgar (or Foulger) v. Taylor (1860) 29 L. J. Ex. 154; 5 H. & N. 202; 8 W. R. 279.

WHEN TO BE MADE.

Nuttall v. Staunton (1825) 4 B. & C. 51; 6 D. & R. 155; 3 L. J. (O.S.) K. B. 135; 28 R. R. 207, *distinguished*.

Wilkinson v. Peel (1895) 64 L. J. Q. B. 178; [1895] 1 Q. B. 516; 15 R. 213; 72 L. T. 151; 43 W. R. 302.—LAWRANCE and KENNEDY, JJ.

HOW TO BE MADE.

Regan v. Shilcock (1851) 7 Ex. 72; 21 L. J. Ex. 65, *commented on*.

Sandon v. Jervis (1850) E. B. & E. 935, 942; 28 L. J. Ex. 156; 5 Jur. (N.S.) 860; 7 W. R. 290.—EX. CH., *distinguished*.

Nash v. Lucas (1867) 8 B. & S. 531; L. R. 2 Q. B. 590.

COCKBURN, C.J.—The later cases lay down that a door which is only fastened by a latch or other like fastening may be opened. I think that is going a long way, and I am not surprised that the Courts in America have not gone so far as the Court of Exchequer. (His lordship had cited *Curtis v. Hubbard* (1 Hill N. Y. 336) as opposed to *Regan v. Shilcock*.) In former times a landlord could not for the purpose of distressing open an outer door. In *Regan v. Shilcock*, by which we are bound, it was held that he may open a door which is closed but not fastened. I presume that rests on the implied licence to any person who has lawful business with the occupier to enter the house in that way. But that is an exceptional case standing on its own ground which does not apply to a window.—p. 554.

MELLOR, J.—With reference to the point that the distress was lawful because the entry of the broker was through the door, I observe that in *Sandon v. Jervis*, Hill, J. said, "I think that the

officer touching the plaintiff through the pane, had as much right to make the arrest through the pane as he would have had to go at once into the house and make the arrest if the door had been left open by the owner, or even broken by third parties and then left open." But there he was dealing with the facts of that case, and the finding of the jury. There the officer had nothing to do with the breaking of the pane; he simply availed himself of the broken pane, and therefore the arrest was valid. Here the defendant had suggested the opening of the window, and we may reasonably infer that it was for the purpose of taking advantage of it for effecting the distress. That circumstance distinguishes the present from *Standon v. Jervis*, and makes the distress not lawful.—p. 535.

Eldridge v. Stacey (1863) 15 C. B. (N.S.) 458; 10 Jur. (N.S.) 517; 9 L. T. 291; 12 W. R. 51, *approved*.

Scott v. Buckley (1867) 16 L. T. 573.—C.P. *overruled*.

Long v. Clarke (1893) 63 L. J. Q. B. 108; [1894] 1 Q. B. 119; 9 L. R. 60; 69 L. T. 654; 42 W. R. 130; 58 J. P. 150.—C.A. *ESHER, M.R., LOPES and KAY, L.JJ.*

LORD ESHER, M.R.—The question, then, is what limitation has the law imposed upon the right of the landlord to go into a house and distrain? . . . If a building is within a curtilage, it has been held that, though the landlord gets into the curtilage without breaking anything, he cannot go into the house if, to do so, he has to break anything. That shows that the fact of the landlord being within a curtilage does not affect the case so far as regards the house; and that within this law, the curtilage is no part of the house. Therefore it is not true to say in this case that the landlord's bailiff could not go into the house to distrain because he first climbed over the wall of the curtilage. But even supposing that the curtilage is part of the house, the bailiff did not break into the curtilage. He did not break open any door or anything else; he merely got over the wall. I can see no difference between that and getting over the wall of the house into the window, or placing a ladder from outside the yard wall against the house, and thus getting in at an open window. In my opinion the decision in *Eldridge v. Stacey* was perfectly right. . . . It is impossible to think that Byles, J., in *Scott v. Buckley* (16 L. T. 573), decided contrary to *Eldridge v. Stacey*, and therefore some fact must have been omitted from the report of that case which would account for the decision.

WHAT AMOUNTS TO.

Wood v. Nunn (1828) 5 Bing. 10; 2 M. & P. 27; 6 L. J. (O.S.) C. P. 198; 30 R. R. 328, *approved*.

Cramer v. Mott (1870) 39 L. J. Q. B. 172; L. R. 5 Q. B. 357; 22 L. T. 857; 18 W. R. 947.—Q.B.

NOTICE OF.

Wakeman v. Lindsey (1850) 19 L. J. Q. B. 166; 14 Q. B. 625; 15 Jur. 79, *distinguished*.

Kerby v. Harding (1851) 6 Ex. 284; 20 L. J. Ex. 163; 15 Jur. 953.—**PARKER, B.** (for the Court).

TENDER OF RENT.

Thomas v. Harries (1840) 1 Man. & G. 695; 9 L. J. C. P. 308; 1 Scott (N.S.) 524; 4 Jur. 723. **Ladd v. Thomas** (1840) 12 A. & E. 117; 9 L. J. Q. B. 345; 4 P. & D. 9; 4 Jur. 798; and **Ellis v. Taylor** (1841) 8 M. & W. 415; 10 L. J. Ex. 462, *overruled*.

Johnson v. Upham (1859) 28 L. J. Q. B. 252; 2 El. & El. 250; 5 Jur. (N.S.) 681.

WIGHTMAN, J.—The case relied upon by the defendants was that of *Ellis v. Taylor*, in which the Court held upon the authority of two previous cases that a tender after impounding a distress for rent was too late. The two cases were *Thomas v. Harries*, in which Maule, J. differed from the other judges, and *Ladd v. Thomas*. Undoubtedly those cases are authorities upon the point; but notwithstanding these decisions the judges of this Court who have heard the argument were unanimously of opinion that upon the equity of the statute of William and Mary before referred to, an action is maintainable for selling goods distrained for rent after tender of the rent and expenses, though the tender be made after the impounding.—p. 257.

Thomas v. Harries, distinguished.

Brown v. Powell (1827) 4 Bing. 230; 12 Moore 454; 5 L. J. (O.S.) C. P. 159.—C.P., *dicta applied*.

Green v. Duckett (1883) 52 L. J. Q. B. 433; 11 Q. B. D. 275; 48 L. T. 477; 31 W. R. 607; 47 J. P. 487.—**DENMAN and HAWKINS, JJ.**

Smith v. Goodwin (1833) 2 L. J. K. B. 192; 4 B. & Ad. 413; 1 N. & M. 371; 2 N. & M. 114, *dictum disapproved*.

Boulton v. Reynolds (1859) 29 L. J. Q. B. 11; 2 El. & El. 369; 6 Jur. (N.S.) 46; 1 L. T. 166; 8 W. R. 62.—Q.B.

HILL, J.—In the report in *Neville & Manning*, it is said: "By the Court—It is clear that the tender to the landlord was a good tender"; and it is added, at the end of a short judgment, "the tender to Nash" [the man in possession] "was rendered invalid by the refusal to pay, unless a receipt was given." This *dictum* was wholly unnecessary and beside the question, as the Court had held the other tender good.—p. 13.

Glynn (or Glyn) v. Thomas (1856) 11 Ex. 870; 25 L. J. Ex. 125; 2 Jur. (N.S.) 378; 4 W. R. 363.—EX. CH., *observed upon*.

Loring v. Warburton (1858) El. Bl. & El. 507; 28 L. J. Q. B. 31; 4 Jur. (N.S.) 634; 6 W. R. 602.—Q.B.

CHROMPTON, J.—I should be sorry to go beyond that case: it goes quite far enough.—p. 508.

Glynn (or Glyn) v. Thomas, explained and applied.

Fell v. Whitaker (1871) 41 L. J. Q. B. 78; L. R. 7 Q. B. 120; 25 L. T. 880; 20 W. R. 317.

—**BAIL COURT**; and see *French v. Phillips* (1836) 26 L. J. Ex. 82; 1 H. & N. 564; 2 Jur. (N.S.) 1169; 5 W. R. 114.—EX. CH.

ABANDONMENT AND RETAKING.

Bannister v. Hyde (1860) 2 El. & El. 627; 29 L. J. Q. B. 141; 6 Jur. (N.S.) 171; 1 L. T. 438, *applied*.

Bagshawes v. Deacon (1898) 67 L. J. Q. B.

658; [1898] 2 Q. B. 173; 78 L. T. 776; 46 W. R. 618.—C.A. SMITH and COLLINS, *L.J.J.*, distinguished.

Jones v. Beilstein (1899) 68 L. J. Q. B. 267; [1899] 1 Q. B. 470; 80 L. T. 157; 47 W. R. 239.—LAWRANCE and CHANNELL, *J.J.*; *affirmed*. (1899) 69 L. J. Q. B. 1; [1900] 1 Q. B. 100; 81 L. T. 553; 48 W. R. 232.—C.A. SMITH, COLLINS and WILLIAMS, *L.J.J.*

HOW GOODS DISPOSED OF.

Wallace v. King (1788) 1 H. Bl. 13, *overruled*.

Robinson v. Waddington (1849) 13 Q. B. 753; 18 L. J. Q. B. 250; 13 Jur. 337.—Q.B.

[*Wallace v. King*, as to mode for the computation of the five days for sale of goods distrained, is overruled by *Robinson v. Waddington*.]

Jones v. Hamp, *not reported*.

Frusher v. Lee (1842) 10 M. & W. 709; 12 L. J. Ex. 321; and *Ridgway v. Stafford* (Lord) (1851) 6 Ex. 404, 20 L. J. Ex. 226, *followed*.

Wilmot v. Rose (1854) 2 C. L. R. 677; 3 El. & Bl. 563; 23 L. J. Q. B. 281; 18 Jur. 518; 2 W. R. 378, *distinguished*.

Abbey v. Petch (1841) 8 M. & W. 419; 10 L. J. Ex. 455, *held overruled*.

Hawkins v. Walrond (1876) 24 W. R. 824; 45 L. J. C. P. 772; 1 C. P. D. 280, 35 L. T. 210.—C.P.D.

LORD COLERIDGE, C.J.—It is reasonable to confine the statute (56 Geo. 3, c. 50, s. 11) to purchasers from the tenant. And there is authority for this construction. The case of *Abbey v. Petch*, decided in 1841, no doubt, conflicts with our view; but there appears to have been a previous decision of the same Court the other way, which was not mentioned to the Court during that argument, and that is *Jones v. Hamp*, in 1840. This we learn from the report in *Frusher v. Lee*, in 1842, where the decision in *Abbey v. Petch* was considered and strongly commented on by the Court. But in 1851 we have a later decision in the same Court precisely on all fours with the present, *Ridgway v. Lord Stafford*, in which case *Abbey v. Petch* was considered and virtually overruled. But it was suggested that the *obiter dicta* of the very learned judges who decided *Wilmot v. Rose* throw some doubt upon the decision in *Ridgway v. Lord Stafford*. However, when we refer to the more extended report in the Law Journal, it is gratifying to find the very same distinction taken that I took in the argument in this case; for Crompton, J. remarked, *arguendo*, that *Ridgway v. Lord Stafford* was the case of "a sale by the landlord, and this is an Act for the protection of landlords from sales upon the lands held by their tenants." Hence all conflict between the cases ceases; for, while concurring with the Queen's Bench that it would be wrong to confine the words "any purchaser" to purchasers under an execution, it is still quite consistent with their decision to limit the operation of the section to purchasers from the tenant, as Crompton, J. appears to suggest.

SUSPENSION OF RIGHT.

Davis v. Gyde (1835) 2 A. & E. 623; 1 H. & W. 50; 4 N. & M. 462; 4 L. J. K. B. 84, *distinguished*.

Palmer v. Bramley (1895) 65 L. J. Q. B. 42; [1895] 2 Q. B. 405; 73 L. T. 329; 14 R. 643.—C.A. KAY and SMITH, *L.J.J.*

KAY, *L.J.*—That case was decided on demurrer to a plea that a bill of exchange was given for rent, but not averring that it was taken in satisfaction or with the intention of suspending the landlord's remedy. On demurrer such a plea was held to be insufficient; but that is not an authority that the giving of the bill was no evidence of an agreement to suspend the landlord's right of distress, had such an agreement been averred.

FRAUDULENT REMOVAL.

Watson v. Main (1799) 3 Esp. 15, 6 R. R. 806, *approved*.

Rand v. Vaughan (1835) 1 Bing. (N.C.) 767; 1 Scott 670; 1 Hodges 173; 4 L. J. C. P. 239.—C.P.

Lane v. Tyler (1887) 56 L. J. Q. B. 461.—

COLERIDGE, C.J. and SMITH, *J.*, *approved*. Tomlinson v. Consolidated Credit Corporation (1890) 24 Q. B. D. 135; 62 L. T. 162; 38 W. R. 118; 54 J. P. 644.—C.A. ESHER, M.R., LINDLEY and LOPES, *L.J.J.*

Fletcher v. Marillier (1839) 9 A. & E. 457;

1 P. & D. 354; 2 W. W. & H. 14; 8 L. J. Q. B. 176, *distinguished*.

Williams v. Roberts (1852) 7 Ex. 618; 22 L. J. Ex. 61.

PARKE, B. (for the Court).—From some passages in the judgment of Lord Denman in the Queen's Bench, in *Fletcher v. Marillier* (if the report be correct), it would appear that the difference between the time of *removal* and of *seizure* was not adverted to; but the case itself is distinguishable, as the plea admitted the goods *at the time of seizure* to be the property of and in the possession of the tenant, and no colour of title was given to the plaintiff; and that is pointed out as a cause of special demurrer, and also relied upon in the judgment.—p. 629.

Thornton v. Adams (1816) 5 M. & S. 38; 17 R. R. 237, *adopted*.

Foulger (or Foulger) v. Taylor (1860) 29 L. J. Ex. 154; 6 H. & N. 202; 1 L. T. 57; 8 W. R. 279.

REMEDY FOR WRONGFUL DISTRESS.

Avenell v. Croker (1828) M. & M. 172; and Wilkinson v. Terry (1834) 1 M. & Rob. 377, *overruled*.

Taylor v. Hemmiker (1840) 12 A. & E. 488; 4 P. & D. 243; 9 L. J. Q. B. 383.

LORD DENMAN, C.J. (for the Court).—We should have considered the plaintiff as clearly entitled to a verdict for nominal damages, but that we paused in consequence of the two *novi prius* cases of *Avenell v. Croker* and *Wilkinson v. Terry*. Now, the first of these cases proceeds on the ground that, as only one thing was taken, and that must have been equally taken if the right sum had been distrained for, no damage accrued, and, therefore, the plaintiff had no cause of action. The same reasoning applies, though many things be taken, if their value be less than the rent really due, and for which the distress ought to have been. The verdict was for the defendant. A motion for a new trial was made on another ground, and the parties agreed to a *stet processus*; but the ruling of Lord Tenterden on the above point was not questioned. In the latter case,

Parke, B. doubted as to the action being maintainable, but a verdict was taken for nominal damages. With all possible respect for the opinion of those learned judges, we cannot agree to the doctrine contained in those cases.—p. 491.

Taylor v. Henniker, overruled.

Tancred v. Leyland (1851) 16 Q. B. 669; 20 L. J. Q. B. 316; 15 Jur. 394.—EX. CH.
PARKE, B. (for Exchequer Chamber).—The defendant, however, relies upon the decision of a similar question in the Court of Queen's Bench in the case of *Taylor v. Henniker*, in which it was laid down that a distress under pretence that more was due than really was due was unlawful in its inception, the sale being mere matter of aggravation. We do not think that case was well decided. On the argument no authority was cited in favour of the decision; and those above referred to, in Rolfe's Abrid. and the Year Book were not brought before the Court. Some *nisi prius* authorities, which were cited, were in favour of the defendant; that of Lord Tenterden in the case of *Arenell v. Croker* (*supra*) in particular. And that of Lord Abinger in *Crowder v. Self* (2 Moo & Rob. 190) was not cited. We are not satisfied with that decision of the Queen's Bench; and think that it should be overruled.—p. 680.

Tancred v. Leyland, applied.

Stevenson v. Newnham (1853) 22 L. J. C. P. 110; 13 C. B. 285; 17 Jur. 600.—EX. CH.

Chandler v. Doulton (1865) 3 H. & C. 553;

34 L. J. Ex. 89; 11 Jur. (N.S.) 286; 11

L. T. 639, *applied*.

The *Walter D. Wallett* (1893) 62 L. J. P. 68; [1893] P. 202; 1 R. 627; 69 L. T. 771.—JEUENE, P.

Lear v. Edmonds (1817) 1 B. & Ald. 157; 2

Chit. 301; 18 R. R. 448, *commented on*.

Lehain v. Philpot (1876) L. R. 10 Ex. 242; 44 L. J. Ex. 225; 33 L. T. 98; 23 W. R. 876.—EX.

EASEMENTS AND PRESCRIPTION.

1. EASEMENTS GENERALLY.
2. EXPRESS GRANT.
3. IMPLIED GRANT.
4. PRESCRIPTION.
5. RIGHTS TO WATER.
6. LIGHT AND AIR.
7. RIGHTS OF WAY.
8. RIGHT TO SUPPORT.
9. EXTINGUISHMENT.
10. DISTURBANCE OF EASEMENTS.

1. EASEMENTS GENERALLY.

Ackroyd v. Smith (1850) 10 C. B. 164; 19

L. J. C. P. 816; 14 Jur. 1047, *explained*.

Thorpe v. Brumfit (1873) L. R. 8 Ch. 650.—L.J.

JAMES, L.J.—The case of *Ackroyd v. Smith* has been misapprehended. It was there in substance said to the defendants, "In any view of the case, you are wrong. If this was a right of way appurtenant to a particular property, it could only be used for purposes connected with that property, and you have been using it for other purposes. If it was not, then it was a right in

gross, and could not be assigned to you." The case involved no decision that the right of way was in gross.—p. 655.

Ackroyd v. Smith, inapplicable.

Simpson v. Godmanchester (1897) 66 L. J. Ch. 770; [1897] A. C. 696; 77 L. T. 409.—H.L. (E.).

LORDS WATSON, SHAND and DAVEY.

LORD DAVEY.—I cannot doubt that the easement as finally alleged by the respondents was a good easement in law. It is, in fact, a claim to divert the water which either has flooded or, if undiverted, would flood their lands, and to come on the appellant's land for the purpose of regulating the flow of the water with that object. It appears to me directly connected with the enjoyment of the respondents' lands by the occupiers thereof. The appellant, however, argues that the right claimed is to protect not only the respondents' lands, but the lands of other proprietors, from floods. The answer is: That is not the right claimed, and we are not dealing here with any excess in the exercise of the easement, but with the question whether the corporation have the right which they claim. The appellant's counsel quoted several cases, of which *Ackroyd v. Smith* may be taken as an example. It was there held that you cannot annex to land rights by way of easement unconnected with the enjoyment of land, as, for example, a right of way to be used for all purposes. There is no doubt about this sound principle of law; but it appears to me to have nothing to do with the present case, in which the claim is only for the protection of the respondents' own lands.—p. 776.

2. EXPRESS GRANT.

Allen v. Seckham, 47 L. J. Ch. 742.—V.C.;

reversed, (1879) 48 L. J. Ch. 611; 11 Ch. D. 790; 41 L. T. 260; 28 W. R. 26.—C.A.

Miles v. Tobin (1867) 17 L. T. 432; 16

W. R. 465.—L.C., *dicta* of LORD CHELMSFORD *dissenting from*.

Allen v. Seckham (*supra*), in C.A.

JAMES, L.J.—In *Miles v. Tobin*, Lord Chelmsford used some expressions which are strongly in the plaintiffs' favour, but they were wholly extra-judicial, for nothing in that case turned on notice. The defendants knew that the plaintiffs derived titles from the same grantors as themselves, the common grantors being the trustees of a charity. The Court came to the conclusion that the lease under which the plaintiffs claimed, and which was prior to the lease to the defendants, bound the plaintiffs to build according to particular plans; the lease, therefore, if not in express terms, at all events by necessary implication, gave the plaintiffs a right to the use of the windows prescribed by those plans. This was a right granted by deed, which bound the adjoining lands of the grantors, apart from any question of notice. Any person who buys land in this country, buys subject to the chance that the vendor may have granted all manner of rights over it, and against this chance he guards himself by taking the covenants of the vendor. The case of *Miles v. Tobin* was simply one of a grant by deed made by the person under whom the defendants derived title, and the remarks of Lord Chelmsford, which have been relied on, were a mere *obiter dictum*, which appears to have remained in the Weekly Reporter, and not to

have found its way into any other books so as to become part of our traditional law. We therefore do not consider ourselves bound by it, and we think that such an extension of the law as to constructive notice would be dangerous and unwarranted.—p. 795.

Pym v. Harrison (1875) 32 L. T. 817.—Q.B.; *reversed*, (1876) 33 L. T. 796.—C.A.

Dynevor (Lord) v. Tennant (1888) 57 L. J. Ch. 1078; 13 App. Cas. 279; 59 L. T. 5; 87 W. R. 193.—H.L. (R.), *distinguished*.
Rymer v. Mellroy (1897) 66 L. J. Ch. 336; [1897] 1 Ch. 528; 76 L. T. 115; 45 W. R. 411.

BYRNE, J.—*Lord Dynevor v. Tennant* does not involve the present point, and assuming it decides that you must regard a right of way as having been made with reference to the existing interest in the dominant tenement, that does not preclude the question raised in this case as to the effect of a particular grant or contract where a larger interest in the dominant tenement is subsequently acquired.

Leech v. Schweder, 43 L. J. Ch. 282; 22 W. R. 292.—M.R.; *reversed*, (1874) 43 L. J. Ch. 487; 13 R. 9 Ch. 468; 30 L. T. 586; 22 W. R. 638.—L.J.

Plant v. James (1833) 5 B. & Ad. 791; 2 N. & M. 517; S. C. 4 A. & E. 749; 6 N. & M. 282, *considered*.

Thomson v. Waterlow (1868) 37 L. J. Ch. 495; L. R. 6 Eq. 36; 18 L. T. 545; 16 W. R. 586.—M.R.

Thomson v. Waterlow and Langley v. Hammond (1868) 37 L. J. Ex. 118; L. R. 3 Ex. 161; 18 L. T. 858; 16 W. R. 937, *considered*.

Watts v. Kelson (1871) 40 L. J. Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 338.—L.J.; *reversing* M.R.

Thomson v. Waterlow and Langley v. Hammond, *discussed*.

Kay v. Oxley (1875) 44 L. J. Q. B. 210; L. R. 10 Q. B. 360; 33 L. T. 164.—Q.B.

Thomson v. Waterlow and Langley v. Hammond, *held overruled*.

Watts v. Kelson (1871) 40 L. J. Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 338.—L.J.; and **Kay v. Oxley**, *followed*.

Barkshire v. Grubb (1881) 18 Ch. D. 616; 50 L. J. Ch. 731; 45 L. T. 383; 29 W. R. 929.

FRY, J.—The authorities would seem to be quite clear, but for the two latter cases of *Thomson v. Waterlow and Langley v. Hammond*, which I think, unfortunately, introduced a distinction into the law on the question. They have given some countenance to the proposition that when the general words used in a grant of land are "together with all ways therewith now used, occupied or enjoyed," and there is a road then actually used with the land granted, which has been constructed over adjoining land of the grantor, but such road did not exist before the unity of possession, a right of way over that road will not pass; but that will pass only if the road had existed before the unity of possession. One asks, why, on principle, should this distinction exist? If the way is actually used at the time when the grant is made, why should it not pass by the grant? And accordingly the doubt which

was introduced by those cases seems to have been dispelled by the cases of *Kay v. Oxley* and *Watts v. Kelson*, which have restored the law, as it had been settled by the earlier decisions.—p. 621.

Kay v. Oxley and Watts v. Kelson, *followed*.
Bayley v. G. W. Ry. (1884) 26 Ch. D. 434; 51 L. T. 337.—C.A. COTTON, BOWEN, and FRY, L.J.

Thomson v. Waterlow, Langley v. Hammond and Watts v. Kelson, *referred to*.

Brown v. Alabaster (1887) 57 L. J. Ch. 255; 37 Ch. D. 490; 58 L. T. 266; 36 W. R. 155.—KAY, J.

Watts v. Kelson, *distinguished*.
Burrows v. Lang (1901) 70 L. J. Ch. 607; [1901] 2 Ch. 502; 84 L. T. 623; 49 W. R. 564.

FARWELL, J.—*Watts v. Kelson*, on which the plaintiff relied, is not really in point, because the whole of the basis on which I rest my judgment was absent in that case. There was no question of an artificial watercourse having been made for one property only. The artificial watercourse in that case was made for the express purpose of providing both the properties with water. The question raised in the present case was not argued; the point did not arise; the only point was whether a quasi-easement, which would by its nature have been an easement if there had not been common ownership, passed by the grant, and it was held that it did. In the present case that is entirely excluded, because I hold that there was no quasi-easement which could pass by the grant, by reason of its precarious nature.

Brown v. Alabaster (1887) 57 L. J. Ch. 255; 37 Ch. D. 490; 58 L. T. 266; 36 W. R. 155.—KAY, J., *observations questioned*.
Titchmarsh v. Royston Water Co. (1900) 81 L. T. 673; 48 W. R. 201; 64 J. P. 56.—KEKEWICH, J.

Martyn v. Lawrence (1864) 2 De G. J. & S. 261; 4 N. R. 312; 10 Jur. (N.S.) 858; 10 L. T. 677; 12 W. R. 1043.—L.J.; and **Baird v. Fortune** (1861) 4 Macq. H. L. 127; 7 Jur. (N.S.) 926; 5 L. T. 2; 10 W. R. 2.—H.L. (SC.), *distinguished*.
Francis v. Hayward, 52 L. J. Ch. 12; 20 Ch. D. 773; 46 L. T. 659; 30 W. R. 744.—KAY, J.; *affirmed*, (1882) 52 L. J. Ch. 291; 22 Ch. D. 177; 48 L. T. 297; 81 W. R. 488; 47 J. P. 517.—C.A. JESSEL, M.R. and BOWEN, L.J.

3. IMPLIED GRANT.

Roberts v. Karr (1809) 1 Taunt. 495; 10 R. R. 592, *followed*.
Espley v. Wilkes (1872) 41 L. J. Ex. 241; L. R. 7 Ex. 298; 26 L. T. 918.—EX.

Roberts v. Karr and Espley v. Wilkes, *approved and followed*.

Harding v. Wilson (1823) 1 L. J. (O.S.) K. B. 288; 3 D. & R. 287; 2 B. & C. 96; 26 R. R. 287, *observed upon*.
Furness Ry. v. Cumberland Building Society (1884) 52 L. T. 144; 49 J. P. 292.—H.L. (E.). LORDS SELBORNE, L.C., BLACKBURN and FITZGERALD.

Roberts v. Karr, *followed*.
Cooke v. Ingram (1893) 3 R. 607; 68 L. T. 671.—WRIGHT, J.

Metropolitan Ry. v. G. W. Ry. (1900) 82 L. T. 451; 64 J. P. 472.—*KEKEWICH, J.*; *reversed*, (1901) 84 L. T. 333.—*C. A. RIGBY, WILLIAMS and STIRLING, L.JJ.*

Booth v. Alcock 28 L. T. 221.—*v.-c.*; *reversed*, (1873) 42 L. J. Ch. 557; L. R. 8 Ch. 663; 29 L. T. 231; 21 W. R. 743.—*L.JJ.*

Beddington v. Atlee (1887) 56 L. J. Ch. 655; 35 Ch. D. 317; 56 L. T. 514; 35 W. R. 799; 51 J. P. 484.—*CHITTY, J.*, *approved*.

List v. Tharp (1897) 66 L. J. Ch. 175; [1897] 1 Ch. 260; 76 L. T. 45; 45 W. R. 243; 61 J. P. 248.—*CHITTY, J.*

Nicholas v. Chamberlain (1606) Cro. Jac. 121. *approved*.

Sniffeld v. Brown (1864) 33 L. J. Ch. 249; 4 De G. J. & S. 185; 10 Jur. (N.S.) 111; 9 L. T. 627; 12 W. R. 356; 3 N. R. 340.—*L.C.*

Nicholas v. Chamberlain, *approved*.
Watts v. Kelson (1871) 40 L. J. Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 338.—*L.JJ.*

Palmer v. Fletcher (1633) 1 Lev. 122; 1 Sid. 167, 227. *approved*.

Tenant v. Goldwin (1703, 1704) 2 Ld. Raym. 1089, 1093.

Palmer v. Fletcher, *approved*.

Allen v. Taylor (1880) 50 L. J. Ch. 178; 16 Ch. D. 355.—*M.R.* See extract (*infra*, col. 907).

Palmer v. Fletcher, *extended*.

Phillips v. Low (1891) 61 L. J. Ch. 44; [1892] 1 Ch. 47; 65 L. T. 552.—*CHITTY, J.*

[The principle of *Palmer v. Fletcher* is applicable not only to conveyances for valuable consideration, but also to devises and voluntary conveyances.]

Palmer v. Fletcher, *applied*.

Smith v. Hancock (1894) 63 L. J. Ch. 477; [1894] 2 Ch. 377; 7 R. 200; 20 L. T. 578; 42 W. R. 456; 58 J. P. 638.—*C.A. LINDLEY and SMITH, L.JJ.*; *KAY, L.J. dissenting*.

Swansborough v. Coventry (1832) 9 Bing. 305; 2 M. & Scott 362; 2 L. J. C. P. 11, *explained*.

Wheeldon v. Burrows (1879) 48 L. J. Ch. 853; 12 Ch. D. 31; 39 L. T. 558; 41 L. T. 327; 28 W. R. 196.—*C.A.* See extract (*infra*, col. 906).

Swansborough v. Coventry, *referred to*.

Allen v. Taylor (1880) 50 L. J. Ch. 178; 16 Ch. D. 355.—*M.R.*

Swansborough v. Coventry, *considered*.

Beddington v. Atlee (1887) 56 L. J. Ch. 655; 35 Ch. D. 317; 56 L. T. 514; 35 W. R. 799; 51 J. P. 484.—*CHITTY, J.*

Swansborough v. Coventry, *approved*.

Brownfield v. Williams (1897) 66 L. J. Ch. 305; [1897] 1 Ch. 602; 76 L. T. 243; 45 W. R. 469.—*C.A.* See extract (*infra*, col. 908).

Suffield v. Brown, 9 Jur. (N.S.) 999; 9 L. T. 192.—*M.R.*; *reversed*, (1864) 33 L. J. Ch. 249; 10 Jur. (N.S.) 111; 9 L. T. 627; 12 W. R. 356; 4 De G. J. & S. 185; 3 N. R. 340.—*L.C.*

Pyer v. Carter (1857) 1 H. & N. 916; 26 L. J. Ex. 258; 5 W. R. 371.—*EX. dis. approved*.

Suffield v. Brown (1864) 33 L. J. Ch. 249; 10 Jur. (N.S.) 111; 9 L. T. 627; 12 W. R. 356; 4 De G. J. & S. 185; 3 N. R. 340.

LORD WESTBURY, L.C.—This observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer v. Carter*, being one of two cases on which his honour relies. In *Pyer v. Carter*, the owner of two houses sold and conveyed one of them to a purchaser absolutely, and without any reservation, and he subsequently sold and conveyed the remaining house to another person. It appeared that the second house was drained by a drain that ran under the foundation of the house first sold, and it was held that the second purchaser was entitled to the ownership of the drain, that is, to a right over the freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house "such as it is." But, with great respect, the expression is erroneous, and shows the mistaken view of the matter, for in a question, such as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house, not "such as it is," but such as it is described, and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the Court that the easement was "apparent," because the purchaser might have found it out by inquiry; but the previous question is, whether he was under any obligation to make inquiry, or would be affected by the result of it, which, having regard to his contract and conveyance, he certainly was not under the circumstances of the case of *Pyer v. Carter*, the true conclusion was, that, as between the purchaser and the vendor, the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority.—p. 259.

Pyer v. Carter, *doubted*.

Polden v. Bastard (1867) 7 B. & S. 130; 35 L. J. Q. B. 92; L. R. 1 Q. B. 156; 13 L. T. 441; 14 W. R. 198.—*EX. CH.*

BRAMWELL, B.—*Pyer v. Carter* is no authority.—p. 131.

MARTIN and CHANNELL, BB., said that it has been doubted, but is confirmed, and its principle explained by *Ewart v. Cochran* (4 Macq. H. L. Cas. 117) and *Hall v. Lund* (1 H. & C. 676).

Pyer v. Carter, *doubted*.

Crossley v. Lightowler (1867) 36 L. J. Ch. 584; L. R. 2 Ch. 478; 16 L. T. 438; 15 W. R. 801.—*L.C.*

LORD CHELMSFORD, L.C.—The defendants insisted that if an easement is apparent and continuous, no express reservation is necessary in a grant of the servient by the owner of the dominant tenement. And they relied on *Pyer v. Carter*, where it was held that if the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and is subject to the trust burden of all existing drains communicating with the

other house, without express reservation or grant or that purpose. Lord Westbury, however, in the case of *Suffield v. Brown* (*supra*), refused to accept the case of *Pyer v. Carter* as an authority, and said: "It seems to me more reasonable and just to hold, that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant rather than limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation. I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make every case of this kind an implied reservation by law. And yet the law will not reserve anything out of a grant in favour of the grantor; except in case of necessity; as is the case put by the Court in *Clerk v. Cogge* (Cro. Jac. 170). "If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved to him by law."—p. 590.

Pyer v. Carter and *Suffield v. Brown*,
commented on.

Morland J., *Cook* (1868) 37 L. J. Ch. 825; L. R. 6 Eq. 252; 18 L. T. 496; 16 W. R. 777.—M.R.

Pyer v. Carter, approved.

Suffield v. Brown, dicta of LORD WESTBURY questioned.

Watts v. Kelson (1871) L. R. 6 Ch. 166; 40 L. J. Ch. 126; 24 L. T. 209; 19 W. R. 338.—L.JJ. MELLISH, L.J.—I think that the order of the two conveyances in point of date is immaterial, and *Pyer v. Carter* is good sense and good law. Most of the common law judges have not approved of Lord Westbury's observations on it.

JAMES, L.J.—I also am satisfied with the decision in *Pyer v. Carter*.—p. 170.

Pyer v. Carter, held overruled.

Suffield v. Brown, explained.

Wheeldon v. Burrows (1879) 12 Ch. D. 31; 48 L. J. Ch. 853; 39 L. T. 558; 41 L. T. 327; 27 W. R. 165; 28 W. R. 196.—C.A., affirming BACON, v.-C.

THE SINGER, L.J.—I now come to *Pyer v. Carter*, which seems to break the hitherto unbroken current of authority upon this point, and there can be no doubt that Sir Henry Jackson is justified in saying that if that case is right this appeal ought to be allowed. That was a case of a somewhat special character. [The lord justice then stated the facts of the case.] Now, although it is possible that the actual decision in *Pyer v. Carter* was not exactly overruled, the principles there laid down were clearly and distinctly overruled by the same Court in *White v. Bass* (7 H. & N. 722); the facts of which case were these: A man was the owner of certain land and of a certain house which had windows through which the light, not as an easement but as a matter of enjoyment, had come for some time. He let the land (reserving the house) to

trustees, subject to certain covenants by which they were to build in a particular manner upon the land, and if these covenants had been complied with, and they had built in the specific manner, there would have been no obstruction to the lights of the house which the grantor or the lessor reserved. Therefore if we were entitled in these cases to go back to matters which existed before the time of the conveyance, we should have found here, as clearly as could be shown, an intimation on the part of the lessor that if the building was to be permitted on the adjoining land, it was only to be permitted under such conditions as would prevent the lights of the house being obstructed. But that being originally the position of matters, it was followed by a conveyance of the reversion in the land to the trustees, and subsequently to that conveyance the house was conveyed to another person, and buildings having been put upon the land occupied by the trustees contrary to the terms of the original covenant, and of such a kind as obstructed the lights of the house, an action was brought by the person to whom the house was conveyed. In that action it was decided that the defendant held his land unfettered by the original covenant, and unfettered by any implied reservation, and that he was entitled to build in such a way as he thought proper on his land, although the effect of what he did might be to obstruct the lights of the plaintiff. In giving judgment, Lord Chief Baron Pollock says this (at p. 730): "My brother Petersdorff has cited no authority for the precise matter which he has urged before us, and I think that in construing a conveyance of land we must collect what the parties intended from the language they have used. It seems to me that we cannot look into the lease of the 2nd of October, 1855, for it is merged in the fee, a conveyance of the reversion having been made to the lessees, and we must look to that conveyance alone in order to ascertain the rights of the parties. In that conveyance there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the plaintiff's house, or indeed any limitation of the right to use the land." Now, no case can be more clear and distinct upon the point which we have to decide to-day, and the case is admitted by Sir Henry Jackson to be such, but he suggested that we ought to overrule it as being an exception to the general current of authority. So far from that being the case, *Pyer v. Carter* appears to me to have been the exception, and not *White v. Bass*.

The latter case was followed by *Suffield v. Brown*. A good deal has been said about that case; and the principles upon which this Court ought to act in dealing with decisions of Courts of co-ordinate authority have been also discussed. I think I may say for myself (and I believe I am expressing the views of the other members of the Court) that we ought not to lay down as an absolute rule that decisions of Lord Chancellors, at all events sitting alone, are to be taken as decisions of the Court of Appeal, and absolutely binding on this Court so as to prevent us from even looking into the grounds or considering the case which was before the particular Lord Chancellor. But no doubt the greatest weight ought to be given to such decisions, and unless they are shown to be manifestly contrary to the general current of authority on the point decided, it

appears to me that we ought not to take upon ourselves to overrule them.

That being so, let us look a little more narrowly into that case. First, we have to see what was decided—and by that I do not mean what was absolutely necessary to be decided, but what really the Lord Chancellor took upon himself to decide, and, although he might have decided the case upon other grounds, put as his *ratio decidendi*. Upon that point there can be no doubt. We have only to read the close of this judgment to see that he put it entirely on this principle, which I have stated as the second of the general rules applicable to cases of this kind, that a man cannot derogate from his own grant, and that as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee. The Lord Chancellor closes his judgment by saying (having dealt with some of the authorities as to continuous and apparent easements): "But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made." Although, therefore, it is perfectly true that, looking to the special circumstances of the case, it might have been decided upon those special circumstances so as even to admit the proposition for which Sir Henry Jackson contends, it is equally clear that the Lord Chancellor did not so decide the case, but decided it upon a distinct negative of that proposition. If we were to stop here, it seems to me that, looking to the fact that this was not a case in which this point in question was mooted for the first time, but that the point had been mooted and decided as early as the third year of the reign of Queen Anne, we should not be justified in doing anything but follow the principles enunciated by Lord Westbury.

But *Suffield v. Brown* (at p. 185) has been confirmed by an equally high authority, for in *Crosley & Sons v. Lightowler*, Lord Chelmsford as Lord Chancellor had to deal with a similar question, and he there says:—"Lord Westbury, however, in the case of *Suffield v. Brown*, refused to accept the case of *Pyer v. Carter* as an authority, and said, 'It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation.' I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non cogitatus* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make, in every case of this kind, an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity."

Now the only case in the Court of Appeal which is suggested as being contrary to this high authority of two Lord Chancellors, is *Watts v. Kelson*, and no doubt there are observations of Lord Justice Mellish to the effect that the order of conveyance in point of date is immaterial; that *Pyer v. Carter* is good sense and good law,

and that most of the common law judges have not approved of Lord Westbury's observations. But putting aside for the moment that this was a mere *dictum* of the lord justice during the argument, I must observe that this is not exactly so, as in *White v. Bass*, the judges of the Court of Exchequer had distinctly, as regards the reasoning of *Pyer v. Carter*, overruled that case. No doubt also Lord Justice James says, "I am satisfied with the decision in *Pyer v. Carter*." But in the considered judgment of the Court, when, if it had been intended to say that *Suffield v. Brown* (at p. 185) was not law, one would have thought there would have been something distinct upon the point, there is not one word to the effect of that which had been said by the lords justices during the argument. All that is said about it is this. Lord Justice Mellish, who delivered the judgment, after referring to *Nicholas v. Chamberlain* (*supra*), said "This case has always been cited with approval, and is identical not only in principle but in its actual facts with the case now before us. It was expressly approved of by Lord Westbury in *Suffield v. Brown*, where, though he objected to the decision in *Pyer v. Carter*, in which it was held that a right to an existent continuous apparent easement was impliedly reserved in the conveyance by the owner of two houses in the alleged servient house, yet he seems to agree that the right to such an easement would pass by implied grant where the dominant tenement is conveyed first"; and that was the word of the Court of Appeal had to decide in *Watts v. Kelson* (*supra*). Therefore *Watts v. Kelson* is no authority to justify us in overruling *Suffield v. Brown*, still less for overruling it, supported as it is by the case of *Crosley & Sons v. Lightowler*.

The next case to which I will refer is *Swanborough v. Corentry*, which has been cited on both branches of the argument addressed to us by Sir Henry Jackson. That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration; because, if it had not been admitted, then the Court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years; but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Tindal, C.J., deals with the matter, as it appears to me, upon the supposition that the general maxim is, that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements; he says (at p. 309), "It is well established, this general rule of law." It appears to me, therefore, that this is a decision which fortifies the previous decision of Lord Holt [in *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093]—p. 51.

Polden v. Bastard (1867) 7 B. & S. 130; 35 L. J. Q. B. 92; L. R. 1 Q. B. 156; 13 L. T. 411; 14 W. R. 198.—EX. CH., *judgment of ERLE, J. approved.*

Watts v. Kelson (1871) 40 L. J. Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 338.—L.J.

Polden v. Bastard, applied.

Nichols v. Nichols (1899) 81 L. T. 811.—STIRLING, J.

Wheeldon v. Burrows, considered.

Allen v. Taylor (1880) 16 Ch. D. 355; 50 L. J. Ch. 178.

JESSEL, M.R.—There can be no doubt that the law as laid down by *Palmer v. Fletcher* is the law of the present day: that is, that where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows, or destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or *quasi*-easements. All that is now, I take it, settled law (p. 357). . . . The last case on the subject is *Wheeldon v. Burrows*; as far as I understand the decision of the Appeal Court in that case, the exception in *Swanborough v. Corentry* (*supra*) and *Compton v. Richards* (1 Price 27), was approved. In *Swanborough v. Corentry* the case was open to great doubt. There was a sale by auction which we have not here; and there is something here which was not there. There was there, and here, a continuous and apparent easement. In the judgment in *Wheeldon v. Burrows*, the case is treated as an exception to the general rule, that if a grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. The late Lord Justice Thesiger says this: "It is said that, even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swanborough v. Corentry* and *Compton v. Richards*, namely, that although the land and houses were not, in fact, conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction." Then he says that will not do. Then he goes on to say, "In the cases which have been cited the conveyances were founded upon transactions which, in equity, were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same moment of time, and as part and parcel of one transaction." So that he evidently means to say that such a case as that is an exception to the general rule, and you cannot block up the lights.—p. 358.

Wheeldon v. Burrows, approved, but held inapplicable.

Russell v. Watts (1885) 55 L. J. Ch. 158; 10 App. Cas. 590; 53 L. T. 876; 34 W. R. 277; 50 J. P. 68.—H.L. (E.); *reversing* (1883) 25 Ch. D. 559; 50 L. T. 678; 32 W. R. 621.—G.A.; *which had reversed* (1882) 47 L. T. 245.—BACON, V.-C.

Wheeldon v. Burrows, observations applied.

Brown v. Alabaster (1887) 57 L. J. Ch. 255; 37 Ch. D. 490; 58 L. T. 266; 36 W. R. 153.—KAY, J.

Wheeldon v. Burrows, distinguished.

Rigby v. Bennett (1882) 21 Ch. D. 559; 48 L. T. 47; 31 W. R. 222; 47 J. P. 217.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ., *approved.*

Birmingham, Dudley and District Banking Co. v. Ross (1888) 57 L. J. Ch. 601; 38 Ch. D. 295; 59 L. T. 609; 36 W. R. 914.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.; *affirming* (1887) 52 J. P. 421.—KEKEWICH, J.

COTTON, L.J.—If there had been an express grant, then it would have been the duty of the grantor or of the lessor to expressly state what right he reserved to himself. A reservation of right to a grantor is a very different thing from an obligation impliedly undertaken by a grantor, because when there is a reservation to himself, that is a reservation from that which he has in terms granted; and if a lessor or other grantor wants to make any reservation in his own favour, then, in my opinion that stands on a very different footing from any implied obligation contracted by him in consequence of the position in which he places himself. *Wheeldon v. Burrows* is a case which on that point would be a strong authority, and which I, of course, agree with. But, in my opinion, when we come to the question which arises here of implied obligation and implied grant, we may have regard to all the circumstances existing at the time when the parties undertook the position from which the implied obligation arises, and, looking at the circumstances existing at the time when the lease was made, I am of opinion that here the plaintiffs cannot assert any implied obligation on the part of the corporation which will enable the plaintiffs to say that there is an interference with any implied obligation on the part of the defendant, and that they are entitled to an injunction.—p. 605.

Wheeldon v. Burrows and Allen v. Taylor (*supra*), *referred to.*

Broomfield v. Williams (1897) 66 L. J. Ch. 305; [1897] 1 Ch. 602; 76 L. T. 243; 45 W. R. 469.—G.A. LINDLEY, SMITH and RIGBY, L.JJ.

SMITH, L.J.—*Prima facie*, a grantee, in circumstances such as exist in the present case, has the right to have the light coming to his windows over the lands of the grantor unobstructed by the grantor. This was laid down in 1832 by Chief Justice Tindal, delivering the judgment of the C. P. in *Swanborough v. Corentry*. . . . *Palmer v. Fletcher* (*supra*) and other cases are cited in support of this proposition. I am not aware that this statement of the law as to the obligation of a vendor to his vendee has ever been doubted, and, on the contrary, I find the C. A. in 1878 in *Wheeldon v. Burrows* citing with approval this statement of the law by the C. P.; and again in *Allen v. Taylor* (in 1880) Sir G. Jessel, M.R., casts no doubt upon this proposition relating to the obligation of a grantor to his grantee. There being this *prima facie* right of a grantee, in circumstances such as exist in the present case, not to have his lights interrupted by his grantor, how, when the grantee brings an action against the grantor for derogating from this right, can the grantor show that what he is doing does not give a cause of action to his grantee, when a material interruption to his lights is established? In my opinion it can only be by the grantor showing that the *prima facie* right of the grantee is in some way limited and

restricted. The burden of proof is upon the grantor; and if he does not show that this *prima facie* right which the grantee has is in some way cut down, and if a material diminution of the grantee's right by what the grantor has done upon his own land is established by the grantee, he is entitled to judgment. When *Birmingham, Dudley and District Banking Co. v. Ross* and *Myers v. Catterson* are examined, it appears that the above statement of the law is not impugned, and that each of these cases was decided upon the ground that the grantor was able to show that this *prima facie* right of the grantee was limited or restricted; or, in other words, the grantor was able to show what was the implied obligation which he, in fact, undertook when he sold to the grantee. In the one case, *Birmingham, Dudley and District Banking Co. v. Ross*, it was shown that it was perfectly well known to each party when the sale took place that the land was to be built upon by the corporation, *i.e.*, the grantors, as they liked, subject only to this, that there was to be a passage of the width of twenty feet between the buildings of the grantors and the house of the grantee, and that this was the measure of the grantee's protection. In the other case, *Myers v. Catterson*, the grantors (the railway company) established that the grantee knew, at the date of the conveyance to him of the house, that the grantors required the remainder of the land for the purposes of the construction of their railway; and it was held that the obligation which the grantors (the railway company) undertook towards the grantee was limited by this—that the company might utilize their land for that purpose, but for no other, and that this was the measure of the grantee's protection.

Wheeldon v. Burrows, followed.

Union Lighterage Co. v. London Graving Dock Co. (1862) 71 L. J. Ch. 791; [1902] 2 Ch. 567; 87 L. T. 381.—*C.A. ROMER and STIRLING, L.J.; WILLIAMS, L.J. dissenting.*

Russell v. Watts (1885) 55 L. J. Ch. 158; 10 App. Cas. 590; 53 L. T. 876; 34 W. R. 277.—H.L. (E.), observations explained.

Beddington v. Atlee (1887) 56 L. J. Ch. 655; 35 Ch. D. 317. 56 L. T. 514; 35 W. R. 799; 51 J. P. 484.—CHITTY, J.

Myers v. Catterson (1889) 59 L. J. Ch. 315; 43 Ch. D. 470; 62 L. T. 205; 48 W. R. 488.—C.A. COTTON, BOWEN and FRY, L.J., followed.

Wilson v. Queen's Club (1891) 60 L. J. Ch. 698; [1891] 3 Ch. 522; 65 L. T. 42; 40 W. R. 172.—ROMER, J.

Myers v. Catterson and Birmingham, Dudley and District Banking Co. v. Ross (1888) 57 L. J. Ch. 601; 38 Ch. D. 295; 59 L. T. 609; 38 W. R. 914.—C.A. COTTON, LINDLEY and BOWEN, L.J.; affirming 52 J. P. 421.—KEKEWICH, J., dissented and explained.

Broomfield v. Williams (1897) 66 L. J. Ch. 305; [1897] 1 Ch. 602; 76 L. T. 243; 45 W. R. 469.—*C.A. LINDLEY, SMITH and RIGBY, L.J.J. See extract, supra.*

Broomfield v. Williams, applied.

Pollard v. Gare (1901) 70 L. J. Ch. 404; [1901] 1 Ch. 834; 84 L. T. 352; 65 J. P. 264.—KEKEWICH, J.

Birmingham, Dudley and District Banking Co. v. Ross (supra), applied.

Burrows v. Laing (1901) 70 L. J. Ch. 607; [1901] 2 Ch. 502; 84 L. T. 623; 49 W. R. 564.—FARWELL, J.

Birmingham, Dudley and District Banking Co. v. Ross and Broomfield v. Williams, applied.

Quicke v. Chapman (1902) 71 L. J. Ch. 879; 87 L. T. 472.—KEKEWICH, J.

Broomfield v. Williams, referred to.

Mappin v. Liberty (1902) 72 L. J. Ch. 63; [1903] 1 Ch. 118; 87 L. T. 523; 51 W. R. 264; 57 J. P. 91; 1 L. G. R. 167.—JOYCE, J.

Richards v. Rose (1853) 9 Ex. 218; 2 C. L. R. 311; 23 L. J. Ex. 3; 17 Jur. 1086, distinguished.

Howarth v. Armsrong (1897) 77 L. T. 62.—*C.A. LINDLEY, LOPES and RIGBY, L.J.J.*

RIGBY, L.J.—There remains the important distinction between the present case and that of *Richards v. Rose*, that, in the latter case, the mutual interdependence of the houses was the result of the building of them by an owner in fee, and was presumably intended to be perpetual; whilst in the present case, the support given by the 11 ft. 3 in. wall to the beams of the one-storey building on the adjacent land was the act of sub-lessees only, and was not intended by them, and could not have been made by them, more lasting than their own interests.—p. 67.

Pinnington v. Galland, referred to.

Richards v. Rose (1853) 23 L. J. Ex. 3; 9 Ex. 218; 2 C. L. R. 311; 17 Jur. 1086.—EX.

Pinnington v. Galland (1853) 9 Ex. 1; 1 C. L. R. 349; 22 L. J. Ex. 348, observed upon.

White v. Bass (1862) 7 H. & N. 722; 31 L. J. Ex. 283; 8 Jur. (N.S.) 312; 5 L. T. 843.—EX.

Holmes v. Goring (1824) 2 Bing. 76; 9 Moore 166, questioned.

Proctor v. Hodgson (1855) 34 L. J. Ex. 195; 3 C. L. R. 755; 10 Ex. 824.

PARKE, B.—The extent of the authority of *Holmes v. Goring* is, that admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary. I should have thought it means as much a grant for ever as if expressly inserted in the deed, and it struck me at the time that the Court was wrong; but that is not the question now.—p. 197.

ANDERSON, B.—Probably if this case be taken to a court of error, *Holmes v. Goring* will be reversed.—p. 197.

Holmes v. Goring, limited.

Pearson v. Spencer (1862) 7 Jur. (N.S.) 1195; 1 B. & S. 871; 4 L. T. 769.—Q.B.; affirmed, (1863) 3 B. & S. 761; 1 N. R. 373; 8 L. T. 166; 11 W. R. 471.—EX. CH.

BLACKBURN, J.—It seems to us settled by modern authority, that the ground on which the way of necessity is created is, that a convenient way is implied by grant as a necessary incident. It is observed by Parke, B., in *Proctor v. Hodgson* (24 L. J. Ex. Ch. 195), that the extent of the authority of *Holmes v. Goring* is, that though it is a grant it may be construed to be a grant of

such a right of way as from time to time may be necessary. He adds, "I should have thought it meant as much a grant for ever as if expressly inserted in the deed, and it struck me at the time that the Court was wrong." We certainly do not feel inclined to extend the authority of *Holmes v. Goring* so far as to hold that the person into whose possession the servient tenement comes may from time to time vary the direction of the way of necessity at his pleasure, so long as he substitutes a convenient way. We think we must hold that the way of necessity, once created, must remain the same way as long as it continues at all.—p. 1198.

4. PRESCRIPTION.

Ladyman v. Grave, 24 L. T. 55; 19 W. R. 344.—V.-C.; *reversed*, (1871) L. R. 6 Ch. 763; 25 L. T. 52; 19 W. R. 868.—L.C.

Harbidge v. Warwick (1849) 3 Ex. 352; 18 L. J. Ex. 245, *considered*.

Ladyman v. Grave (1871).—L.C. (*supra*).

Bridewell Hospital v. Ward (1893) 62 L. J. Ch. 270; 3 L. T. 228; 68 L. T. 212.—KEKEWICH, J., *followed*.

Battersea (Lord) v. Sewers Commissioners (1895) 65 L. J. Ch. 81; [1895] 2 Ch. 708; 13 R. 795; 73 L. T. 116; 44 W. R. 124; 59 J. P. 728.—NORTH, J.

Plasterers' Co. v. Parish Clerks' Co. (1851) 6 Ex. 630; 20 L. J. Ex. 362; 15 Jur. 965.—EX. CH., *referred to*.

Bewley v. Atkinson (1879) 49 L. J. Ch. 153; 13 Ch. D. 283; 41 L. T. 603; 28 W. R. 638.—C.A.

Bewley v. Atkinson, *inapplicable*.

Mitchell v. Cantrill (1887) 57 L. J. Ch. 72; 37 Ch. D. 56; 58 L. T. 29; 86 W. R. 229.—C.A. COTTON, LINDLEY AND LOPES, L.JJ.

Bewley v. Atkinson, *distinguished*.

Plasterers' Co. v. Parish Clerks' Co. and **Tickle v. Brown** (1836) 4 A. & E. 369; 1 H. & W. 769; 6 N. & M. 230; 5 L. J. K. B. 119, *discussed*.

Gardner v. Hodgson's Kingston Brewery Co. (1901) 70 L. J. Ch. 504; [1901] 2 Ch. 198; 84 L. T. 373; 49 W. R. 421.—C.A. WILLIAMS and ROMER, L.JJ.; RIGBY, L.J. *disentangling*; *reversing* (1900) 69 L. J. Ch. 368; [1900] 1 Ch. 592; 82 L. T. 455; 48 W. R. 469; 64 J. P. 344.—COZENS-HADY, J.

Mitchell v. Cantrill (1887) 57 L. J. Ch. 72; 37 Ch. D. 56; 58 L. T. 29; 36 W. R. 229.—C.A. COTTON, LINDLEY AND LOPES, L.JJ., *distinguished*.

Haynes v. King (1893) 63 L. J. Ch. 21; [1893] 3 Ch. 439; 3 R. 715; 69 L. T. 855; 42 W. R. 56.—NORTH, J.

Bright v. Walker (1834) 1 C. M. & R. 211; 4 Tyr. 508; 3 L. J. Ex. 250, *referred to*.

Onley v. Gardiner (1838) 4 M. & W. 496; 1 H. & H. 381; 8 L. J. Ex. 102.—EX.

Bright v. Walker, *limited*.

Beggan v. McDonald (1878) 2 L. R. Ir. 560.—C.A.

Bright v. Walker, *principle applied*.

Bass v. Gregory (1890) 59 L. J. Q. B. 574; 25 Q. B. D. 481; 55 J. P. 119.—POLLOCK, B.

Bright v. Walker, *followed*.

Perry v. Eames (1891) 60 L. J. Ch. 345; [1891] 1 Ch. 658; 64 L. T. 438; 39 W. R. 602.—CHITTY, J., *approved*.
Wheaton v. Maple (1893) 62 L. J. Ch. 963; [1893] 3 Ch. 48; 2 R. 549; 69 L. T. 208; 41 W. R. 677.—C.A. LINDLEY, LOPES AND SMITH, L.JJ.; *partly reversing* KEKEWICH, J.

Bright v. Walker and Wilson v. Stanley

(1861) 12 Ir. C. L. R. 345.—EX., *followed*.
Hanna v. Pollock (1899) [1900] 2 Ir. R. 664.—C.A.

Bright v. Walker; Onley v. Gardiner (1838)

4 M. & W. 496; 1 H. & H. 381; 8 L. J. Ex. 102; and **Battishill v. Reed** (1856) 18 C. B. 696; 25 L. J. C. P. 290, *followed*.
Damper v. Bassett (1901) 70 L. J. Ch. 657; [1901] 2 Ch. 350; 84 L. T. 682; 49 W. R. 536.—JOYCE, J.

Mill v. New Forest Commissioner (1856) 25

L. J. C. P. 213; 18 C. B. 60; 2 Jur. (N.S.) 520.—C.P., *considered*.
Bobbett v. S. E. Ry. (1882) 9 Q. B. D. 424.—DENMAN, J.

5. RIGHTS TO WATER.

Swindon Waterworks Co. v. Wilts and

Berks Canal Navigation Co. (1876) 45 L. J. Ch. 638; L. R. 7 H. L. 697; 33 L. T. 513; 24 W. R. 284.—H.L. (E.), *considered*.
Bonner v. G. W. Ry. (1883) 24 Ch. D. 1; 48 L. T. 619; 32 W. R. 190; 47 J. P. 580.—C.A. BAGGALLAY, LINDLEY AND FRY, L.JJ.

BAGGALLAY, L.J.—No doubt you may in particular cases, in which particular matters have been the subject of complaint, find observations by learned judges to the effect that railway companies do not possess the same unlimited powers of using their land as ordinary individuals would have; in other words, that they are not at liberty to use their land otherwise than for purposes consistent with the purposes of the Act of Parliament under which they are incorporated. But when it comes to a question as to the way in which land may be ordinarily enjoyed by a proprietor who derives his title under Acts of Parliament, and for purposes specified in Acts of Parliament, you have the observations made by Lords Cairns and Hatherley in the case of *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, which go very strongly to the effect of showing that the provisions of such Acts are not to interfere with the ordinary rights which proprietors otherwise would have. Certain observations made by Malins, V.-C., in the case of *Norton v. London & N. W. Railway Co.* have been very much relied upon. But, if that case is looked into, it will be seen that it was decided on a collateral point, namely, that the railway company had been guilty of trespass, and to the extent to which they had been guilty of trespass the injunction was continued, though it was limited to that portion of the complaint with respect to which there had been a trespass.—p. 9.

Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co., *considered*.

Roberts v. Gwyrfai District Council (1899) 68 L. J. Ch. 233; [1899] 1 Ch. 583; 80 L. T. 107; 47 W. R. 376; 68 J. P. 181.—KEKEWICH, J.;

affirmed, (1899) 68 L. J. Ch. 757; [1899] 2 Ch. 608; 81 L. T. 465; 48 W. R. 51.—C.A. LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.J.

LINDLEY, M.R.—These defendants, apart from all statutory powers, are not exercising the rights of riparian owners at all. They are diverting the water from this lake, not for their own purposes, not for the use, either ordinary or extraordinary, of the land of which they are owners, but for a totally different purpose—that of supplying townships some distance off. That is no exercise of the right of a riparian proprietor within the meaning of the law laid down in the cases to which I have referred; and if we look at *Stouton Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, we find that Lord Cairns alludes to the distinction. He says: "I think your lordships will find . . . flow towards the north." Then he says that the use being made by the waterworks company in that case was not a use by them in the exercise of their rights as riparian proprietors, but for a totally different purpose. So it is here. Therefore, I take it, the defendants cannot justify what they are doing under the common law doctrine as to riparian owners.

Popplewell v. Hodgkinson (1869) 38 L. J. Ex. 126; L. R. 4 Ex. 248; 20 L. T. 578; 17 W. R. 806.—EX. CH., *commented on*.
Jordanes v. Sutton, Southcoates and Drypool Gas Co. (1899) 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692.—C.A.

Per LINDLEY, M.R. and RIGBY, L.J.—Whether *Popplewell v. Hodgkinson* is an authority that in no circumstances can there be a right to support to land from underground water, *quære*.

Per VAUGHAN WILLIAMS, L.J.—*Popplewell v. Hodgkinson* is a clear authority that there is no right, and that a landowner is under no obligation at common law so to deal with his land as not to withdraw water support from the land of another person.

Pomfret v. Ricroft (1669) 1 Wms. Saunders 321, *discussed*.

Buckley p. Buckley (1898) 67 L. J. Q. B. 953; [1898] 2 Q. B. 608.—C.A. SMITH, RIGBY and WILLIAMS, L.J.

WILLIAMS, L.J.—I entirely dissent from the suggestion that the doctrine of *Pomfret v. Ricroft* in any way limits the liability of the defendants to the plaintiffs. It cannot be denied that prior to the time when the plaintiffs acquired a right to use the water in the goit, the predecessors in title of the defendants, having established an artificial stream on his land, came under an obligation to the owners of adjoining lands, including the owners of the plaintiffs' land, to take care that the water conducted along that artificial stream did not break loose and cause damage to those owners. It is suggested, however, that the owners of the plaintiffs' land having now established a right to a flow of water along that stream, it may be taken under *Pomfret v. Ricroft*—first, that the owner of the servient tenement is under no obligation to execute such repairs as are necessary to the enjoyment of the easement, and also that the owners of the dominant tenement could not sue the owners of the servient tenement for not doing such repairs; but it seems to me that this in no way gets rid of the antecedent obligation on the owners of the goit here so to maintain it that the water shall not break-out and injure the lands of adjoining proprietors, including those of the plaintiffs. I

am of opinion that the easement which the plaintiffs have acquired, and the consequential right of executing such repairs as are necessary to enable them to enjoy that easement, have not lost them the right to insist on the obligation which *prima facie* lies on the defendants, so to maintain the goit as that the water shall not break out and flood their land.—p. 955.

6. LIGHT AND AIR

Bourke v. Alexandra Hotel Co., 25 W. R. 393; *reversed*, (1877) 25 W. R. 782.—C.A.

Anon. cited in Wasse v. Pretty (1716) Winch 3, *questioned*.

Webb v. Bird (1868) 18 C. B. (N.S.) 841; 31 L. J. C. P. 335, 8 Jur. (N.S.) 621.—EX. CH.; *affirming* 4 L. T. 445; 9 W. R. 899.—C.P.

Webb v. Bird, followed, *Bryant v. Lefever* (1879) 48 L. J. Q. B. 389; 4 C. P. D. 172; 49 L. T. 579; 27 W. R. 592.—C.A.; *distinguished*.
Sturges v. Bridgman (1879) 48 L. J. Ch. 785; 11 Ch. D. 852; 41 L. T. 219; 28 W. R. 200.—C.A.

Webb v. Bird, disapproved.
Dalton v. Angus (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132.—H.L. (E.).

Webb v. Bird, followed.
Harris v. De Pinna (1886) 56 L. J. Ch. 344; 33 Ch. D. 238; 54 L. T. 770; 50 J. P. 486.—C.A.

Webb v. Bird, opinion dissented from.
Bryant v. Lefever, inapplicable.
Bass v. Gregory (1890) 59 L. J. Q. B. 574; 25 Q. B. D. 481; 55 J. P. 119.

COLLOCK, B.—In *Webb v. Bird*, ERLE, C.J., expressed an opinion that the second section of the Prescription Act only applied to rights of way and of water. If it were necessary for me to decide that point, I should certainly prefer to adopt Lord Selborne's view in *Dalton v. Angus*. But it is not necessary, because the plaintiffs have also claimed to be entitled by lost grant.

Webb v. Bird and Bryant v. Lefever, referred to

Aldin v. Latimer Clark (1894) 63 L. J. Ch. 601; [1894] 2 Ch. 437; 8 R. 352; 71 L. T. 119; 42 W. R. 553.—STIRLING, J.

Webb v. Bird and Bryant v. Lefever, followed.

Chastey v. Ackland (1895) 64 L. J. Q. B. 523; [1895] 2 Ch. 389; 12 R. 420; 72 L. T. 845; 43 W. R. 627.—C.A. LINDLEY, LOPES and KAY, L.J.; *reversing* WRIGHT, J. (*post*).

Aldred's Case (1610) 9 Rep. 57, b. 58 b.
Hall v. Lichfield Brewery Co. (1880) 49 L. J. Ch. 653; 43 L. T. 380.—FRY, J.; and *Bass v. Gregory* (*supra*), *referred to*.
Aldin v. Latimer Clark (1894).—STIRLING, J. (*supra*).

Aldred's Case; Hall v. Lichfield Brewery Co.; and Bass v. Gregory, inapplicable.
Chastey v. Ackland (1895).—C.A. (*supra*).

Harris v. De Pinna (1886) 56 L. J. Ch. 344; 33 Ch. D. 238; 54 L. T. 770; 50 J. P. 486.—C.A. COTTON, BOWEN and FRY, L.J., *followed*.

Chastey v. Ackland (1895).—C.A. (*supra*).

Harris v. De Pinna, considered.

Clifford v. Holt (1898) 65 L. J. Ch. 332; [1899] 1 Ch. 698; 80 L. T. 48; 63 J. P. 22.—KEKEWICH, J.

Martin v. Goble (1808) 1 Camp. 320, questioned.

Courtauld v. Legh (1869) 38 L. J. Ex. 45; L. R. 4 Ex. 126; 19 L. T. 737; 17 W. R. 466.
CLEASBY, B.—With reference to one case that has been referred to, that of *Martin v. Goble*, I confess that the decision in that case appears to me to a certain extent to be in favour of Mr. Pollock's view, but it is wholly inconsistent, in my opinion, with the case of *Tupling v. Jones* (11 H. L. Cas. 290). According to the marginal note in *Martin v. Goble*, if a building, after having been used for twenty years as a malt-house, is turned into a dwelling-house, in its new state it is only entitled to the same degree of light that was necessary to it in its former state, and the owner of the adjoining ground may lawfully erect a wall which prevents the admission of sufficient light for domestic purposes. In that case, the Chief Baron said that it was necessary to enquire with regard to what extent the light was sufficient for the building as a malt-house. But *Tupling v. Jones* is conclusive to show that where the building has been erected and has existed for twenty years, and the light has actually been received into the windows for that period, the right to the whole quantity of light that passed through these windows is indefeasible.—p. 49.

Martin v. Goble, dissented from.

Moore v. Hall (1878) 3 Q. B. D. 178; 47 L. J. Q. B. 334; 38 L. T. 419; 26 W. R. 401.—Q.B.D.

MELLOR, J.—With regard to the case of *Martin v. Goble*, I quite agree with the Master of the Rolls in *Aynsley v. Glover* (L. R. 18 Eq. 544; 10 Ch. 283, *infra*), in thinking that the actual mode of occupation of the dominant tenement is not the test. I am, therefore, of opinion that the test applied by McDonald, C.B., in *Martin v. Goble*, was not the correct test. It seems to me that the owner of the dominant tenement is entitled to all the light that has been accustomed to come through the particular aperture or window without challenge on the part of the owner of the servient tenement. How is the owner of the servient tenement concerned with, or how can he know anything about, the mode of occupation of the dominant tenement? In *Lanfranchi v. Mackenzie* (L. R. 4 Eq. 421), an injunction was claimed on the ground that the access of light had been so far diminished that the room could no longer be used as a sampling room. The injunction was refused, on the ground that it was not shown that the room had been so used for twenty years; and it is said that the Vice-Chancellor in that case approved of the views in *Martin v. Goble*. I cannot agree with the Vice-Chancellor that the use of a room as a sampling room for twenty years would, in any other sense, have been material than as a test of the amount of light that had been accustomed to find access to the room during those years.—p. 180.

Courtauld v. Legh (supra), referred to.

Cooper v. Straker (1888) 58 L. J. Ch. 26; 40 Ch. D. 21; 59 L. T. 849; 37 W. R. 137.—RAY, J.

Courtauld v. Legh, followed.

Collis v. Laugher (1894) 63 L. J. Ch. 851;

[1894] 3 Ch. 659; 8 R. 760; 71 L. T. 226; 43 W. R. 202.—ROMER, J.

Courtauld v. Legh and Collis v. Laugher, considered.

Cooper v. Straker (supra), discussed and approved.

Hollins v. Verney (1884) 53 L. J. Q. B. 480; 13 Q. B. D. 304; 51 L. T. 753; 33 W. R. 5; 48 J. P. 580.—C.A., applied.

Smith v. Baxter (1900) 69 L. J. Ch. 487; [1900] 2 Ch. 138; 82 L. T. 650; 48 W. R. 458.—STIRLING, J.

[The rule laid down in *Hollins v. Verney* with regard to user in the case of discontinuous easements applies to the user in connection with light.]

Lanfranchi v. Mackenzie (1867) 36 L. J. Ch. 518; L. R. 4 Eq. 421; 16 L. T. 114; 15 W. R. 416.—V.-C., referred to.

Moore v. Hall (1878).—Q.B.D. (supra).

Lanfranchi v. Mackenzie, not followed.

Lazarus v. Artistic Photographic Co. (1897) 66 L. J. Ch. 522; [1897] 2 Ch. 214; 76 L. T. 457; 45 W. R. 614.—KEKEWICH, J.

Lanfranchi v. Mackenzie and Dickinson v. Harbottle (1873) 28 L. T. 186.—V.-C., disapproved.

Warren v. Brown (1901) 71 L. J. K. B. 12; [1902] 1 K. B. 15; 85 L. T. 444; 50 W. R. 97.—C.A. LORD ALVERSTONE, C.J., WILLIAMS and ROMER, L.JJ.; reversing (1900) 69 L. J. Q. B. 842; [1900] 2 Q. B. 722; 83 L. T. 318.—WRIGHT, J.

ROMER, L.J. (for the Court).—The precise point arising in this case was clearly dealt with by Lord Justice Mellish in *Kalk v. Pearson*, where he says, "I cannot think that it is possible for the law to say that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light. It appears to me that it is utterly impossible to make any rule or adopt any measure of that kind. It is essentially a question of comparison, whether by reason of deprivation of light the house is substantially less comfortable than it was before." This statement has been since approved of and followed in many cases, and we believe it accurately states the existing law on the subject. So far as other judges have in their judgments used expressions which appear to, or do in fact, conflict with what Lord Justice Mellish has said, those expressions cannot, in our opinion, be justified. And in particular we may say that the opposing views expressed by Malins, V.-C., in *Lanfranchi v. Mackenzie* and *Dickinson v. Harbottle* cannot now be regarded as sound.

Att.-Gen. v. Nichol (1808) 16 Ves. 338; 3 Mer. 687; 10 R. B. 186, referred to.

Blakemore v. Glamorganshire Canal Navigation (1832) 1 Mylne & K. 154, 182.

Att.-Gen. v. Nichol, applied.

Att.-Gen. v. Sheffield Gas Consumers Co. (1853) 3 De G. M. & G. 304; 22 L. J. Ch. 811; 17 Jur. 677; 1 W. R. 185.—L.JJ.

Att.-Gen. v. Nichol and Fishmongers' Co. v. East India Dock Co. (1752) 1 Dick. 163, observed upon.

Jackson v. Newcastle (Duke) (1864) 10 Jur. (N.S.) 688, 810; 3 De G. J. & S. 275; 33 L. J. Ch. 698; 10 L. T. 635, 802; 12 W. R. 1066.—L.C.

LORD WESTBURY, J.C.—As observed by Lord Eldon, the Court will not interfere upon every degree of darkening ancient lights and windows; but the standard of the amount of damage that calls for the exercise of the jurisdiction to grant preventive relief, or to prohibit the continuance of the nuisance, has not been defined with any certainty. In *Att.-Gen. v. Nichol*, which was an application for an injunction to restrain the building of a wall which would darken the ancient lights of the Scottish Hospital, Lord Eldon is represented as saying, at p. 342: "The foundation of this jurisdiction interfering by injunction, is that head of mischief alluded to by Lord Hardwicke—that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages, more or less, would be given in an action at law." The sentence is not very accurately worded, and when examined it amounts to this—that this Court will interfere by injunction. Probably the report, which in other respects is very inaccurate, does not do justice to the language of the noble and learned judge; and I think it may be collected that Lord Eldon meant to say, that where the darkening of the ancient windows of a dwelling-house has materially injured the comfort of the existence of those who dwell in it, the Court would interfere by injunction. This rule or standard would have no application to a manufactory or business premises which are not occupied otherwise than for the purposes of some trade or manufactory. But, upon a similar principle, where the obstruction of the ancient lights of a manufactory or of business premises render the building, to a material extent, less suitable for the business carried on in them, it is, in my judgment, a case for an injunction, and not merely for compensation in damages. . . . It is true, that in the same case of *Att.-Gen. v. Nichol*, Lord Eldon is reported to have said: "I repeat the observations of Lord Hardwicke, that a diminution of the value of the premises is not a ground," namely, not a ground for an injunction. But there is here again some error in the report. Lord Hardwicke made no such general observation. In the case referred to, which is that of *Fishmongers' Co. v. East India Dock Co.*, Lord Hardwicke says: "It is not sufficient to say, it will alter the plaintiff's lights, for there no vacant piece of ground could be built upon in the City; and here there will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true, that the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building upon his own ground." It is clear, therefore, that what Lord Hardwicke meant to determine, and did determine, was this—that the shutting out of a view or prospect will not afford a ground for the interference by way of injunction, even though it be attended by a diminution of the value of the premises. He did not decide that a diminution of value by the obstruction of ancient lights is not a ground for an injunction.—p. 689.

Blanchard v. Bridges (1835) 4 A. & E. 176; 5 N. & M. 567; 1 H. & W. 630; 5 L. J. K. B. 78, *applied*.

Cooper v. Hubbuck (1860) 30 Beav. 160; 31

L. J. Ch. 123; 7 Jur. (N.S.) 457; 9 W. R. 352.—M.R.; *disapproved*.

Hutchinson v. Copestake (1861) 9 C. B. (N.S.) 863; 31 L. J. C. P. 19, 8 Jur. (N.S.) 54; 5 L. T. 178; 9 W. R. 896.—EX. CH. (*overruled*). See *infra*.

CROMPTON, J.—We were pressed with the argument that there was no greater amount of inconvenience to the servient tenement; and a case of *Cooper v. Hubbuck* was cited, where the Master of the Rolls was supposed to have held that a party having several windows in a house could put out an intermediate new window between two old ones, where no apparent detriment to the owner of the servient tenement appeared to arise therefrom. I wholly dissent from this doctrine. I think that the right to restrict the owner of the adjoining land from building on his own land, gained by user or grant, must be confined to the subject-matter of such user or grant, and that the restriction on the owner of the servient tenement must be substantially the same, according to the rule as laid down in *Blanchard v. Bridges*.—p. 867.

Blanchard v. Bridges, distinguished.

National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co. (1877) 46 L. J. Ch. 871; 6 Ch. D. 757; 37 L. T. 91; 26 W. R. 26.

FRY, J.—*Blanchard v. Bridges* appears to me to have proceeded on this: there was that which the Court held amounted to an implied grant of a right to have certain windows, and an implied licence or covenant not to obstruct the access to certain windows; and the whole question was, what was the extent to which that implied licence or covenant went? The facts were shortly these. The plaintiff had been allowed to erect windows looking east in his building or cottage. He then built out a projection five feet from the original house, two bays looking north and south, and also more or less east; and the question was, whether the original grant, licence, or covenant was to be deemed to protect these new windows. The Court held it was not. It was a mere question how far the implied grant, licence, or covenant was to be deemed to have gone. They say this: "A person might well acquiesce in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him; but to hold him to be thereby concluded as to some other window to which he might have the greatest objection, as to which he would never have assented if it had come in the first instance, would be an erroneous conclusion." Therefore I do not think that *Blanchard v. Bridges* is an authority for the use for which it has been used before me.

Blanchard v. Bridges, held superseded.

National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co., *considered*.

Scott v. Pape (1885) 54 L. J. Ch. 914; 31 Ch. D. 554; 53 L. T. 598.—NORTH, J.; *affirmed in C.A., infra*.

Benshaw v. Bean (1852) 18 Q. B. 112; 21

L. J. Q. B. 219; 16 Jur. 314, *approved*.

Chandler v. Thompson (1811) 3 Camp. 80; 13 R. R. 756, *impeached*.

Wilson v. Townend (1860) 30 L. J. Ch. 25; 6 Jur. (N.S.) 1109; 1 Drew. & Sm. 324; 3

L. T. 352; 9 W. R. 30.

KINDERSLEY, V.-C.—Now, I am bound to say,

I feel very great difficulty in reconciling *Renshaw v. Bean* with *Chandler v. Thompson*. At the same time, I am bound to make this observation, that Lord Campbell expressly says the Court does not in any way mean to overrule the decision in *Chandler v. Thompson*; and he says, "We do not mean to say that there may not be many cases in which you may obstruct the light of a new window, although you have no right to obstruct the light of that portion which is the portion of the old window—that is, the aperture part of the new window, which was also part of the old window." But if the cases were not reconcilable, as Lord Campbell considers they were, still as *Renshaw v. Bean* is the decision of the Court *in banc*, when all the judges of the Court gave their opinion, and *Chandler v. Thompson* is a case at Nisi Prius, of course if there were any inconsistency *Renshaw v. Bean* would overrule *Chandler v. Thompson*.—p. 28.

Renshaw v. Bean and Hutchinson v. Copestake (1861) 9 C. B. (N.S.) 863; 31 L. J. C. P. 19; 8 Jur. (N.S.) 54; 5 L. T. 178; 9 W. R. 896.—EX. CH., *overruled*.

Tapling v. Jones (1865) 11 H. L. Cas. 290; 20 C. B. (N.S.) 166; 34 L. J. C. P. 342; 11 Jur. (N.S.) 309; 12 L. T. 555; 13 W. R. 617.—H. L. (E.). *But see infra*.

Renshaw v. Bean and Hutchinson v. Copestake, held overruled.
Newson v. Pender (1884) 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243.—C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ. *See extract (post, col. 921)*.

Hutchinson v. Copestake, held superseded.
Scott v. Pape (1885) 54 L. J. Ch. 914; 31 Ch. D. 554; 53 L. T. 598.—NORTH, J.: *affirmed in C.A. (infra)*.

Scott v. Pape (1886) 55 L. J. Ch. 426; 31 Ch. D. 554; 54 L. T. 399; 34 W. R. 465; 50 J. P. 645.—C.A. COTTON, BOWEN and FRY, L.JJ., *considered*.

Greenwood v. Hornsey (1886) 55 L. J. Ch. 917; 33 Ch. D. 471; 55 L. T. 185; 35 W. R. 168.—BACON, V.-C.

Scott v. Pape and Newson v. Pender, considered.
Smith v. Baxter (1900) 69 L. J. Ch. 437; [1900] 2 Ch. 138; 82 L. T. 650; 48 W. R. 458.—STIRLING, J.

Tapling v. Jones (1865) 11 H. L. Cas. 290; 20 C. B. (N.S.) 166; 34 L. J. C. P. 342; 11 Jur. (N.S.) 309; 12 L. T. 555; 13 W. R. 617.—H. L. (E.), *observed upon*.

Heath v. Bucknall (1869) 38 L. J. Ch. 372; L. R. 8 Eq. 1; 20 L. T. 549; 17 W. R. 755.—M.R.

FROMMILLY, M.R. held that *Tapling v. Jones* applied only to the right of the owner of the dominant tenement, who has replaced ancient lights by new large windows, to recover damages at law, and is not to be extended to establish his right to relief in equity.]

Tapling v. Jones, observed upon.
Staught v. Burn (1869) 39 L. J. Ch. 289; L. R. 5 Ch. 163; 22 L. T. 831; 18 W. R. 243.—L.J. *See extract (infra, col. 922)*.

Tapling v. Jones, applied.
Ayusley v. Glover (1874) 43 L. J. Ch. 777; L. R. 18 Eq. 544; 31 L. T. 219; 23 W. R. 147.—M.R.

Tapling v. Jones, observed upon.
National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co. (1877) 46 L. J. Ch. 871; 6 Ch. D. 757; 37 L. T. 91; 26 W. R. 26.

FRY, J.—It is said, and said truly, that the cases proceed to a large extent upon observations with regard to the form and size of the aperture or window; and that is perfectly true, because of course, the opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement; and therefore, it seems to me, it is that in all cases the Court has regard to the aperture in the dominant tenement by means of which the space over the servient tenement has been useful to the dominant tenement. Now, it is said that that conclusion is inconsistent with the definition of Lord Westbury in *Tapling v. Jones*. It appears to me it is not so, and that Lord Westbury, in referring to a window as equivalent to an access, in *Tapling v. Jones*, only says this, that the window in fact defines the access. And that that was the view taken by the House of Lords, seems to me confirmed by a passage from the judgment of Lord Chelmsford. . . . "By the Prescription Act then, after twenty years' user of the light, the owner acquires an absolute indefeasible right, which so far restricts the adjoining owner in the use of his own property that he can do nothing on his premises which may have the effect of obstructing him; the right thus acquired must, nevertheless, be confined to the exact dimensions of the opening through which the access of light and air has been permitted." In other words, he seems to me to say that the aperture, the opening through which the access of light has been admitted, is the measure of the access which you are to enjoy over the servient tenement.

Tapling v. Jones, considered.
Fréchette v. La Compagnie Manufacturière de St. Hyacinthe (1883) 53 L. J. P. C. 20; 9 App. Cas. 170; 50 L. T. 62.—P.C. LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUGH, and SIR A. HOBHOUSE.

SIR A. HOBHOUSE (for J.C.).—*Tapling v. Jones* was cited as an authority for the plaintiffs; but so far as it bears upon the point under discussion it favours the argument for the defendants. For the plaintiff in *Tapling v. Jones*, succeeded in getting protection for nothing but his ancient light; those very rays of light to which he had acquired an indefeasible right. . . . It may be inferred by the judgments [of Lord Westbury and Lord Chelmsford] that if the plaintiff in *Tapling v. Jones* had so mixed up his old lights with his new ones that they could not be distinguished he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights.

Tapling v. Jones, considered

Newson v. Pender (1884) 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243.—C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ.

COTTON, L.J.—It was contended on behalf of the defendants, as I understand the argument, that there was authority which showed that in respect to all those windows which were not coincident with the windows in the old house, the plaintiffs had lost their right, and *Hutchinson v. Capestake* was the case relied upon, whereas, upon the other hand, the plaintiff contended that *Tapling v. Jones*, in the House of Lords, overruled altogether what was laid down in *Hutchinson v. Capestake*, and that, according to the decision of the House of Lords in *Tapling v. Jones*, the plaintiffs remained entitled to their legal right, and to the protection of an injunction in respect of all those portions of their present windows which were coincident with any portion of the old lights in the old house and corresponded with any portion of the old lights.

In my opinion, *Tapling v. Jones* did not decide that. That case is reported both in the House of Lords and in the Court of Exchequer Chamber; and it was remarked by the judges that there the plaintiff had one window in his new building which was entirely coincident with—except that it had been reconstructed—the ancient light in the ancient building, and in my opinion all that *Tapling v. Jones* decided was this, that where there is a modern light in a reconstructed building coincident with an old light there, the right to be protected was not lost by putting other lights in the building which were not entitled to any protection from being ancient lights—that is to say, a neighbour could not, under the guise of these new lights having been added, claim to obstruct the windows in respect to which the right to an ancient light could be claimed. But that was not overruling the principle to be found in *Hutchinson v. Capestake*, as laid down by Lord Blackburn and Lord Bramwell. In that case what they decided was that there was no window in the new building which was coincident with the old windows, and therefore there was no light in the new building which could be considered as a continuance of any ancient light. *Tapling v. Jones* decided that, by constructing new windows, either by the side of or above or below the ancient light in a reconstructed building, the right in respect of it was not lost, and I can see no reason why, when a window is reconstructed, which has within its area the entire area of an old ancient light entitled to protection, if the building is reconstructed, with that in its exactly former position, the addition to the area of a new window which included the area of the old would destroy the right which would have existed if, instead of being within the same mullions, it had been an addition of a window just by the side of the old window. I understand the ruling to be that, although there is a portion of the ancient light coincident with a portion of the new light, yet if the new light does not include the area of the old light, or if there is not substantially the area of the ancient light included in the new, it cannot be said to be a continuance of the ancient light, and a plaintiff cannot seek protection in respect of the existing windows simply because he has got a little bit of the area of the ancient light included in the area of the new, which is not a continuance of the ancient light. There would be a question as to whether the plaintiffs

here have at law a right in respect of a great many of these windows, but undoubtedly there are some of their windows which do include the entire area of the old lights, and, in my opinion, having regard to *Tapling v. Jones*, they are entitled in respect of the area of the old ancient lights included, substantially, in the area of the new lights, to protection.—p. 60.

Tapling v. Jones, applied.

Scott v. Pape (1886) 55 L. J. Ch. 426; 31 Ch. D. 554; 54 L. T. 399, 34 W. R. 465; 50 J. P. 643.—C.A. COTTON, BOWEN and FRY, L.JJ.

Tapling v. Jones, applied.

Simpson v. Godmanchester Corporation (1897) 66 L. J. Ch. 770; [1897] A. C. 896, 77 L. T. 409.—H.L. (H.). LORDS WATSON, SHAND and DAVEY.

Tapling v. Jones, applied.

Jordeson v. Sutton, Southcoates and Drypool Gas Co. (1898) 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 187.—NORTH, J.; affirmed, (1899) 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692.—C.A. LINDLEY, M.R. and RIGBY, L.J.; WILLIAMS, L.J. partly dissenting.

Jordeson v. Sutton, Southcoates and Drypool Gas Co., followed.

Batcheller v. Tunbridge Wells Gas Co. (1901) 84 L. T. 765; 65 J. P. 680.—FARWELL, J.

Heath v. Bucknall (1869) 38 L. J. Ch. 372; L. R. 8 Eq. 1; 20 L. T. 549; 17 W. R. 755.—M.R., observed upon

Straight v. Burn (1869) L. R. 5 Ch. 163; 39 L. J. Ch. 289; 22 L. T. 531; 18 W. R. 243.—L.J.

GIFFARD, L.J.—That leaves only the other part of the case which has been argued, namely, the authority of *Heath v. Bucknall*. With respect to that case, I cannot take it as having been decided otherwise than upon its particular circumstances; those particular circumstances, as I gather them, being, that a very small and almost inappreciable proportion of the ancient window was preserved, and the rest was new; so that there would have been no material damages at law. But if this case is supposed to lay down the proposition that a plaintiff who, according to *Tapling v. Jones*, has clear legal rights cannot come to this Court and get protection for those rights, I entirely demur to such a conclusion. If, for instance, there is a house with three ancient windows, and it is desirable to add, at no great distance from those three ancient windows, two other windows, is it to be said that because those two other windows are to be placed in that position, the plaintiff is not to come into Court to preserve what has been decided in *Tapling v. Jones* to be his clear legal right? Such a conclusion would not be either according to principle or to the course of this Court. I take the course of this Court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, this Court will interfere by injunction.—p. 166.

Heath v. Bucknall, held to be overruled by Straight v. Burn (supra) and Jackson v. Newcastle (Duke) (1864) 10 Jur. (N.S.) 688, 810; 10 L. T. 635.—L.C., held overruled.

Aynsley v. Glover (1874) 43 L. J. Ch. 777; L. R. 18 Eq. 544; 31 L. T. 219; 23 W. R. 147.—M.R.;

affirmed (1875) 44 L. J. Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 459.—L.J.

JESSEL, M.R.—Now, if the case of *Heath v. Bucknall* was well decided, and there were no other case upon the subject, I should have great difficulty in holding that the plaintiffs are not so deprived [of their right to an injunction]. The principle of that case I understand to be this: that where the plaintiff has altered his ancient lights materially and in such a manner that the defendant cannot obstruct the additional or new lights without, to some extent, obstructing the ancient lights, so that by reason of the alteration the plaintiff must in time gain a right to the new or additional lights similar to that which he enjoyed as regards the ancient lights, then a Court of equity will not interfere at the instance of the plaintiff to grant an injunction, which would in effect preserve not only the ancient lights, but enable him to acquire a title to the new lights. But *Heath v. Bucknall* was, in that view of the case, overruled by Giffard, L.J., in *Staught v. Burn*. The Lord Justice Giffard, speaking of *Heath v. Bucknall*, says this [*vide ante, sub Staught v. Burn*]. . . . That amounts, in my view, to a decision to this effect, that if either by alteration of the windows themselves (that is, by adding new lights immediately adjoining), or by adding new lights in close proximity to the old windows, the plaintiff has altered the access of light in respect of quantity; yet, according to the decision in *Tupling v. Jones* (*supra*), he is still entitled to damages at law for any injury done to the ancient lights, and that being so entitled, if his case is otherwise one in which a Court of equity would grant an injunction, his title to that injunction is not affected by the circumstance either that he has added to the windows (that is, the ancient lights themselves), or that he has made new windows in close proximity to the ancient windows. Therefore, following the decision of the lord justice, which indeed I am bound to follow, and considering that the principle which he has enunciated is not reconcilable with the principle upon which I consider *Heath v. Bucknall* to have been decided. I hold that the defence which has been urged upon me, arising from the case of *Heath v. Bucknall*, cannot be sustained.—p. 547.

I must express my decided opinion that *Jackson v. Duke of Newcastle* is not law. Of course I should have no right to say so if there had been no other decision of a Court of equal jurisdiction: but there is such decision. The decision of Lord Cranworth in *Yates v. Jack* (L. R. 1 Ch. 295, 298), which is subsequent in point of date, is entirely in conflict with the decision of Lord Westbury in *Jackson v. Duke of Newcastle*. . . . I may mention, although it is not conclusive, that Lord Hatherley, when Vice-Chancellor, had occasion to consider the decisions both of *Jackson v. Duke of Newcastle* and of *Yates v. Jack*, and he not only adhered (as of course being V.-C. he was bound to adhere), but he expressed an opinion in favour of the view taken by Lord Cranworth in *Yates v. Jack*.—p. 548.

Staught v. Burn, followed.

Ecclesiastical Commissioners v. Kino (1880) 49 L. J. Ch. 529; 14 Ch. D. 213; 42 L. T. 201; 28 W. R. 544.—C.A. JAMES, BRETT and COTTON, L.J.J.; reversing HALL, V.-C.

Staught v. Burn and Ecclesiastical Commissioners v. Kino, referred to.

Scott v. Pape (1886) 55 L. J. Ch. 426; 31 Ch. D. 554; 54 L. T. 399; 34 W. R. 465; 50 J. P. 645.—C.A. COTTON, BOWEN and FRY, L.J.J.

Moore v. Rawson (1824) 3 L. J. (o.s.) K. B. 32; 5 D. & R. 234; 3 B. & C. 332; 27 R. L. 375, applied.

Stokoe v. Singers (1857) 26 L. J. Q. B. 257; 8 El. & Bl. 31; 3 Jur. (N.S.) 1256; 5 W. R. 756.—Q.B., distinguished.

Young v. Star Omnibus Co. (1902) 86 L. T. 41.—FARWELL, J.

7. RIGHTS OF WAY.

Williams v. James (1837) 36 L. J. C. P. 256; L. R. 2 C. P. 577; 16 L. T. 664; 15 W. R. 923, followed.

Cowling v. Higginson (1838) 4 M. & W. 245; 7 L. J. Ex. 265; 1 H. & H. 269, observed upon.

Wimbledon and Putney Conservators v. Dixon (1875) 45 L. J. Ch. 353; 1 Ch. D. 362; 33 L. T. 679; 24 W. R. 466.—C.A.

Williams v. James and Wimbledon and Putney Conservators v. Dixon, followed. Pym v. Harrison (1876) 33 L. T. 796.—C.A.

Williams v. James and United Land Co. v. G. E. Ry. (1875) 44 L. J. Ch. 685; L. R. 10 Ch. 586; 33 L. T. 292; 23 W. R. 896.—L.J.J., adopted.

New Windsor Corporation v. Stovell (1884) 54 L. J. Ch. 113; 27 Ch. D. 665; 51 L. T. 626; 33 W. R. 223.—NORTH, J.

Senhouse v. Christian (1787) 1 Term Rep. 560; 1 R. R. 300; Durham and Sunderland Ry. v. Walker (1842) 9 Q. B. 940; 2 G. & D. 326; 11 L. J. Ex. 442.—EX. CH.; and Dand v. Kingscote (1840) 6 M. & W. 174; 2 Railw. Cas. 27; 9 L. J. Ex. 279, distinguished.

Bidder v. North Staffordshire Ry. (1878) 4 Q. B. D. 412; 48 L. J. Q. B. 248; 40 L. T. 801; 27 W. R. 540.—C.A.

Durham and Sunderland Ry. v. Walker and Dand v. Kingscote, discussed and distinguished.

Hamilton (Duke) v. Graham (1871) L. R. 2 H. L. Sc. 166.—H.L. (SC.)

Codling v. Johnson (1829) 4 M. & Ry. 671; 3 B. & C. 933; 8 L. J. (o.s.) K. B. 68, adopted.

Newcomen v. Coulson (1877) 46 L. J. Ch. 459; 5 Ch. D. 133; 36 L. T. 385; 25 W. R. 469.—C.A.

Allan v. Gomme (1840) 11 A. & E. 759; 3 P. & D. 581; 9 L. J. Q. B. 258, limited.

Skull v. Glenister (1864) 16 C. B. (N.S.) 81; 33 L. J. C. P. 185; 9 L. T. 763; 12 W. R. 554, commented on.

Newcomen v. Coulson (*supra*), followed.

Finch v. G. W. Ry. (1879) 5 Ex. D. 254; 41 L. T. 731; 28 W. R. 229; 44 J. P. 8.—EX. D. STEPHEN, J. (for the Court).—It seems to us, upon the whole, that the proper view to take of *Allan v. Gomme*, is that it establishes

no general principle, but turns on the construction of the particular deed referred to—a deed bearing no resemblance to the grant in the present case (p. 258). It is remarkable that *Skull v. Glenister* was not cited in the argument on *Newcomen v. Coulson*. It appears to us that if the two are inconsistent, we must follow *Newcomen v. Coulson*, but the cases may be reconciled (though the reasoning in the judgment of Williams, J. seems scarcely consistent with the latter case) by treating *Skull v. Glenister* as deciding only that if there is a private right of way to one close, it must not be used colourably with the real intention of going to a different though adjoining close.—p. 263.

Newcomen v. Coulson, explained and applied.
New Windsor Corporation v. Stovell (1884) 54 L. J. Ch. 113; 27 Ch. D. 665; 61 L. T. 626; 33 W. R. 223.—NORTH, J.

Metropolitan Ry. v. G. W. Ry. (1900) 82 L. T. 451; 64 J. P. 472.—KEKEWICH, J.; reversed, (1901) 84 L. T. 333.—C.A. RIGBY, WILLIAMS and STIRLING, L.JJ.

De Carteret v. Baudains (1886) 55 L. J. P. C. 33; 11 App. Cas. 214.—P.C., observations adopted.

Godfray v. Sark Constables (1902) 71 L. J. P. C. 116; [1902] A. C. 534; 87 L. T. 3.—P.C.

S. RIGHT TO SUPPORT.

Humphries v. Brogden (1860) 12 Q. B. 739; 20 L. J. Q. B. 10; 15 Jur. 124, *questioned* *Solomon v. Vintners' Co.* (1859) 4 H. & N. 585; 28 L. J. Ex. 370; 5 Jur. (N.S.) 1177; 7 W. R. 613.—EX.

POLLOCK, C.B.—It seems to us that, in the absence of all evidence as to origin or grant, the only way in which such a right can be supported is that suggested by Lord Campbell in *Humphries v. Brogden*, namely, an absolute rule of law similar to that which is stated to have existed in the civil war. But there is no authority for any such rule to be found, at least none was stated to us. Lord Campbell compares it to a right to light. But that right is created by the express enactment of the sect. 3 of the statute 2 & 3 Will. 4, c. 71, before referred to. And it seems contrary to justice and reason that a man, by building a weak house adjoining to the house of his neighbour, can, if the weak house gets out of the perpendicular and leans upon the adjoining house, thereby compel his neighbour either to pull down his own house within twenty years, or to bring some action at law, the precise nature of which is not very clear; otherwise it is said an adverse right would be acquired against him.—p. 599.

Humphries v. Brogden and Solomon v. Vintners' Co., considered.
Hunt v. Peake (1860) 29 L. J. Ch. 785; 1 Johns. 705; 6 Jur. (N.S.) 107.—WOOD, V.C.

Angus v. Dalton (1877) 47 L. J. Q. B. 163; 3 Q. B. D. 85; 38 L. T. 510.—Q.B.D.; reversed, (1878) 48 L. J. Q. B. 225; 4 Q. B. D. 162; 40 L. T. 605; 27 W. R. 623.—C.A. COTTON and

THESSIGER, L.JJ., BRETT, L.J. *dissenting*; affirmed, *nom.* Dalton v. Angus (1881) 60 L. J. Q. B. 689; 6 App. Cas. 740; 41 L. T. 844; 30 W. R. 191; 46 J. P. 132.—H.L. (R.)

Dalton v. Angus, applied.
Lemaître v. Davis (1881) 51 L. J. Ch. 173; 19 Ch. D. 281; 46 L. T. 407; 30 W. R. 360.—HALL, V.C.

Dalton v. Angus, discussed.
Tone v. Preston (1888) 24 Ch. D. 739; 49 L. T. 99; 32 W. R. 166.—DENMAN, J.

Dalton v. Angus, applied.
Solomon v. Vintners' Co. (*supra*) distinguished.

Latimer v. Official Co-operative Society (1885) 16 L. R. Ir. 305.—C.P.D.

Dalton v. Angus, dictum applied.
Hardacre v. Idle District Council (1896) 65 L. J. Q. B. 363; [1896] 1 Q. B. 335; 74 L. T. 69; 44 W. R. 323; 60 J. P. 196.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.

Dalton v. Angus, explained.
Union Lighterage Co. v. London Graving Dock Co. (1902) 71 L. J. Ch. 791; [1902] 2 Ch. 557; 87 L. T. 381.—C.A. ROMER and STIRLING, L.JJ.; WILLIAMS, L.J. *dissenting in part*.

Weston v. Arnold (1873) 43 L. J. Ch. 123; L. R. 8 Ch. 1084; 22 W. R. 284.—L.JJ., applied.

Knight v. Purcell (1879) 48 L. J. Ch. 395; 11 Ch. D. 412; 40 L. T. 391; 27 W. R. 817.—FRY, J.

Weston v. Arnold, considered.
Drury v. Army and Navy Co-operative Supply (1896) 65 L. J. M. C. 169; [1896] 2 Q. B. 271; 74 L. T. 621; 44 W. R. 560; 60 J. P. 421.—WRIGHT and COLLINS, JJ.

COLLINS, J.—*Weston v. Arnold* establishes that a wall is not a party wall when it gets three feet above the roof of the adjoining building, unless there is some special statutory provision to make it a party wall above that height; and here, unless it is a party wall above that height, the provisions of sect. 59 [of the London Building Act, 1894] do not apply to make it be carried three feet above the roof of the higher building. The construction which is sought to be given to sect. 59 can only be got at by assuming in the appellant's favour the point which *Weston v. Arnold* decided.

Partridge v. Scott (1838) 7 L. J. Ex. 101; 3 M. & W. 220; 1 H. & H. 81.—EX.—**Browne v. Robins** (1859) 28 L. J. Ex. 250; 4 H. & N. 156.—EX.—and **Birmingham Corporation v. Allen** (1877) 48 L. J. Ch. 673; 6 Ch. D. 284; 37 L. T. 207; 25 W. R. 810.—C.A., explained and distinguished.

Rigby v. Bennett (1882) 21 Ch. D. 559; 48 L. T. 47; 31 W. R. 222; 47 J. P. 217.—C.A., discussed.

Green v. Belfast Tramway Co. (1887) 20 L. R. Ir. 85,

9. EXTINGUISHMENT.

- Thomas v. Thomas** (1835) 2 C. M. & R. 34; 1 Gale 61; 5 Tyr. 804; 4 L. J. Ex. 179, *followed*.
Harvey v. Walters (1873) 42 L. J. C. P. 105; L. R. 8 C. P. 162; 28 L. T. 343.—C.P.

10. DISTURBANCE OF EASEMENTS.

What amounts to.

- Hackett v. Baiss** (1875) 45 L. J. Ch. 13; L. R. 20 Eq. 494.—M.R., *explained*.
Theod. v. Debenham (1876) 2 Ch. D. 165; 24 W. R. 775.—BACON, V.-C.

Hackett v. Baiss, considered.

- Parker v. First Avenue Hotel Co** (1883) 24 Ch. D. 282; 49 L. T. 318, 32 W. R. 105.—C.A. BRETT, M.R., COTTON and BOWEN, L.JJ.

COTTON, L.J.—Now, it was said that the learned judge followed a decision of the late Master of the Rolls in *Hackett v. Baiss*. It may be, that having regard to the pleadings in that case and the contention between the parties, the Master of the Rolls took it as an admitted fact between the parties that an erection at that particular angle would not in any way interfere substantially with the light for which the plaintiff sought protection; and if that was so, then in my opinion he was quite right in limiting the injunction in the way in which he did limit it, because when a matter is ripe for decision between the parties on a motion for injunction, it is quite right for the Court, and it is its duty so to mould its injunction that, having regard to the case made and the evidence before the Court, it may decide that which is ripe for decision, and prevent the question being raised *de novo*, which it might be on a motion to commit, if the injunction were simply granted in the ordinary form of an injunction to restrain from building or doing something else so as to interfere with the plaintiff's rights.—p. 285.

Remedies for.

- Gale v. Abbott** (1862) 8 Jur. (N.S.) 987; 6 L. T. 852; 10 W. R. 748.—V.-C., *adopted*.
Bass v. Gregory (1890) 59 L. J. Q. B. 574; 25 Q. B. D. 481; 55 J. P. 119.—POLLOCK, B.

Gale v. Abbott, inapplicable.

- Chastey v. Ackland** (1895) 64 L. J. Q. B. 523; [1895] 2 Ch. 389; 12 R. 420; 72 L. T. 845; 43 W. R. 627.—C.A. LINDLEY, LOPES and KAY, L.JJ.

- Clarke v. Clark** (1865) 35 L. J. Ch. 151; L. R. 1 Ch. 16; 11 Jur. (N.S.) 914; 13 L. T. 482; 14 W. R. 115.—L.C., *followed*.

- Robson v. Whittingham** (1866) 35 L. J. Ch. 227; L. R. 1 Ch. 442; 12 Jur. (N.S.) 40; 13 L. T. 730; 14 W. R. 291.—L.JJ.; *reversing* KINDERSLEY, V.-C.

Clarke v. Clark and Robson v. Whittingham, dicta in, held overruled.

- Dent v. Auction Mart Co.**; **Pilgrim v. Auction Mart Co.**; **Mercers' Co. v. Auction Mart Co.**

- (1866) L. R. 2 Eq. 238; 35 L. J. Ch. 555; 12 Jur. (N.S.) 447; 14 L. T. 827; 14 W. R. 709.

wood, V.-C.—Another difficulty which existed at the time I heard this case, has to my mind been removed by the recent decision in *Yates v. Jack*, namely, a suggestion in the previous case of *Clarke v. Clark*, whereby the Lord Chancellor appeared to indicate that there was some difference between the right to protection of a person residing in a town, and the right of a person residing in the country, who would have reason to expect a greater amount of light in his dwelling. I confess it always appeared to me there must have been some misapprehension of the view in which these observations were put forward by the Lord Chancellor, and I should not have felt much embarrassed by them (for they could have been explained), but for an apparent acquiescence in the same view on the part of Knight Bruce, L.J., in *Robson v. Whittingham*. But I cannot suppose the Lord Chancellor or the Lord Justice to mean that in reality there is any substantial difference between the right which a plaintiff has to seek the protection of this Court when he lives in a town, and that which he would have if he resided in the country (p. 248). That being so, I confess I should have felt more difficulty than I do now, had it not been for the recent decision in *Yates v. Jack*, which puts it beyond all doubt that the Lord Chancellor did not entertain the view which his observations in *Clarke v. Clark* were supposed to imply.—p. 249.

Clarke v. Clark, commented on.

- Robson v. Whittingham, referred to.**
Dent v. Auction Mart Co. followed.
Martin v. Headon (1866) 35 L. J. Ch. 602; L. R. 2 Eq. 425; 12 Jur. (N.S.) 387; 14 L. T. 585; 14 W. R. 723.—V.-C.

Clarke v. Clark, referred to.

- Kelk v. Pearson** (1871) L. R. 6 Ch. 809; 24 L. T. 890; 19 W. R. 665.—C.A.; *reversing*. 23 L. T. 458; 19 W. R. 269.—V.-C.

Dent v. Auction Mart Co. adopted.

- Bass v. Gregory** (1890) 59 L. J. Q. B. 574; 25 Q. B. D. 481; 55 J. P. 119.—POLLOCK, B.

Clarke v. Clark, followed.

- Warren v. Brown** (1900) 69 L. J. Q. B. 842; [1900] 2 Q. B. 722; 83 L. T. 318.—WRIGHT, J.; *reversed*, (1901) 71 L. J. K. B. 12; [1902] 1 K. B. 15; 85 L. T. 444; 50 W. R. 97.—C.A. ALVERSTONE, C.J., WILLIAMS and ROMER, L.JJ.

- Yates v. Jack** (1866) L. R. 1 Ch. 295; 14 L. T. 151.—L.C., *followed*.

- Dent v. Auction Mart Co.** (1866) 35 L. J. Ch. 555; 12 Jur. (N.S.) 447; 14 L. T. 827; 14 W. R. 709.—V.-C. *See extract, supra*.

Yates v. Jack, followed.

- Aynsley v. Glover** (1874) 43 L. J. Ch. 777; L. R. 18 Eq. 544; 31 L. T. 219; 23 W. R. 147.—M.R.; *affirmed*, (1875) 44 L. J. Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 459.—L.JJ.

Yates v. Jack, adopted.

- Hackett v. Baiss** (1875) 45 L. J. Ch. 13; L. R. 20 Eq. 494.—JESSEL, M.R.

City of London Brewery Co. v. Tennant (1873) 43 L. J. Ch. 457; L. R. 9 Ch. 212; 29 L. T. 755; 22 W. R. 172.—L.C. and L.J.; *observed upon*, **Stanley of Alderley (Lady) v. Shrewsbury (Earl)** (1875) 44 L. J. Ch. 389; L. R. 19 Eq. 616; 32 L. T. 248; 23 W. R. 678.—v.c.; *adopted*, **Hackett v. Bais** (1875) 45 L. J. Ch. 13; L. R. 20 Eq. 494.—JESSEL, M.R.

City of London Brewery Co. v. Tennant, *unapplicable*.

Chnstey v. Aokland (1895) 64 L. J. Q. B. 523; [1895] 2 Ch. 389; 12 R. 420; 72 L. T. 845; 47 W. R. 627.—C.A. LINDLEY, LOPES and KAY, L.JJ.

City of London Brewery Co. v. Tennant, *followed*.

Warren v. Brown (1900).—WRIGHT, J.; *reversed*, (1901).—C.A. (*supra*, col. 916).

Durell v. Pritchard (1865) 35 L. J. Ch. 223; L. R. 1 Ch. 244; 12 Jur. (N.S.) 16; 13 L. T. 645; 14 W. R. 212.—L.J., *referred to*, **Martin v. Headon** (1866) 35 L. J. Ch. 602; L. R. 2 Eq. 425; 12 Jur. (N.S.) 387; 14 L. T. 585; 14 W. R. 723.—v.c.

Durell v. Pritchard, *explained*.

Kelk v. Pearson (1871) L. R. 6 Ch. 809; 24 L. T. 890; 19 W. R. 665.—C.A.; *reversing*, 23 L. T. 458; 19 W. R. 269.—v.c., *approved*.

City of London Brewery Co. v. Tennant (1873) L. R. 9 Ch. 212; 43 L. J. Ch. 457; 29 L. T. 755; 22 W. R. 172.—L.C. and L.J.

JAMES, L.J.—With regard to one point which was raised by Mr. Pearson in his very able argument, based upon **Durell v. Pritchard**, but upon which the Vice-Chancellor does not appear to have proceeded, that unless there was a clear case for a mandatory injunction as to the whole of the building, there was no case for the Court's interference, I think it is not safe to rely upon **Durell v. Pritchard** as establishing any such doctrine. I think this Court would not be slow to give relief in damages where, although no sufficient case for a mandatory injunction was made, it found that a case for substantial damages might be laid before a jury; and so the Court might by interfering under the powers of Lord Cairns' Act, prevent multiplicity of actions.—P. 218.

SELBORNE, L.C. to the same effect.

Durell v. Pritchard and Kelk v. Pearson, *observed upon*.

Stanley of Alderley (Lady) v. Shrewsbury (Earl) (1875) 44 L. J. Ch. 389; L. R. 19 Eq. 616; 32 L. T. 248; 23 W. R. 678.—v.c.

Kelk v. Pearson, *explained*.

Scott v. Pape (1886) 55 L. J. Ch. 426; 81 Ch. D. 554; 54 L. T. 399; 84 W. R. 465; 50 J. P. 643.—C.A. COTTON, BOWEN and FRY, L.JJ.

BOWEN, L.J.—In **Kelk v. Pearson**, Lord Justice James expressed an opinion that the statute (the Prescription Act) has in no degree altered the pre-existing law as to the nature and extent of the right of excess of light. His language must not be misunderstood. Since the statute, as before, the right remains a right to have an amount of access of light to and through apertures in a house or building which would be sufficient for the use and occupation of the building. It is not a right in gross, but a right

to light in connection with a "dwelling-house, workshop, or building;" the building, workshop, or dwelling-house being the means by which the light is enjoyed for a period of twenty years, and by which the right to enjoy it is acquired. But the right has been altered by an Act of Parliament in one and a very material sense. It used, in the absence of a specific agreement, to depend on the implication, derived from user, of some supposed covenant by the owner of the servient tenement, by which he was deemed to have precluded himself from thenceforward interfering with the access of light to the dominant tenement to the extent of such user. What the statute has done is to create a fresh origin for the right. The origin of the right is to be, not the supposition of any implied covenant—that is not necessary, provided you fulfil the requirements of the statute as to enjoyment for a certain period—not enjoyment as of right, but actual enjoyment. There may still, since the statute, be conventional agreements between the parties which dispense with the necessity of proving even the enjoyment for twenty years, but the statutory origin which it is necessary to consider in the present instance is an alleged enjoyment for twenty years.

Durell v. Pritchard (1865) 35 L. J. Ch. 223; L. R. 1 Ch. 244; 12 Jur. (N.S.) 16; 13 L. T. 645; 14 W. R. 212.—L.J., *followed*, **Chastey v. Aokland** (1895) 64 L. J. Q. B. 523; [1895] 2 Ch. 389; 12 R. 420; 72 L. T. 845; 48 W. R. 627.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Warren v. Brown (1901) 71 L. J. K. B. 12; [1902] 1 K. B. 15; 85 L. T. 444; 50 W. R. 97.—C.A. (*supra*, col. 916), *followed and applied*.

Home and Colonial Stores v. Colls (1901) 71 L. J. Ch. 146; [1902] 1 Ch. 302; 85 L. T. 701; 50 W. R. 227.—C.A. WILLIAMS, ROMER and HARDY, L.JJ.; *reversing* 83 L. T. 759.—JOYCE, J.

Warren v. Brown, *discussed*.

Parker v. Stanley (1902) 50 W. R. 282.—FARWELL, J.

Aynsley v. Glover, *observed upon*.

Stanley of Alderley (Lady) v. Shrewsbury (Earl) (1875) 44 L. J. Ch. 389; L. R. 19 Eq. 616; 32 L. T. 248; 23 W. R. 678.—HALL, v.c.

Aynsley v. Glover; Smith v. Smith (1875) 44 L. J. Ch. 630; L. R. 20 Eq. 500; 32 L. T. 787; 23 W. R. 771.—JESSEL, M.R.; and **Krehl v. Burrell**, 47 L. J. Ch. 353; 7 Ch. D. 551; 38 L. T. 407.—M.R.; *affirmed*, (1879) 48 L. J. Ch. 252; 11 Ch. D. 146; 40 L. T. 637; 27 W. R. 805.—C.A., *considered*.

Holland v. Worley (1884) 54 L. J. Ch. 268; 26 Ch. D. 578; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7.—PEARSON, J.

Aynsley v. Glover and Krehl v. Burrell *applied*.

Holland v. Worley (1884) 54 L. J. Ch. 268; 26 Ch. D. 578; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7.—PEARSON, J., *distinguished*.

Greenwood v. Hornsey (1886) 55 L. J. Ch. 917; 38 Ch. D. 471; 55 L. T. 135; 35 W. R. 163.—v.c.

BACON, V.-C.—Reference was made to the case of *Uniland v. Worley*, before the late Mr. Justice Pearson, in which that learned judge exercised the discretion vested in him by Lord Cairns' Act, by granting to the plaintiff 150*l.* as the proper compensation to be paid to the plaintiff by the defendant, instead of the injunction which the plaintiff sued for. I have no right, and certainly no inclination, to criticise the judgment thus referred to, but it must be observed that there was there no such undertaking as that which has been given by the defendant in the present case. The question there was (as such a question always must be), one of mere discretion, and that discretion must be exercised with an intimate knowledge of the facts of each particular case. I think I should err in principle, and I should disregard the decisions and reasons propounded by the late Master of the Rolls in *Aynsley v. Glover* (L. R. 2 Eq. 425; 43 L. J. Ch. 777); and in *Krehl v. Burrell* (L. R. 7 Ch. D. 551; L. R. 11 Ch. D. 146; 47 L. J. Ch. 353; 48 L. J. Ch. 252), if I undertook to say that I have authority to grant or to sell to the defendant against the will of the plaintiff a licence to commit that wrong, of which the plaintiff complains, in consideration of any money payment. On the contrary, I am bound to say, as was said in somewhat similar terms in the case of *Scout v. Pape*, that the way in which this case has been dealt with on the motion, precludes me from entering into this question.—p. 918.

Dreyfus v. Peruvian Guano Co. (1889) 43 Ch. D. 316; 62 L. T. 518; 6 Asp. M. C. 492.—**G.A. COTTON and FRY, L.J.**; **BOWEN, L.J. dissenting, distinguished.**

Phillips v. Homfray (1890) 59 L. J. Ch. 547; 44 Ch. D. 694; 62 L. T. 897; 39 W. R. 45.—**STIRLING, J.**

Dreyfus v. Peruvian Guano Co. and Holland v. Worley, discussed.

Martin v. Price (1898) 63 L. J. Ch. 209; [1894] 1 Ch. 276; 7 R. 90; 70 L. T. 202; 42 W. R. 262.—**C.A. LINDLEY, SMITH and DAVEY, L.J.**

LINDLEY, L.J. (for the Court).—The question whether the Court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand this Court in *Dreyfus v. Peruvian Guano Co.*, expressed a clear opinion against the existence of such jurisdiction. On the other hand, it has been very commonly assumed, and there are several observations by eminent judges favouring the view, that there is such a jurisdiction; and in *Holland v. Worley* the late Mr. Justice Pearson did award damages in lieu of an injunction which, if granted, would have been simply preventive, and in no sense mandatory. The question is one of very great importance; but we do not think it right to keep the parties waiting while we make up our minds upon it. If there is no such jurisdiction the order appealed from will be wrong. But, assuming the jurisdiction to exist, we are of opinion that, upon the facts of this case, the plaintiff was entitled to an injunction.

Martin v. Price, principle applied.
Shelfer v. City of London Electric Lighting

Co. (1894) 64 L. J. Ch. 216, [1895] 1 Ch. 287; 12 R. 112; 72 L. T. 84; 43 W. R. 238.—**C.A.**

Martin v. Price and Shelfer v. City of London Electric Lighting Co., principle applied.

Jordeson v. Sutton, Southcoates and Drypool Gas Co. (1899) 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692.—**C.A.**

Jacomb v. Knight, 32 L. J. Ch. 601; 9 Jur. (N.S.) 529; 8 L. T. 412; 11 W. R. 585.—**M.R. reversed**, (1868) 3 De G. J. & S. 533; 32 L. J. Ch. 601; 8 L. T. 621; 11 W. R. 812.—**L.J.**

Baxter v. Bower (1875) 44 L. J. Ch. 625; 33 L. T. 41; 23 W. R. 805.—**L.J.**, explained.

Gaskin v. Balls (1879) 13 Ch. D. 324; 28 W. R. 552.—**C.A.**

THESTIGER, L.J.—The Court will rarely interfere to pull down a building which has been erected without complaint. *Baxter v. Bower* was a very special case—just one of those exceptions which prove the rule in *non exceptis*.—p. 829.

ECCLESIASTICAL LAW.

BISHOPS.

Coveney's Case (1562) 2 Dyer 209, *disapproved*.

Phillips v. Bury (1788) 2 Term Rep. 346; 1 Ld. Raym. 5.—**HOLT, C.J.**

Phillips v. Bury, followed.

Rex v. Ely (Bishop) (1794) 5 Term Rep. 475; 2 R. R. 644.—**KENTON, C.J.**

Phillips v. Bury, commented on.

Att.-Gen. v. York (Archbishop) (1831) 2 Russ. & M. 461; 34 R. R. 129.

BROUGHAM, L.C.—In that case, which is one of great authority, Lord Holt has laid it down, that every incorporated charity must, if ecclesiastical, have the ordinary for its visitor; if lay, the patron.—p. 466

Evans v. Ascuithe (or Askwith) (1628) Sir W. Jones 158; Palm. 172, *discussed*.

Rex v. St. Peter's, Thetford (1798) 5 Term Rep. 364, *distinguished*.

Reg. v. Canterbury (Archbishop), Hampden, In re (1848) 17 L. J. Q. B. 252; 11 Q. B. 485; 12 Jur. 362; Jebb's Report.—**DENMAN, C.J.** and **ERLE, J.**; **PATTESON and COLERIDGE, JJ. dissenting.**

Mountague's Case (1628) 6 St. Trials (N.S.) 427, n. (b), *not applied*.

Evans v. Ascuithe, distinguished.

Reg. v. Canterbury (Archbishop), Hampden's Case, *discussed and applied*.

Rex v. Canterbury (Archbishop), Gore, In re (1902) 71 L. J. K. B. 894; [1902] 2 K. B. 503; 86 L. T. 79; 50 W. R. 348.—**ALVERSTONE, C.J.**, **WRIGHT and MIDLEY, JJ.**

PREBENDARIES.

Randolph v. Milman (1866) 36 L. J. C. P. 28; L. R. 2 C. P. 60; 12 Jur. (N.S.) 941; 15 W. R. 156.—**ERLE, C.J.** (for the Court); *reversed*, (1868) 38 L. J. C. P. 81; L. R. 4 C. P. 107; 17 W. R. 262.—**EX. CH.**

CURATES.

Capel v. Child (1832) 1 L. J. Ex. 205; 2 Cr. & J. 558; 2 Tyr. 689.—*EX. referred to.*
Hammesmith v. Rent Charge, In re (1849) 19 L. J. Ex. 66; 4 Ex. 87; 14 Jur. 917.—*EX.*
Bonaker v. Evans (1850) 20 L. J. Q. B. 137; 16 Q. B. 163; 15 Jur. 460.—*EX. CH.*; Reg. v. Canterbury (Archbishop) (1859) 28 L. J. Q. B. 154; 1 EL. & EL. 545; 5 Jur. (N.S.) 958; 7 W. R. 212.—*Q.B.*; Reg. v. Cheshire Lines Committee (1878) 42 L. J. M. C. 100; L. R. 8 Q. B. 344; 28 L. T. 808; 21 W. R. 846.—*Q.B.*; Wood v. Wood (1874) 43 L. J. Ex. 153; L. R. 9 Ex. 190; 30 L. T. 815; 22 W. R. 709.—*EX.*; Smith v. Reg. (1878) 47 L. J. P. C. 51; 3 App. Cas. 614, 38 L. T. 233.—*P.C.*; and Abergavenny (Marquis) v. Llandaff (Bishop) 57 L. J. Q. B. 233; 20 Q. B. D. 460, 58 L. T. 812; 36 W. R. 859.—*HUDDLESTON, B.*

Reg. v. Canterbury (Archbishop) (*supra*),
referred to.
Smith v. Reg. (*supra*).

Bonaker v. Evans (*supra*), *applied.*
Reg. v. Cheshire Lines Committee (*supra*).

RESIGNATIONS.

Gathercole v. Smith (1881) 50 L. J. Ch. 671; 17 Ch. D. 1; 44 L. T. 439; 29 W. R. 484.—*C.A.* JAMES, COTTON and LUSH, *J.J.*, *followed.*
Gathercole v. Smith (No. 2) (1881) 50 L. J. Q. B. 681; 7 Q. B. D. 626; 45 L. T. 106; 29 W. R. 577; 45 J. P. 812.—*BAGGATLAY and LUSH, J.J.*; *BRAMWELL, J.*, *dissenting.*

Gathercole v. Smith.—*CH. D.*, *distinguished.*
McBean v. Deane (1885) 30 Ch. D. 520; 55 L. J. Ch. 19; 53 L. T. 701; 33 W. R. 924.

CHITTY, J..—In *Gathercole v. Smith* it was held, under the Incumbents' Resignation Act, 1871, s. 10, which declares that the pension allowed to a retiring incumbent shall be a charge upon the revenues of the benefice, and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators or assigns, but shall not be transferable at law or in equity; that such pension, notwithstanding the use of the word "assigns," was incapable of alienation.—*p. 524.*

CANONS.

Middleton v. Crofts (1736) 2 Atk. 650 (Appendix); 2 Str. 1056; Cas. t. Harlow. 57; 2 Barn. K. B. 351; 2 Keil. 148.—*L.C.* *discussed.* **Exeter (Bishop) v. Marshall** (1868) 37 L. J. C. P. 331; L. R. 7 H. L. 17; 18 L. T. 376.—*H.L. (E.)* (*post.* col. 939); *approved.* **Reg. v. Allen** (1872) 42 L. J. Q. B. 37; L. R. 8 Q. B. 69 (*post.* col. 946).

RUBRICS.

Jenkins v. Cook (1875) L. R. 4 A. & E. 463.—*SIR R. PHILLIMORE; reversed.* (1876) 45 L. J. P. C. 1; 1 P. D. 80; 34 L. T. 1; 24 W. R. 439.—*P.O.*

ADVOWSON.

Anon. (1373) 3 Dyer 323, b.; and **Kensley v. Langham** (1735) Cas. t. Talb. 143 (this

case is called also **Kensley v. Langhorn, Kensley v. Langman**), *discussed and reconciled.*

Gully v. Exeter (Bishop) (1827) 4 Bing. 290; 12 Moore 291; 5 L. J. (o.s.) C. P. 178; 29 R. R. 565.—*BEST, C.J.* *referred to.*
Crompton v. Jarratt (1885) 54 L. J. Ch. 1109; 30 Ch. D. 298; 53 L. T. 603; 33 W. R. 913.—*C.A.*

COTTON, L.J.—A good deal of reliance was rightly placed in the course of the argument on the case in Dyer. That case is thus stated: "Upon evidence in *quare impedit* for the vicarage of T., in the county of Worcester, parcel of the possessions of the college of Westminster, it was moved, whether the advowson thereof passed, in a lease for years made in the time of Edward VI. in the second year, to Sir T. S. (who was an adumal and attainted), by the name of 'all the hereditaments situate, lying, and being in T.' where the vicarage was"; and it was held that it did. We were unsuccessful in our endeavours to obtain the record of that case, and we do not know what the facts were upon which that decision was given, but it is expressly stated that it was "upon evidence in *quare impedit*." There was probably some evidence in that case which we have not here which had a bearing upon the decision of the Court in that case. If the grantor had had no other property in T., and had granted a lease of "all the hereditaments of the lessee situate, lying, and being in T." I should come to the conclusion that these words were intended to, and in my opinion, if intended, they can, include an advowson. It is no doubt difficult to see how an advowson, which is simply a right to present to a church in a particular place, can itself be situate in a place: yet it does concern land in a particular place. Therefore that decision would lay down, and I think correctly, that that description, although not in my opinion an appropriate one, may under certain circumstances, pass an advowson. I desire also to refer to *Gully v. Exeter (Bishop)*, where a passage from Coke's Institutes [1st Instit. 19, b.; Co. Litt. Thomas's Edition, vol. i. 1511] is quoted, where he is dealing with the Statute of Westminster. He says this, that though "tenement" is the only word used in the statute "it includeth not only all corporate inheritances which are or may be holden, but also all inheritances rising out of any of those inheritances, or concerning or annexed to, or exercisable within the same though they lie not in tenure, as rents, estovers, commons, or other profits granted out of land, or uses, offices, dignities which concern land or certain places." Then Best, C.J., who is quoting that passage, says: "An advowson concerns land and a certain place," and that is what I think Mr. Wolstenholme suggested as explaining the description here, and showing that the words "situate in a certain place" are properly descriptive of an advowson. Against the case in Dyer, we must not disregard *Kensley v. Langham*, where there was a devise of all other the testator's messuages, cottages, closes, woodlands, and tenements in (among other places) Hardwick, and all other his lands and tenements not thereinafter devised. In the former gift referring to property in certain places there is the word "hereditament," and no doubt that would include an advowson.—*p. 1118.*

LINDLEY and BOWEN, L.J.J., to the same effect.

Crompton v. Jarratt (*supra*), *distinguished*.
Early v. Rathbone (1888) 57 L. J. Ch. 652;
 58 L. T. 317.—KEREWICK, J.

Crompton v. Jarratt, *distinguished*.
Hodgson, In re. Taylor v. Hodgson (1898) 67
 L. J. Ch. 591; [1898] 2 Ch. 545; 79 L. T. 345;
 47 W. R. 44.

ROMER, J.—The words in the will, the testator's
 "real estate in the county of Lincoln," and the
 words "freehold hereditaments situate in the
 several parishes of Doncaster, &c." in *Crompton v.*
Jarratt, are both expressions which might in-
 clude advowsons, although I agree they are not
 apt words to include them. I refer to what was
 said by Cotton, L.J. in *Crompton v. Jarratt*, and
 also to the observations of Bowen, L.J. In
Crompton v. Jarratt, the Court, upon looking
 at the deeds as a whole, including the recitals,
 came to the conclusion that the words "here-
 ditaments situated in the parish of Doncaster,"
 although they might include the advowson in
 question in that action, did not include it, and
 should not be held to pass it on the true con-
 struction of the particular deed.—p. 592.

[Mr. Cox's manuscript notes were produced
 from Lincoln's Inn Library, and from them it
 appeared that in *Kensey v. Langham* (*supra*,
 col. 933) the word "hereditament" was relied
 upon in the decision of that case.]—*Id.*

SIMONY.

Barrett v. Glabb (1778) 2 W. Bl. 1052; Dick.
 516, *explained*.

Greenwood v. London (Bishop) (1814) 5 Taunt.
 727; 1 Marsh. 292; 15 R. R. 627.

GIBBS, C.J. (for the Court).—No decided case
 has been cited which bears directly upon the
 point in question, but certain expressions of
 De Grey, C.J., in *Barrett v. Glabb*, as it is
 reported in the later editions of Bac. Abr. tit.
 Simony, A., have been selected and relied
 upon as showing that where simony enters into
 any part of the contract, the whole conveyance
 made in pursuance of it is void. There certainly
 are passages in that report which taken by
 themselves seem to countenance this opinion;
 but it is to be observed, that the question then
 before the Court was confined to the next pre-
 sentation only; that no such doctrine is to be
 found in the report of the same case by Black-
 stone, J., who joined in the judgment; and
 therefore it is very probable that the expressions
 relied upon are inaccurately reported, or may
 perhaps have been used with reference only to
 the next presentation, upon which alone the
 Court had to decide. Be this as it may, we
 certainly cannot be guided by so loose an
 authority, when the reasoning of the case leads
 us to a different conclusion.—p. 746.

Barrett v. Glabb, *commented on*.

Fox v. Chester (Bishop) (1829) 3 Bligh (N.S.)
 123; 1 Dow & Cl. 416; 6 Bing. 1; 32 R. R. 23.
 —H.L. (E.). ELDON, L.C. (with the JUDGES),
reversing (1824) 2 B. & C. 635; 4 D. & R. 93;
 2 L. J. (O.S.); K. B. 109.—ABBOTT, C.J.

London (Bishop) *v. Ffytche* (1788) 2 Bro.

P. C. 211.—H.L. (E.), *principle applied*.
Fletcher v. Sondes (Lord) (1827) 1 Bligh (N.S.)
 144; 3 Bing. 500; 30 R. R. 32.—H.L. (E.).
reversing S. C. nom. *Sondes* (Lord) *v. Fletcher*
 (1822) 5 B. & Ald. 835.—K.B.

Goldham v. Edwards (1855) 24 L. J. C. P.
 189; 16 C. B. 437; 17 C. B. 141; 1 Jur.
 (N.S.) 684; 3 W. R. 551.—C.P.; *affirmed*,
 (1856) 25 L. J. C. P. 223; 18 C. B. 389;
 2 Jur. (N.S.) 493; 4 W. R. 550.—EX. CH.,
followed.

Wright v. Davies (1876) 46 L. J. C. P. 41; 1
 C. P. D. 638; 35 L. T. 188; 24 W. R. 841.—C.A.
 JESSEL, M.R., KELLY, Q.B., MELLISH, L.J. and
 POLLOCK, B.

[An agreement by the plaintiff and defendant,
 with the assent of their respective patrons and
 diocesan, to exchange their respective benefices,
 was held on the authority of *Goldham v. Edwards*
 not to have been necessarily simoniacal before
 the Ecclesiastical Dilapidations Act, 1871, and
 not to be so contrary to the policy of that Act as
 to become illegal and void since.]

Lincoln (Bishop) *v. Wolferstan* (1764) 3
 Burr. 1504; 5 C. nom. *Lincoln* (Bishop)
v. Wolferstan, 1 W. Bl. 490.—MANSFIELD,
 C.J.; *affirming* 2 Wils. 174, *discussed*.

Rennel v. Lincoln (Bishop) 7 B. & C. 113; 9
 D. & R. 810; 5 L. J. (O.S.) K. B. 320; 31 R. R.
 171.—K.B.; *reversing* 11 Moore 139; 3 Bing.
 223; 4 L. J. (O.S.) C. P. 1.—C.P.; *affirmed*, nom.
Mirehouse v. Rennel (1832) 7 Bligh (N.S.) 241;
 1 Cl. & F. 527; 1 M. & Scott 683; 8 Bing. 490;
 36 R. R. 189.—H.L. (E.).

MODE OF FILLING BENEFICES.

Att.-Gen. v. Davy (1741) 2 Atk. 212.

—HARDWICKE, L.C. *discussed*.

Att.-Gen. v. Parker (1747) 3 Atk. 576; 1 Ves.
 sen. 48.—HARDWICKE, L.C.

Att.-Gen. v. Parker, *followed*. *Att.-Gen. v.*
Rutter (1770) 2 Russ. 101, n. *discussed*. *Att.-*
Gen. v. Forster (1805) 10 Ves. 335.—ELDON, L.C.;
followed. *Att.-Gen. v. Newcombe* (1807) 14
 Ves. 1.—ELDON, L.C. *Shaw v. Thompson* (*post*,
 col. 937).

Att.-Gen. v. Davy, *commented on*.

Rex v. Davie (1837) 6 A. & E. 374.—DENMAN,
 C.J. and WILLIAMS, J.

Att.-Gen. v. Parker, *definition of "parish-*
ioner" adopted.

Etherington v. Wilson (1875) 45 L. J. Ch. 153;
 1 Ch. D. 160; 33 L. T. 652; 24 W. R. 303.—C.A.
See "CHARITY."

Att.-Gen. v. Parker; Att.-Gen. v. Forster;
and Att.-Gen. v. Newcombe, *dicta in*
considered.

St. Stephen, Coleman Street, In re, St. Mary's,
Aldermanbury, In re (1888) 57 L. J. Ch. 917;
 39 Ch. D. 492; 59 L. T. 393; 36 W. R. 837.—
 KAY, J. *See judgment at length*.

St. Stephen, Coleman Street, In re, approved.
Hunter v. Att.-Gen. (1899) 68 L. J. Ch. 449;
 [1899] A. C. 309; 80 L. T. 732; 47 W. R. 673.—
 H.L. (E.). *See "CHARITY."*

Woodley v. Exeter (Bishop) (1625) Cro. Jac.
 691; Winch 94.—HOBART, C.J., *dis-*
tinguished.

Troward v. Cailland (1795) 6 Term Rep. 439,
 778; 3 R. R. 389.—KENYON, C.J.; *which affirmed*
 S. C. nom. *Cailland v. Troward* (1794) 2 H. Bl.
 324.—EYRE, C.J.; *affirmed*, nom. *Troward v. Cal-*
land (1796) 8 Bro. P. C. 71.—H.L. (E.).

Dixon v. Metcalfe (1766) 2 Eden 860: S. C. *nom. Dixon v. Kershaw*, Ambl. 528.—L.C.

Hecker's Case (1522—1523) Davis' Reports, 77, *approved*.
Potter v. Chapman (1750) Ambl. 98: Dick 146.—HARDWICKE, L.C.

Hecker's Case, discussed.
Walsh v. Lincoln (Bishop) (1875) 44 L. J. C. P. 244; L. R. 10 C. P. 518; 32 L. T. 471; 23 W. R. 829.—COLERIDGE, C.J. (for the Court). See Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 8 (5).

Carter v. Cropley (1856) 2 Jur. (N.S.) 1200.—KINDERLEY, V.-C.; *reversed*, (1857) 26 L. J. Ch. 246; 8 De G. M. & G. 680; 3 Jur. (N.S.) 171; 5 W. R. 248.—KNIGHT BRUCE and TURNER, L.JJ.

Fowler v. Gloucester and Bristol (Bishop) (1869) 38 L. J. C. P. 253, 341; L. R. 4 C. P. 668; 17 W. R. 1028.—EX. CH.; *affirming* 20 L. T. 706.—C.P.; *reversed, nom. Allen v. Gloucester and Bristol* (Bishop) (1873) 42 L. J. C. P. 299; L. R. 6 H. L. 219; 22 W. R. 193.—H.L. (E.). SELBORNE, L.C., LORDS CHELMSFORD and COLONSAY.

Albany v. St. Asaph (Bishop) (1885) Cro. Eliz. 119. Leonard 31. *discussed*.
Argenny v. Marquis (Bishop) v. Llandaff (Bishop) (1888) 57 L. J. Q. B. 233; 20 Q. B. D. 480; 53 L. T. 812; 36 W. R. 859.—HUDDLESTON, B.

Faulkner v. Elger (1825) 4 B. & C. 449; 6 D. & R. 517; 28 R. R. 317; and **Edenborough v. Canterbury** (Archbishop) (1826) 2 Russ. 93, *observed on*.
Shaw v. Thompson (1876) 45 L. J. Ch. 827; 3 Ch. D. 233; 34 L. T. 721.

BACON, V.-C.—I have a few words still to say with respect to Sir H. Jackson's argument that an election by ballot would have been wholly illegal. I cannot follow that at all, and having attended to the authorities referred to I cannot conceive anything to justify that assertion. . . . *Faulkner v. Elger* only decides that an election by ballot is not legal because it does not afford the opportunity for a scrutiny, and Lord Eldon echoes the same opinion [in *Edenborough v. Canterbury* (Archbishop)], though he seems, as he sometimes did, to have hesitated very much about it. But he refers to the fact that there are societies and institutions in this country in which for centuries past the mode of election by ballot has been practised, so that it was common enough. Acts of Parliament regulating municipal and parliamentary elections, which have introduced voting by ballot, have at the same time introduced regulations which have freed voting by ballot from the objections which were taken in *Faulkner v. Elger*.—p. 835.

Edenborough v. Canterbury (Archbishop), *referred to on question of costs*.
Andrews v. Barnes (1888) 57 L. J. Ch. 694; 39 Ch. D. 133; 58 L. T. 748; 36 W. R. 705; 53 J. P. 4.—C.A. COTTON, FRY and LOPES, L.JJ.

Hawkins v. Chappel (1739) 1 Atk. 621.—HARDWICKE, L.C.; and **Briggs v. Sharp** (1876) 44 L. J. Ch. 510; L. R. 20 Eq. 317;

33 L. T. 154; 23 W. R. 806.—JESSEL, M.R., *followed*.

Welch v. Peterborough (Bishop) (1885) 15 Q. B. D. 432; 1 Cab. & E. 534.—MATHEW, J.

Wise v. Metcalfe (1829) 10 B. & C. 299; 5 M. & R. 235; 8 L. J. (O.S.) K. B. 126; 34 R. R. 417.—BAYLEY, J. (for the Court), *followed*.

Downes v. Craig (1841) 11 L. J. Ex. 239; 9 M. & W. 166.—EX. See per PARKE, B.

Downes v. Craig, followed.
Richards v. Maclesfield (Earl) (1835) 4 L. J. Ch. 163; 7 Sim. 267; 40 R. R. 131.—SHADWELL, V.-C., *principle applied*.

Birch v. Litchfield (Bishop) (1803) 3 B. & P. 441.—ALVANLEY, C.J., *dicta followed*.
Keen v. Denry (1894) 64 L. J. Ch. 55; (1894) 3 Ch. 169; 8 L. R. 629; 71 L. T. 566; 49 W. R. 82.—CHITTY, J.

Meath (Bishop) v. **Winchester** (Marquis) (1896) 4 Cl. & F. 445, 556; 10 Bgh (N.S.) 330.—H.L. (IR) (with the JUDGES), *explained*.

Carlisle v. Whaley (1867) L. R. 2 H. L. 391; 16 W. R. 229.—H.L. (IR).

CHELMSFORD, L.C.—Tindal, C.J., in *Meath* (Bishop) v. *Winchester* (Marquis) said: "It is clearly established that neither the clerk nor ordinary, in that character, could counterplead the plaintiff's title at common law, for neither of them had any interest in the patronage; and under the statute 25 Edw. 3, c. 7, the incumbent (as possessor when presented and instituted) could not counterplead the plaintiff's title without maintaining his own title and that of his patron, on which his own depends." This, I think, must be understood where the *quare impedit* is brought against the incumbent alone. For it would be strange to hold, where the patron and clerk are co-defendants, and the church is full (the patron, according to the authorities, not being compelled to show any title, or at least being only required to state a *pro forma* title) that the clerk, who can know nothing about the title, should be put to a proof from which the patron is exempt. The more reasonable view is, that, as it is the patron's right which is in issue, what is a good plea for him is good also for the clerk, who must stand or fall with his patron.—p. 412.

LORD CRANWORTH to the same effect. LORD COLONSAY concurred.

Specoot's Case (1590) 5 Co. Rep. 57 a; Anderson 189; 3 Leon. 198; and **Exeter** (Bishop) v. **Hele** (1670) Show. Parl. Cas. 88, *discussed*.

Rex v. Canterbury (Archbishop) (1812) 15 East 117; 13 R. R. 409.—ELLENBOROUGH, C.J.

Rex v. Canterbury (Archbishop), *distinguished*.

Rex v. Canterbury (Archbishop), Gore, In re [1902] 2 K. B. 503; 71 L. J. K. B. 894 (*supra*, col. 932).

Specoot's Case; Bell v. Norwiche (Bishop) (1566) Dyer 251 b.; and **Exeter** (Bishop) v. **Marshall** (*post*, col. 939), *discussed*.

Heywood v. Manchester (Bishop) (1884) 53 L. T. Q. B. 196; 12 Q. B. D. 404; 50 L. T. 236; 32 W. R. 567.—POLLOCK, B.

See *non Benefices Act*, 1898 (61 & 62 Vict. c. 48), s. 2 (1) (b).

Palmer v. Peterborough (Bishop) (1601) Cro. Eliz. 241; 1 Leon. 230, *questioned*.
Marshall v. Exeter (Bishop) (1860) 29 L. J. C. P. 354; 7 C. B. (N.S.) 653.—ERLE, C.J. (for the Court); *affirmed*, (1862) 10 W. R. 390.—EX. CH. *affirmed, nom.* Exeter (Bishop) v. Marshall (1868) 37 L. J. C. P. 331; L. R. 7 H. L. 17; 18 L. T. 37.—H. L. (E.). CHEADLEFORD, L.C., LORDS. CRANWORTH and WESTBURY (with the JUDGES). *And see post*.

Gorham v. Exeter (Bishop) (1850) 14 Jur. 448; Moore's Special Report.—P.C.; *reversing* 13 Jur. 288, 887; 2 Rob. Eccl. Rep. 1.—SIR H. JENNER FUST, *discussed*.
Barton v. Ashton (1753) 1 Lee 460; and **Pearson v. Gamon** (1756) 2 Lee 268, *considered*.
Walsh v. Lincoln (Bishop) (1874) L. R. 4 A. & E. 242.—SIR R. PHILLIMORE.

Exeter (Bishop) v. Marshall (supra), and Gorham v. Exeter (Bishop), applied.
Willis v. Oxford (Bishop) (1877) 2 P. D. 192.—LORD PENZANCE. *See Benefices Act, 1898* (61 & 62 Vict. c. 48), ss. 2 (b), 3 (5).

Boyer v. Norwich (Bishop) (1891) [1892] P. 41.—LORD PENZANCE: *affirmed*, (1892) 61 L. J. P. C. 46; [1892] A. C. 417; 67 L. T. 30; 56 J. P. 692.—P.C. HALSBURY, L.C., LORDS SELBORNE, WATSON, HERSCHELL and SHAND [with ECCLESIASTICAL ASSESSORS]. *See Benefices Act, 1898* (61 & 62 Vict. c. 48), s. 7.

NON-RESIDENCE.

Law v. Ibbetson (1771) 2 Burr. 2722, *established*.
Wilkinson v. Allot (1776) Cowp. 429. MANFIELD, C.J.—It is said that in *Law v. Ibbetson* I did say, "that if there was no parsonage house, the parson might reside where he pleased"; but it is clear that that must mean somewhere in the parish. Any other construction would be a shameful evasion of the statute [21 Hen. 8. c. 13].—p. 431. ASTON and WILLES, JJ. concurred.

Law v. Ibbetson, held overruled.
Wynn v. Smithes (or Smythes) (1815) 6 Taunt. 198. 1 Marshall 547.
CHAMBER, J.—In *Law v. Ibbetson*, the Court of K.B. took up the opinion, that the defendant had nothing to do in his archdeaconry, no duty to perform for it, and therefore that the defendant ought to reside in his rectory house of Bushey; but *Wilkinson v. Allot* is a later case, and it completely overrules *Law v. Ibbetson*.—p. 201.

PROPERTY.

Nether Stowey Vicarage, in re (1873) L. R. 17 Eq. 156; 29 L. T. 604; 22 W. R. 180.—JESSEL, M.R., *distinguished*.
Sewers Commissioners and Vicar of St. Botolph, Aldgate, Ex parte (1894) 63 L. J. Ch. 862; (1894) 3 Ch. 544; 8 R. 649.
NORTH, J.—What I am asked to do is to sanction the transformation of a warehouse into a suitable house for a vicarage. I think it can be done in this case. . . . In the *Nether Stowey Vicarage* the application by the vicar was to be

repaid the money which had been already spent by him on repairs.—p. 863.

Cardinal v. Molyneux, 2 Hff. 535; 7 Jur. (N.S.) 254; 4 L. T. 136.—STUART, V.-C.: *reversed*, (1861) 4 De G. F. & J. 117; 7 Jur. (N.S.) 854; 4 L. T. 605.—WESTBURY, L.C.

Strachey v. Francois (1741) 2 Atk. 217; and **Hoskins v. Featherstone** (1789) 2 Bro. C. C. 552, *commented on*.
Portland (Duke) v. Bingham (1792) 1 Hagg. Cons. 157.—SIR W. SCOTT.

Portland (Duke) v. Bingham, discussed.
Lee v. Fagg (1874) 43 L. J. Ecc. 1; L. R. 6 P. C. 38.—P.C. (*post*, col. 952).

Knight v. Mosely (1753) Amb. 176.—HARDWICKE, L.C.; and **Jefferson v. Durham (Bishop)** 1 B. & P. 105.—EYRE, C.J., *discussed*.
Wither v. Winchester (Dean) (1817) 3 Mer. 421; 17 R. R. 107.—ELDON, L.C.

Knight v. Mosely, not applied.
Huntley v. Russell (1849) 18 L. J. Q. B. 239; 13 Q. B. 572; 13 Jur. 887.—PATTERSON, J. (for the Court).

Knight v. Mosely; Wither v. Winchester (Dean); and Strachey v. Francois (supra), discussed.
Marlborough (Duke) v. St. John (1852) 21 L. J. Ch. 381; 5 De G. & Sm. 174; 16 Jur. 310.—PARKER, V.-C.

Marlborough (Duke) v. St. John; Worcester's (Dean) Case (1606) 6 Co. Rep. 37 a; **Rutland's (Countess) Case** (1663) 1 Lev. 107. S. C. *nom.* **Butland (Lord) v. Greene (or Gie)** 1 Keb. 557; Sid. 152; **Knight v. Mosely**; and **Bartlett v. Phillips** (1859) 4 De G. & J. 414.—KNIGHT BRUCE and TURNER, L.JJ., *discussed*.
Holden v. Weekes (1860) 30 L. J. Ch. 35; 1 J. & H. 278; 6 Jur. 885; 1288; 3 L. T. 437; 9 W. R. 94.—WOOD, V.-C.

Knight v. Mosely and v. Weekes, observed on.
Sowerby v. Fryer (1869) L. R. 8 Eq. 417; 38 L. J. Ch. 617; 20 L. T. 186; 17 W. R. 879.
JAMES, V.-C.—Now it is laid down in *Knight v. Mosely* and *Holden v. Weekes* that a patron cannot file a bill for an account. I confess that doctrine has always seemed to me to be utterly unintelligible. I could never understand why a vicar who has wrongfully cut timber should not be called to account for the proceeds after he has turned it into money, in order that they may be invested for the benefit of the advowson, it being conceded that the patron is entitled to the specific timber. Here, however, I cannot grant the plaintiff relief without violating any decision, or supposed decision, of that kind, for this timber, though cut, has not been sold.—p. 423.

Holden v. Weekes; Marlborough (Duke) v. St. John; Huntley v. Russell; and Bartlett v. Phillips, considered.
Ecclesiastical Commissioners v. Wodehouse (1895) 64 L. J. Ch. 329; [1895] 1 Ch. 552; 13 R. 372; 72 L. T. 267; 43 W. R. 396; 60 J. P. 200.—ROMER, J. *See judgment*.

DIVINE SERVICE

Hutchins v. Denziloe (1792) 1 Hagg. Com. 181.—SIR W. SCOTT; and **Titchmarsh v. Chapman** (1844) 1 Roberts 175.—SIR H. JENNER FUST, *explained*.

Barnes v. Shore (1846) 1 Roberts 382; 11 Jur. 887.—SIR H. JENNER FUST; S. C. (1846) 15 L. J. Q. B. 296; 8 Q. B. 640; 10 Jur. 688.—DENMAN, C.J. (for the Court).

Barnes v. Shore, confirmed.
Freeland v. Neale (1848) 1 Roberts 643; 12 Jur. 635.—SIR H. JENNER FUST.

Hutchins v. Denziloe, referred to.
Richings v. Cordingley (1865) L. R. 3 A. & E. 113 (*post*, col. 948).

Freeland v. Neale, discussed.
Taylor v. Timson (1888) 57 L. J. Q. B. 216; 20 Q. B. D. 671 (*post*, col. 946).

Barnes v. Shore and Freeland v. Neale, applied.
Nesbitt v. Wallace [1901] P. 354.—SIR A. CHARLES.

Newbery v. Goodwin (1811) 1 Phill. 282.—SIR J. NICHOLL; and **Hutchins v. Denziloe, referred to.**
Girt v. Fillingham [1901] P. 176.—CHANCELLOR OF DIOCESE OF ST. ALBANS.

Faulkner v. Litchfield (1845) 3 Notes of Cases, 555.—SIR H. JENNER FUST, *approved and applied*.

Westerton v. Liddell (1857) Moore's Special Report, p. 156; S. C. *nom.* **Liddell v. Westerton**; **Liddell v. Beal**, 5 W. R. 470.—P.C., *on appeal from* (1856) 5 W. R. 179.—SIR J. DODSON; and S. C. *nom.* **Beal v. Liddell** (1855) 1 Jur. (N.S.) 1178; 4 W. R. 167.—DR. LUSHINGTON, *adhered to.* *And see* col. 944.

Martin v. Mackonochie (1868) 38 L. J. Ecc. 1; 1 L. R. 2 P. C. 365; 19 L. T. 503; 17 W. R. 187.—P.C.; *reversing* (1868) 37 L. J. Ecc. 17; L. R. 2 A. & E. 116; 16 W. R. 604.—SIR R. PHILLIMORE.

LORD CAIRNS (for self, ARCHBISHOP OF YORK, LORDS CHELMSFORD and WESTBURY, SIR W. ERLE and SIR J. COLVILLE).—The rule upon this subject has been already laid down by the J.C. in *Westerton v. Liddell* (and their lordships are disposed entirely to adhere to it): "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omissions and no addition can be permitted." The construction of this rubric [the rubric as to ornaments in the commencement of the Prayer Book] was very fully considered by this committee in *Westerton v. Liddell* already referred to; and the propositions which their lordships understand to have been established by the judgment in that case may thus be stated:—(1) The words "authority of Parliament" in the rubric, refer to and mean the Act of Parliament 2 & 3 Edw. 6, c. 1, giving parliamentary effect to the first Prayer Book of Edward the Sixth, and do not refer to or mean canons or royal injunctions, having the authority of Parliament, made at an earlier period (Moore, p. 160).

(2) The term "ornaments" in the rubric means those articles, the use of which, in the services and ministrations of the church is prescribed by

that Prayer Book (*Id.* p. 156). (3) The term "ornaments" is confined to those articles (*Id.* p. 156). (4) Though there may be articles not expressly mentioned in the rubric, the use of which would not be restrained, they must be articles which are consistent with, and subsidiary to, the services: as an organ for the singing, a credence table from which to take the sacramental bread and wine, cushions, hassocks, &c. (*Id.* p. 187). In these conclusions, and in this construction of the rubric, their lordships entirely concur.—pp. 11—14.

Liddell v. Beal, applied.
Sieveling v. Kingsford (1866) 36 L. J. Ecc. 1; 15 L. T. 800.—DR. LUSHINGTON. *And see post*, col. 944.

Sieveling v. Kingsford, distinguished.
Adlam v. Coulthurst (1867) 37 L. J. Ecc. 3; L. R. 2 A. & E. 80 (*post*, col. 954).

Westerton v. Liddell and Martin v. Mackonochie, considered and confirmed.
Hebbert v. Purchas (1871) L. J. Ecc. 33; L. R. 3 P. C. 605; 7 Moore P. C. (N.S.) 468; 19 W. R. 898.—P.C. HATHERLEY, L.C., ARCHBISHOP OF YORK, BISHOP OF LONDON and LORD CHELMSFORD; *reversing* S. C. *nom.* **Elphinstone v. Purchas** (1870) 39 L. J. Ecc. 28; L. R. 3 A. & E. 66.—SIR R. PHILLIMORE; S. C., L. R. 2 P. C. 365; 18 W. R. 1072. *And see post*, col. 943.

Westerton v. Liddell, referred to.
Richings v. Cordingley (*post*, col. 948).

Westerton v. Liddell and Martin v. Mackonochie, followed.
Sheppard v. Bennett (1872) 41 L. J. Ecc. 1; L. R. 4 P. C. 371; 26 L. T. 923; 20 W. R. 804.—P.C. HATHERLEY, L.C., ARCHBISHOP OF YORK, BISHOP OF LONDON, ROMILLY, M.R., SIR J. COLVILLE, SIR J. NAPIER, JAMES and MELLISH, L.J., M. BERNARD and SIR M. SMITH.

Westerton v. Liddell, applied.
White v. Bowron (1873) 43 L. J. Ecc. 7; L. R. 4 A. & E. 207.—DR. TRISTRAM. *And see col.* 944.

Westerton v. Liddell, approved.
Phillipotts v. Boyd (1875) 44 L. J. Ecc. 1, 44; L. R. 6 P. C. 435; 32 L. T. 73; 23 W. R. 491.—P.C. LORDS HATHERLEY, PENZANCE and SELBORNE, KELLY, C.B., SIR M. SMITH and SIR R. COLLIER; *reversing* (1874) L. R. 4 A. & E. 297.—SIR R. PHILLIMORE. *And see col.* 944.

Westerton v. Liddell and Liddell v. Beal (1860) 14 Moore P. C. 1; 3 L. T. 218; 3 W. R. 569.—P.C. LORD KINGSDOWN, KNIGHT BRUCE, L.J., SIR E. RYAN and TURNER, L.J., *explained and followed*.

Marsters v. Duist (1876) 46 L. J. P. C. 51; 1 P. D. 373; 35 L. T. 37; 24 W. R. 1019.—P.C. CAIRNS, L.C., LORDS HATHERLEY and PENZANCE, SIR B. PEACOCK and SIR M. SMITH.

Hebbert v. Purchas and Phillipotts v. Boyd, approved.

Westerton v. Liddell, explained. *And see* col. 944.

Ridsdale v. Clifton (1877) 46 L. J. P. C. 27; 2 P. D. 276; 36 L. T. 865.—P.C. CAIRNS, L.C., LORD SELBORNE, SIR J. COLVILLE, KELLY, C.B., SIR R. PHILLIMORE, JAMES, L.J., SIR M. SMITH, SIR R. COLLIER, SIR B. BRETT and SIR R.

AMPHLETT (with EPISCOPAL ASSESSORS); affirming in part *S. C. nom. Clifton v. Ridsdale* (1876) 1 P. D. 316; 35 L. T. 432.—LORD PENZANCE.

Ridsdale v. Clifton (*supra*), distinguished. Hughes v. Edwards (1877) 2 P. D. 361.—LORD PENZANCE; followed, Combe v. Edwards (1877) 2 P. D. 354.—LORD PENZANCE.

Phillipotts v. Boyd (col. 942), *Ridsdale v. Clifton* and Hughes v. Edwards, discussed.
St. Lawrence, Pittington, In re (1880) 5 P. D. 131.—CHANCELLOR OF DIOCESE OF DURHAM.

Phillipotts v. Boyd, explained.
Allcroft v. London (Bishop) [1891] A. C. 666; 65 L. T. 92; 55 J. P. 778.—H. L. (C.); affirming *S. C. nom. Reg. v. London* (Bishop) (1889) 55 L. J. Q. B. 169; 24 Q. B. D. 213; 38 W. R. 214.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J.J.; which reversed 58 L. J. Q. B. 385; 23 Q. B. D. 414; 61 L. T. 389.—Q.B.D.: and Lighton v. London (Bishop), affirming *S. C. nom. Reg. v. London* (Bishop), Leighton's Case (1890) 7 Times L. R. 122.—C.A. ESHER, M.R., LOPES and KAY, L.J.J., which affirmed [1891] 2 Q. B. 48; 39 W. R. 141.—Q.B.D.

LORD HERSHELL.—It is impossible to read the bishop's statement without seeing that he has honestly considered what appeared to him to be all the circumstances bearing on the question whether proceedings should be allowed to go on. This being so, it is not for your lordships, on this application for a *mandamus*, to consider whether the bishop's reasons are good or bad; whether they ought or ought not to have led him to form the opinion he did. But I think it only right to say that the meaning of that part of his statement which refers to *Phillipotts v. Boyd* has, in my opinion, been misconceived by the appellants. That case did, I think, decide that the introduction of a figure of Our Lord in a reredos as part of a decoration was not of itself necessarily and under all circumstances unlawful. And this is, I think, all that the bishop meant to say in the passage which was so much commented on at the Bar.—p. 682.

HALSBURY, L.C. to the same effect.

LORD BRAMWELL, who also concurred, referred to *Julius v. Offord* (Bishop) (*post*, col. 950).

Ridsdale v. Clifton, dictum approved.
Tooth v. Power (1891) 60 L. J. P. C. 39; [1891] A. C. 284; 64 L. T. 698.—P.C. HALSBURY, L.C., LORDS WATSON, HOBHOUSE, MACNAGHTEN, MORRIS and FIELD.

Clifton v. Ridsdale (*supra*), explained.
Hebbert v. Purchas (*supra*, col. 942), reasoning in, disapproved.
Read v. Lincoln (Bishop) (1892) 62 L. J. P. C. 1; [1892] A. C. 644; 67 L. T. 123; 56 J. P. 725.—P.C. HALSBURY, L.C., LORDS HOBHOUSE, ESHER, HERSHELL, HANNEN, SIR R. COUCH and LORD SHAND.

Phillipotts v. Boyd, Hughes v. Edwards and Ridsdale v. Clifton, discussed.
Great Bardfield (Vicar) v. Inhabitants [1897] P. 135.—CHANCELLOR OF DIOCESE OF ST. ALBANS.

Clifton v. Ridsdale, Phillipotts v. Boyd and Westerton v. Liddell (col. 941), discussed.
Sieveking v. Kingsford (*supra*, col. 942), followed.

St. Mark's, Marylebone, In re, St. Mark's (Vicar) v. Parishioners [1898] P. 114.—DR. TRISTRAM.

Westerton v. Liddell and Phillipotts v. Boyd, principle applied.
Clifton v. Ridsdale, discussed.
Hughes v. Edwards, applied.
St. Anslem, Pinner, In re [1901] P. 202.—SIR A. CHARLES. See judgment at length.

Beal v. Liddell (*supra*, col. 941), applied.
St. Augustine's, Haggerston, In re (1877) 4 P. D. 111.—DR. TRISTRAM; Church of the Annunciation, Chislehurst (Vicar) v. Parishioners (1877) 4 P. D. 114.—DR. TRISTRAM; Bradford v. Fry (1878) 4 P. D. 93.—LORD PENZANCE.

Beal v. Liddell and Bradford v. Fry, not applied.
Church of St. John's, Isle of Dogs, In re (1888) Tristram's Consistory Judgments.—DR. TRISTRAM.

Bradford v. Fry, applied.
St. Andrew's, Romford v. Parishioners [1894] P. 220.—CHANCELLOR OF DIOCESE OF ST. ALBANS.

Beal v. Liddell and Bradford v. Fry, discussed and not applied.
Butt v. Jones (1829) 2 Hagg. Ecc. 417.—SIR J. NICHOLL, principle applied.
St. James, Norland (Vicar) v. Parishioners [1894] P. 257.—DR. TRISTRAM.

Butt v. Jones, rule applied.
St. Nicholas, Cole Abbey (1892) [1893] P. 58 (*post*, col. 960).

Bradford v. Fry and Ridsdale v. Clifton (*supra*, col. 942), applied.
Richmond (Vicar) v. Parishioners (1896) [1897] P. 70.—CHANCELLOR OF DIOCESE OF ROCHESTER; Davey v. Hinde (1900) [1901] P. 95.—DR. TRISTRAM.

Clifton v. Ridsdale (*supra*), applied.
St. Lawrence, Pittington, In re (col. 943), referred to.

Beal v. Liddell; St. Augustine's, Haggerston, In re; Bradford v. Fry; and St. James, Norland (Vicar) v. Parishioners, discussed.
St. John the Baptist, Timberhill v. Rectors of same (1894) [1895] P. 71.—CHANCELLOR OF DIOCESE OF NORWICH.

St. Lawrence, Pittington, In re, approved.
St. John, Pendlebury (Vicar) v. Parishioners [1895] P. 178.—CHANCELLOR OF DIOCESE OF MANCHESTER.

St. John, Timberhill v. Rectors of same, adhered to.
Barsham, Suffolk (Rector) v. Parishioners [1896] P. 256.—CHANCELLOR OF DIOCESE OF NORWICH.

Westerton v. Liddell (*supra*, col. 941); Beal v. Liddell; White v. Bowron (*supra*, col. 942); and Phillipotts v. Boyd (*supra*), discussed.
Kensit v. St. Ethelburga, Bishopsgate Within (Rector) (1899) [1900] P. 80.—DR. TRISTRAM.

Kensit v. St. Ethelburga (Rector), followed.
Davey v. Hinde (1800) [1901] P. 95.—**DR. TRISTRAM.**

FACULTIES.

Groves v. Hornsey (Rector) (1793) 1 Hagg. Cons. 188.—**SIR W. SCOTT, discussed and distinguished.**

Taylor v. Timson (post, col. 946).

Peek v. Trower (1881) 7 P. D. 21; 45 J. P. 797.—**LORD PENZANCE, explained.**

Nickalls v. Briscoe [1892] P. 269.

LORD PENZANCE.—And this is all that was meant to be conveyed by the Court in *Peek v. Trower*, upon which the learned counsel for the appellants have relied so largely as an authority for the proposition that the consent of the majority in the parish is almost a necessary condition to the grant of the faculty. That case was an application for a faculty to authorise a structural change in the entire body of the church for which no justifiable reason could be offered; it was an alteration which added nothing to the comfort or convenience of the congregation, and which, on the other hand, was fatal to a certain unity of architectural design which was obvious in the structure of the church. The remarks of the Court as to the general desire of the parishioners were in express terms confined to a case like the one then in hand, where the proposed alteration could not be supported on its own merits as an improvement from any point of view. It is the very reverse in the present case.—p. 283.

Breeks v. Woolfrey (1838) 1 Curt. 880.—**SIR H. JENKIN RUST, discussed.**

Egerton v. All Saints, Odd Rode (1893) [1894] P. 15.—**CHANCELLOR OF DIOCESE OF CHESTER.**

ARTICLES OF RELIGION.

Williams v. Salisbury (Bishop) (1863) 2 Moore P. C. (N.S.) 875; 3 N. R. 494; 10 Jur. (N.S.) 406; 9 L. T. 787; 12 W. R. 445.—**P.C.; and King's Proctor v. Stone** (1808) 1 Hagg. Cons. Rep. 424.—**SIR W. SCOTT, principles applied.**

Voysey v. Noble; *Noble v. Voysey* (1871) 40 L. J. Ecc. 11; L. R. 3 P. C. 357; 7 Moore P. C. (N.S.) 167; 25 L. T. 167; 19 W. R. 629.—**P.C. ARCHBISHOP OF CANTERBURY, HATHERLEY, L.C., LORD CHELMSFORD and SIR R. PHILLIMORE; Sheppard v. Bennett** (1870) 39 L. J. Ecc. 59; L. R. 4 P. C. 350.—**P.C. (post, col. 950).**

Voysey v. Noble, discussed.

Martin v. Mackonochie (1888) 8 P. D. 191 (post, col. 958).

ECCLESIASTICAL COMMISSIONERS.

Ecclesiastical Commissioners v. Clerkenwell (Vestry) 7 Jur. (N.S.) 326; 4 L. T. 83; 9 W. R. 495.—**STUART, V.-C.; reversed.** (1861) 30 L. J. Ch. 454; 3 De G. F. & J. 688; 7 Jur. (N.S.) 810; 4 L. T. 599; 9 W. R. 681.—**CAMPBELL, L.C.**

CHURCHWARDENS.

Stoughton v. Reynolds (1736) 2 Sh. 1045; Porteus 168; Cas. tem. Hardw. 276, *discussed.*

Wilson v. M'Math (1819) 3 Phill. 67; 3 B. & Ald. 244, n. (b).—**SIR J. NICHOLL.**

Stoughton v. Reynolds, approved and explained.

Reg. v. St. Pancras Vestrymen (1839) 11 A. & E. 15; 4 P. & D. 66, n.—**Q.B., distinguished.**

Reg. v. D'Oyly, Reg. r. Hedger (1840) 12 A. & E. 139; 4 P. & D. 52; 4 Jur. 1056—**Q.B. See also Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 31 (1).**

Reg. v. D'Oyly, followed.

Chillington Iron Co., In re, Maunsell, Ex. parte (1885) 54 L. J. Ch. 624; 29 Ch. D. 159; 52 L. T. 604; 33 W. R. 442.—**KAY, J. And see "COMPANY" (col. 474).**

Hubbard v. Penrice (1746) 2 Str. 1246—**LEE, C.J., referred to.**

Reg. v. Allen (1872) 42 L. J. Q. B. 37; L. R. 8 Q. B. 69; 27 L. T. 707; 21 W. R. 190.—**Q.B.**

Reg. v. D'Oyly, Campbell v. Mann (1836) 6 L. J. M. C. 145; 5 A. & E. 865;

1 N. & P. 558; 2 H. & W. 457.—**EX. CH.; Reg. v. How** (1863) 33 L. J. M. C. 53.—

Q.B.; and Reg. v. St. Matthew, Bethnal Green (1875) 52 L. T. 558.—**Q.B., discussed.**

Reg. r. Wimbledon Local Board (1882) 51 L. J. Q. B. 219; 8 Q. B. D. 459; 46 L. T. 47; 30 W. R. 400; 46 J. P. 292.—**C.A.**

Reg. v. Allen, applied.

Wilson v. M'Math, followed.

Reg. v. D'Oyly, dictum considered.

Rex v. Salisbury (Bishop) (1901) 70 L. J. K. B. 423; [1901] 1 Q. B. 573.—**WILLS and CHANNELL, J.; affirmed.** 70 L. J. K. B. 593; [1901] 2 K. B. 225; 84 L. T. 558; 49 W. R. 529; 65 J. P. 581.—**C.A. A. L. SMITH, M.B., V. WILLIAMS and ROMER, L.J.**

Lunne v. Dodson (1638) 3 Salk. 201, *followed.*

Rex v. Simpson (1724) 1 Str. 609; 2 Ld. Raym. 1379; 8 Mod. 325, *discussed.*

Reg. r. Sowter (1901) 70 L. J. K. B. 332; [1901] 1 K. B. 66; 396; 84 L. T. 36; 49 W. R. 338; 65 J. P. 355.—**C.A. A. L. SMITH, M.B., COLLINS and ROMER, L.JJ.**

Wise v. Creeke (1677) 2 Lev. 186, *discussed.*

Reg. v. Green (1874) 31 L. T. 543.—**EX. CH.; reversed.** 80 L. T. 255.—**Q.B.**

Reynolds v. Monkton (1841) 2 M. & Rob. 384.—**ROLFE, B., followed.**

Asher v. Calcraft (1887) 56 L. J. M. C. 57; 18 Q. B. D. 607; 56 L. T. 490; 35 W. R. 651; 51 J. P. 398.—**A. L. SMITH and GRANTHAM, JJ.**

Burton v. Henson (1842) 11 L. J. Ex. 348; 10 M. & W. 105.—**EX., explained.**

Asher v. Calcraft, referred to.

Taylor v. Timson (1888) 57 L. J. Q. B. 216; 20 Q. B. D. 671; 52 J. P. 135.—**STEPHEN, J.**

Taylor v. Timson, referred to.

Perry Almshouses, In re (1898) 67 L. J. Ch. 206; [1898] 1 Ch. 391; 78 L. T. 103; 46 W. R. 360.—**STIRLING, J.; affirmed.** 68 L. J. Ch. 66; [1899] 1 Ch. 21; 79 L. T. 366.—**C.A.**

Rex v. Shepherd (1791) 4 Term Rep. 381, *discussed.*

Rex v. Birmingham (Rector) (1837) 7 A. & E. 254; 1 Jur. 754.—**K.B. And see post.**

Re x v. Birmingham (Rector), distinguished.
Joyce (*or* Mawby), *Ex parte* (1854) 23 L. J. M. C. 153; 3 El. & Bl. 718; 18 Jur. 906; 2 W. R. 473.

CAMPBELL, C.J.—In that case there was nothing like an election *de facto*. Here the only objection is, that certain persons were not allowed to vote, and if it prevailed in respect of a single ratepayer, the *mandamus* would go.—p. 153 COLERIDGE. ERLE and CROMPTON, JJ. concurred.

Reg. v. St. Mary, Lambeth (1838) 3 N. & P. 416.—Q.B.; and Joyce. *Ex parte*, *followed*
Shaw v. Thompson (1876) 45 L. J. Ch. 827; 3 Ch. D. 233 (*supra*, col. 937).

Withnell v. Gartham (1795) 6 Term Rep. 388; 1 Esp. 324; 3 E. R. 218—KENYON, C.J. and LAWRENCE, J., *referred to*.

Fell v. Official Trustee of Charity Lands (1898) 67 L. J. Ch. 385; [1898] 2 Ch. 44; 78 L. T. 474; 62 J. P. 804.—C.A. LINDLEY, M.R., RIGBY and COLLINS, L.JJ.

COLLINS, L.J.—In my judgment churchwardens are not a corporation. They are, as has been said in *Withnell v. Gartham*, which is a leading case on the matter, *qua* a corporation for certain purposes, and in the City of London they are only an annual corporation for the purposes of holding lands; but beyond that they are only annual officers, and I think this trust so treats them—p. 393.

Worth v. Terrington (1845) 14 L. J. Ex. 133; 13 M. & W. 781, *corrected*
Cope v. Barber (1872) L. R. 7 C. P. 393; 41 L. J. M. C. 137; 26 L. T. 891; 20 W. R. 885.

WILLES, J. desired to correct an error in the report of *Worth v. Terrington*, at p. 795. Counsel referring to *Jarratt v. Steele* [3 Phill. 170] as an authority for saying that the churchwardens with the concurrence of the rector have authority to turn out a person for committing a trespass in the church. Parke, B. is there reported to have said: "We ought to have higher authority than the decision of Doctors' Commons for that proposition." He [Willess, J.], said he had in his possession a letter from Lord Wensleydale, in which that learned judge declared that he had never made the observation imputed to him. In the margin of Lord Wensleydale's copy of 13 M. & W., there are also these words in his lordship's own handwriting: "I never said so."—p. 404. n.

Shaw v. Hislop (1824) 4 D. & R. 241; 2 L. J. (o.s.) K. B. 168; 27 R. R. 315; **Gouldsworth v. Knights** (1843) 12 L. J. Ex. 282; 11 M. & W. 337; **Fry v. Treasure** (1865) 2 Moore P. C. (N.S.) 539; 5 N. R. 388; 11 Jur. (N.S.) 205; 11 L. T. 753; 13 W. R. 476.—P.C.; **Dewdney v. Good** (1861) 7 Jur. (N.S.) 637; and **Ensham (Churchwardens) v. Ensham (Vicar)** (1857) 29 L. T. (o.s.) 402, *referred to*.

Jarratt v. Steele (1820) 3 Phill. 167.—SIR J. NICHOLL, *explained*.

Griffin v. Deighton (1864) 33 L. J. Q. B. 181; 5 B. & S. 93; 10 L. T. 814; 12 W. R. 441.—EX. CH., *discussed*.

Ritchings v. Cordingley (1868) L. R. 3 A. & E. 115; 19 L. T. 26.—SIR R. PHILLIMORE.

Walter v. Montague (1836) 1 Curt. 253.—**Hansard v. St. Matthew (Parishioners)** (1878) 4 P. D. 48.—DR. TRISTRAM; and **Ritchings v. Cordingley**, *approved*.

Marriott v. Tarpley (1838) 7 L. J. Ch. 245; 9 Sim. 279; 2 Jur. 464.—SHADWELL, V.-C., *explained*.

Batten v. Gedye (1839) 58 L. J. Ch. 549; 41 Ch. D. 507; 60 L. T. 802; 37 W. R. 540; 53 J. P. 501.—KAY, J.

Batten v. Gedye, *followed*.
Kensit v. St. Ethelburga, Bishopsgate Within (Rector) (1899) [1900] P. 80.—DR. TRISTRAM.

PARISH CLERKS.

Pinder v. Barr (1854) 24 L. J. Q. B. 30; 4 El. & Bl. 105; 2 C. L. R. 1618; 1 Jur. (N.S.) 205; 2 W. R. 589.—COLERIDGE, J. (for the Court), *distinguished*.

Lawrence v. Edwards (1891) 60 L. J. Ch. 336; [1891] 1 Ch. 144; 64 L. T. 77; 39 W. R. 411; 5 C. [1891] 2 Ch. 72; 64 L. T. 343.

CHITTY, J.—Now it has been decided in *Pinder v. Barr* that where the vicar was suspended for misconduct by the bishop from performing the duties and receiving the profits of the vicarage, he was not the proper person, and had no authority to appoint a parish clerk, so long as the suspension remained in force. The question there turned upon the construction of the 91st canon, and in that case the Court of Q. B. held that "the minister for the time being" was the curate who had been appointed by the bishop to perform the ecclesiastical duties of the parish, and that the curate was entitled to make the appointment, not by virtue of the bishop's licence, but by virtue of the canon; and that, on the true construction of this canon, inasmuch as the vicar had been suspended from his functions, the term "minister" applied to and included the curate. It follows, therefore, from that case, that if the rector in the present case had been suspended or inhibited, he would have no authority to appoint a parish clerk. But the rector has not been suspended or inhibited, though he has been adjudicated bankrupt, and a sequestration has been issued.—p. 337.

Reg. v. Smith (1844) 13 L. J. Q. B. 166, 5 Q. B. 614; D. & M. 564; 8 Jur. 599.—Q.B., *referred to*.

Abergavenny (Marquis) v. Llandaff (Bishop), 57 L. J. Q. B. 238; 20 Q. B. D. 460 (*supra*, col. 938).

PEWS.

Stocks v. Booth (1786) 1 Term Rep. 428; 1 R. R. 244; and **Pettman v. Bridger** (1811) 1 Phill. 816.—SIR J. NICHOLL, *referred to*.

Crisp v. Martin (1876) 2 P. D. 15.—LORD PENZANCE.

Walter v. Gunner (1798) 1 Hag. Cons. 314.—**Pettman v. Bridger**; **Fuller v. Lane** (1825) 2 Addams 419; **Nunn v. Varty** (1843) 3 Curt. 352; and **Byerley v. Windus** (1826) 5 B. & C. 1; 7 D. & R. 564; 4 L. J. (o.s.) K. B. 102; 29 R. R. 167.—K.B., *discussed and distinguished*.

Taylor v. Timson (1888) 57 L. J. Q. B. 216; 20 Q. B. D. 671 (*supra*, col. 940).

Stocks v. Booth; Walter v. Gunner; and Rogers v. Brooks (1784) 1 Term Rep. 431, n.—MANSFIELD, C.J. and WILLES, J., *approved and applied*.

Fuller v. Lane, *referred to*.

Phillips v. Halliday (1891) 61 L. J. Q. B. 210; [1891] A. C. 228; 64 L. T. 745; 55 J. P. 741.—H.L. (R.). **LORDS** HEIRSHELL, WATSON, MACNAGHTEN, MORRIS and HANSEN; *affirming* S. C. nom. Halliday v. Phillips (1889) 58 L. J. Q. B. 404; 23 Q. B. D. 48; 37 W. R. 776; 53 J. P. 627.—C.A. **ESHER, M.R., BOWEN** and **PRY, L.JJ.**

Kenrick v. Taylor (1752) 1 Wils. 326, *referred to*.

Proud v. Price (1893) 63 L. J. Q. B. 61; 9 R. 40; 69 L. T. 664; 42 W. R. 102.—C.A. **ESHER, M.R., LOPES** and **KAY, L.JJ.**

Phillips v. Halliday, *principle applied*.

Simpson v. Godmanchester Corporation (1895) 65 L. J. Ch. 154; [1896] 1 Ch. 214; 73 L. T. 423; 44 W. R. 149; 12 Times L. R. 56.—C.A. **LORD** HEIRSHELL, A. L. SMITH and **RIGBY, L.JJ.**; *affirmed* (1897) 66 L. J. Ch. 770; [1897] A. C. 696; 77 L. T. 409; 13 Times L. R. 644.—H.L. (R.). **LORDS** WATSON, SHAND and **DAVEY**.

Crisp v. Martin (*supra*) and **Phillips v. Halliday**, *applied*.

Moore v. Rawson (1824) 3 B. & C. 332; 3 L. J. (O.S.) K. B. 32; **Spry v. Flood** (1840) 2 Curt. 352; and **Clifford v. Wicks** (1818) 1 B. & Ald. 498; 19 R. R. 364, *referred to*. **Stleman-Gibbard v. Wilkinson** (1896) 66 L. J. Q. B. 215; [1897] 1 Q. B. 749; 76 L. T. 90; 61 J. P. 214.—CHARLES, J. *See judgment*.

CHURCH AND CHAPEL RATES.

Reg. v. Dalby (1843) 3 Q. B. 602; **S. C. nom. Reg. v. Forston**, 7 Jur. 13.—DENMAN, C.J.

Watson v. All Saints', Poplar (1892) 46 L. T. 201; 46 J. P. 454.—FIELD and **BOWEN, JJ.**, *distinguishing*.

Reil v. Bassett (1882) 47 L. T. 19; 52 L. J. Q. B. 22.

DAY, J.—I must say that I think that this [arrangement] is in the nature of a contract, and that there is abundant consideration for the rate for which the parishioners submitted themselves, as they appear to me to have done, by this statute of 51 Geo. 3, c. l. which was practically to confirm an arrangement made between these parties. This distinguishes the case from *Watson v. All Saints', Poplar*—p. 21.

Reg. v. St. Matthew's, Bethnal Green (1883) 50 L. T. 65; 48 J. P. 340.—C.A. **BRETT, M.R., COTTON** and **BOWEN, L.JJ.**; *affirmed*, nom. **St. Matthew's, Bethnal Green v. Perkins** (1885) 53 L. T. 634.—H.L. (R.). **LORDS** BLACKBURN, **BRANWELL** and **FITZGERALD**.

Wilson v. Sunderland Churchwardens (1864) 34 L. J. M. C. 90; 17 C. B. (N.S.) 694; 10 Jur. (N.S.) 1105; 11 L. T. 342; 13 W. R. 85.—C.P., *applied*.

Davey v. Hinde (1900) [1901] P. 95.—DR. **TRISTRAM**.

Craven v. Sanderson (1838) 7 L. J. Q. B. 81; 7 A. & E. 880; 2 N. & P. 641; W. W. & D. 694.—Q.B., *applied*. **Sandbach School and Almshouse Foundation**,

In re, Att.-Gen. v. Crewe (1901) 70 L. J. Ch. 604; [1901] 2 Ch. 317; 84 L. T. 815; 49 W. R. 647.—FAIRWELL, J.

PRACTICE AND PROCEDURE.

Rex v. St. Pancras Church Trustees (1837) 1 N. & P. 507; 6 A. & E. 314.—K.B., *followed*.

Reg. v. Tithe Commissioners (1849) 19 L. J. Q. B. 177; 14 Q. B. 459; 14 Jur. 290.—COLERIDGE, J. (for the Court).

Reg. v. Chichester (Bishop) (1859) 29 L. J. Q. B. 23; 2 El. & El. 209; 6 Jur. (N.S.) 120; 7 W. R. 629.—Q.B., *approved*. **Newport Bridge**, In re (1859) 29 L. J. M. C. 32.—CROMPTON, J.

Ditcher v. Denison (1857) 11 Moore P. C. 324; 1 Deane & Sw. Eccl. R. 334; 6 W. R. 342.—P.C. **BISHOP OF LONDON, KNIGHT BRUCE, L.J., T. PEMBERTON LEIGH, SIR E. RYAN TURNER, L.J. and SIR J. PATTISON**, *referred to*. **Sheppard v. Bennett** (1st appeal) (1870) 39 L. J. Ecc. 59; L. R. 4 P. C. 350; 23 L. T. 145; 18 W. R. 650.—P.C. **HATHERLEY, L.C., ARCHBISHOP OF YORK, BISHOP OF LONDON, SIR J. NAPIER and GIFFARD, L.JJ.**

Reg. v. Tithe Commissioners; Ditcher v. Denison; and Reg. v. Chichester (Bishop), *commented on and explained*.

Julius v. Oxford (Bishop) (1880) 5 App. Cas. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.—H.L. (R.); *affirming* S. C. nom. **Reg. v. Oxford** (Bishop) (1879) 48 L. J. Q. B. 609; 4 Q. B. D. 535; 41 L. T. 122.—C.A. **BRANWELL, BACALLAY and THESIGER, JJ.**; *which reversed* 4 Q. B. D. 245.—Q.B.D.

CAIRNS, L.C. (after discussing earlier cases on the words "it shall be lawful," continued): The only other case that I will refer to is *Reg. v. Tithe Commissioners*. . . In delivering the opinion of the Court, Coleridge, J. uses these words: "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissive, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." To the rule thus guardedly expressed there is not, perhaps, much to object, and I only refer to the words for the purpose of pointing out that I am unable to see that they justify the expressions of the L.C.J. of the Queen's Bench in the present case, who speaks of them thus: "Now finding nothing in the enactments or language of the 3rd section or other parts of the Church Discipline Act, which should have the effect of controlling or qualifying the words 'it shall be lawful,' but, on the contrary, finding the language of the section pointing, as it seems to us, the contrary way, we can see no ground which would justify us in giving to those words any other than the meaning which the established canon of construction so thoroughly settled, that Coleridge, J. speaks of it as an axiom—and by which, in construing this statute, we deem ourselves absolutely bound." The only axiom Coleridge, J. spoke of was, that, under certain circumstances, enabling words might have a compulsory force.—p. 224.

LORD PENANCE.—The change actually made

[by the Church Discipline Act] whereby the bishop is substituted for the judge, renders the practice which existed at the time when the whole proceedings were in the hands of the judge, a matter of very slender and remote consideration. If it were otherwise, I should not hesitate to say that, in my opinion, the judge always had a right and power to refuse to permit his office to be promoted if he thought fit; and that the statements of the law on this subject by Lord Stowell and Sir G. Nicoll, far outweigh the language attributed to Dr. Lushington in the single case of *Ditcher v. Dawson*. . . . There are numerous *dicta* on the interpretation of the clause in the Church Discipline Act which is now in controversy: but there has been one decision, and one only, which proceeded upon the proper effect to be given to that clause. I allude to the *Bishop of Chester's Case*, in which Wightman, J., with, I think, probably the approval of Lord Campbell, decided the case, and acted upon the principle which the C. A. in the present case has affirmed.—p. 229.

See also the speech at length, and that of LORD BLACKBURN to the same effect. LORD SELBORNE concurred.

Julius v. Oxford (Bishop) (*supra*), referred to. *Abergavenny* (Marquis) v. *Llandaff* (Bishop) (1888) 57 L. J. Q. B. 283, 20 Q. B. D. 460 (*supra*), col. 933; *Allcroft v. London* (Bishop) [1891] A. C. 616.—H.L. (E.) (*supra*), col. 943; *applied*. *Reg. v. Turner* (1897) 66 L. J. Q. B. 417; [1897] 1 Q. B. 445; 76 L. T. 556; 45 W. R. 316.—WRIGHT and BRUCE, JJ.

Fell v. Bond (1849) 1 Robert. 740.—SIR H. JENNER FUST, referred to.
Burch v. Reid (1873) L. R. 4 A. & E. 112.—SIR R. PHILLIMORE.

Burch v. Reid, followed.
Crisp v. Martin (1876) 1 P. D. 802.
[This case was cited by counsel, opposing an application made by a solicitor, not a proctor, to appear in the Archies Court, as decisive against the solicitor's contention. LORD PENZANCE refused the application.]

Simmons v. Simmons (1847) 1 Robert. 566; 5 N. C. 542.—DR. LUSHINGTON, *adhered to*.
Evans v. Evans (1844) 1 Robert. 165.—SIR H. JENNER FUST, commented on.
Burder v. O'Neill (1863) 9 Jur. (N.S.) 1109; 9 L. T. 232.—DR. LUSHINGTON.

Burder v. O'Neill, commented on.
Berney v. Norwich (Bishop) (1867) 36 L. J. Ecc. 10.—P.C. ARCHBISHOP OF YORK, SIR W. ELLI, SIR J. COLVILLE, SIR E. V. WILLIAMS, CAIRNS, L.J. and SIR R. KINDERSLEY.

Burder v. O'Neill, not followed.
Norwich (Bishop) v. *Pearse* (1868) 27 L. J. Ecc. 90; L. R. 2 A. & E. 281.—SIR R. PHILLIMORE.

Hallack v. Cambridge University (1841) 10 L. J. Q. B. 206; 1 Q. B. 593; 1 G. & D. 100; 9 D. C. P. 583; 6 Jur. 10.—DENMAN, C.J. (for the Court), followed.
Reg. v. Twiss (1869) 38 L. J. Q. B. 228; L. R. 4 Q. B. 407 (*post*, col. 960).

Line v. Harris (1752) 1 Lee Eccl. 146; and **Hopper v. Davis** (1754) 1 Lee Eccl. 640, *discussed*.

Lee v. Fagg (1874) 43 L. J. Ecc. 1; L. R. 6 P. C. 38; 30 L. T. 801; 22 W. R. 902.—P.C. SIR J. COLVILLE, SIR B. FRASCOCK, SIR M. SMITH and SIR R. COLLIER; *affirming* S. C. *nom.* Fagg v. Lee (1873) L. R. 4 A. & E. 135.—SIR R. PHILLIMORE.

Lee v. Fagg, explained.
Hansard v. St. Matthew, Bethnal Green (Parishioners) (1878) 4 P. D. 46.—DR. TRISTRAM.

Lee v. Fagg, applied.
Davey v. Hinde (1900) [1900] P. 95.—DR. TRISTRAM.

Rex v. Jenkins (1823) 3 D. & R. 41; S. C. *nom.* *Jenkins, Ex parte*, 1 B. & C. 655.—K.B.

Wheeler's Case (1614) Godb. 218, commented on.
Camden (Lord) v. *Home* (1791) 4 Term Rep. 382; 1 H. Bl. 476, *affirmed, nom.* *Home v. Camden* (Lord) (1795) 6 Bro. P. C. 203; 2 H. Bl. 533.—H.L. (E.).

BULLER, J.—If that case be understood as establishing this point, that the Ecclesiastical Courts had no jurisdiction to construe the Act of Parliament [5 Edw. 6, c. 3], it cannot be supported, for one of the sections (sect. 3) of the Act expressly gives them jurisdiction. Indeed, it does not appear, from the state of the case in Godbolt, that the Court adverted to the statute; and the ground of that case must have been that it appeared on the face of the libel that the Ecclesiastical Court had no jurisdiction in that particular case.—p. 898.

Camden (Lord) v. *Home*, discussed.
Gould v. Gapper (1804) 5 East 345; 1 Smith 528; 7 R. R. 766.—K.B.

Wenmouth v. Collins (1701) 3 Ld. Raym. 850, explained.
Wilson v. M'Math (1819) 3 B. & Ald. 241; 22 R. R. 371.—K.B. *See now* Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81 (1).

Rex v. Mills (1834) 4 L. J. K. B. 18; 4 N. & M. 7; S. C. *nom.* *Law, Ex parte*, 2 A. & E. 45; 2 D. P. C. 528.—K.B.

Hudson v. Tooth (1877) 2 P. D. 79; 35 L. T. 820.—LORD PENZANCE, explained.
Dale's Case, *Enraght's Case* (1881) 50 L. J. Q. B. 234; 6 Q. B. D. 376; 43 L. T. 769.—C.A. JAMES, BRETT and COTTON, L.J.J.; *partly reversing* 43 L. T. 534.—Q.B.D.; *affirmed*, col. 953.

Dale's Case, referred to.
Green v. Penzance (Lord) (1881) 54 L. J. Q. B. 218; 6 App. Cas. 657; 45 L. T. 363; 30 W. L. R. 25; 46 J. P. 115.—H.L. (E.). SELBORNE, L.C., LORDS BLACKBURN and WATSON; *affirming*, S. C. *nom.* *Green, Ex parte*, 7 Q. B. D. 278.—C.A. JAMES, BRETT and COTTON, L.J.J. *And see post*, col. 953.

Reg. v. Thorogood (1840) 9 L. J. Q. B. 211; 12 A. & E. 189; 3 F. & D. 629; 4 Jur. 987.—DENMAN, C.J., LITTLEDALE and PATTISON, JJ.; *Hudson v. Tooth*, and *Baker v. Thorogood* (1840) 2 Curt. 682.—DR. LUSHINGTON, discussed.
Baines, In re (1840) 10 L. J. Ch. 108;

Cr. & Ph. 31; 4 Jur. 1194.—COTTENHAM, L.C., *approved*.

Dean v. Green (1882) 8 P. D. 79; 46 J. P. 742.—LORD PENZANCE, *followed*.

Cox, Ex parte (1887) 56 L. J. Q. B. 532; 19 Q. B. D. 307.—COLERIDGE, C.J. and A. L. SMITH, J.

Martin v. Mackonochie (1870) 40 L. J. Ecc. 1; L. R. 3 P. 409; 24 L. T. 204; 18 W. R. 217.—P.C. HATHERLEY, L.C., ARCHBISHOP OF YORK and LORD CHRYSTOFFER; and **Hebbert v. Purchas** (1872) L. R. 4 P. C. 301.—P.C. HATHERLEY, L.C., ARCHBISHOP OF YORK, BISHOP OF LONDON, SIR J. COLVILLE, SIR M. SMITH, *approved*.

Mackonochie v. Penzance (Lord) (1881) 50 L. J. Q. B. 611; 6 App. Cas. 424; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584.—H.L. (E.). SELBORNE, L.C., LORDS CAIRNS, BLACKBURN and WATSON; *affirming* S. C. *nom.* Martin v. Mackonochie (1879) 49 L. J. Q. B. 9; 4 Q. B. D. 697; 40 L. T. 680.—C.A. COLERIDGE, C.J., JAMES and THESIGER, L.J.J.; BRETT and COTTON, L.J.J. *dissenting*; which *reversed* 3 Q. B. D. 730.

Caudrey's Case (1601) 5 Co. Rep. 1 a, *discussed and applied*.

Sanders v. Head (1843) 3 Curt. 565.—SIR H. JENNER PUST. *And see post*, col. 954.

Caudrey's Case and Pullen v. Clewer (1684) 1 Hag. Ecc. App. B. p. 2, *discussed and applied*.

Combe v. De la Bere (1881) 6 P. D. 157; 45 J. P. 345.—LORD PENZANCE. *See judgment*, where all the authorities are referred to; and *see post*, col. 954.

Mackonochie v. Penzance (Lord), **Hebbert v. Purchas** and **Pullen v. Clewer**, *discussed*.

Head v. Sanders (1842) 4 Moore P. C. 186.—P.C. BISHOP OF LONDON, LORD CAMPBELL, KNIGHT BRUCE, V.-C. and DR. LUSHINGTON, *principles applied*.

Martin v. Mackonochie (1882) 51 L. J. P. C. 88; 7 P. D. 94; 46 L. T. 689; 31 W. R. 1.—P.C. THE LORD PRESIDENT, SELBORNE, L.C., ARCHBISHOP OF YORK, LORDS BLACKBURN and WATSON, SIR B. PEACOCK, SIR E. COLLIER and SIR J. HANNEN, with ECCL. ASSESSORS; *varying* (1880) 6 P. D. 87.—LORD PENZANCE.

Green v. Penzance (Lord) (col. 952) and

Mackonochie v. Penzance (Lord), *discussed*. Enright v. Penzance (Lord) (1882) 51 L. J. Q. B. 506; 7 App. Cas. 240; 46 L. T. 779; 30 W. R. 753; 46 J. P. 644.—H.L. (E.). LORDS BLACKBURN, WATSON and BRAMWELL; *affirming* S. C. *nom.* Enright's Case (*supra*, col. 952).

Mackonochie v. Penzance (Lord), *referred to*.

Combe v. De la Bere (1881) 47 L. T. 185; 31 W. R. 24.—CHITTY, J.; *affirmed*, (1882) 22 Ch. D. 316; 48 L. T. 298; 31 W. R. 258.—C.A. JESSEL, M.R., OOTTON and BOWEN, L.J.J.

Hodgson v. Oakeley (1845) 1 Robert. 322; 4 Notes of Cases 180.—SIR H. JENNER PUST, *discussed*.

Combe v. De la Bere, *followed*.

Martin v. Mackonochie (third suit) (1888) 8 P. D. 191.—LORD PENZANCE.

Combe v. De la Bere, *discussed*.

Heywood v. Manchester (Bishop) (1884) 53 L. J. Q. B. 196; 12 Q. B. D. 404 (*supra*, col. 938).

Sanders v. Head (*supra*, col. 953), and

Combe v. De la Bere, *referred to*.

Beneficed Clerk v. Lee (1896) 66 L. J. P. C. 8; [1897] A. C. 226; 75 L. T. 461.—P.C. HALSBURY, L.C., LORDS WATSON, HOBHOUSE and DAVEY, SIR R. COUCH and SIR F. JEUNE, with ECCL. ASSESSORS. *See now* Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1, sub-s. 5.

Beneficed Clerk v. Lee, *observations applied*.

Sweet v. Young (1901) [1902] P. 37; 50 W. R. 96.—CHANCELLOR OF DIOCESE OF ROCHESTER.

Adam v. Colthurst (1887) 37 L. J. Ecc. 3;

L. R. 2 A. & E. 30; 17 L. T. 226.—SIR R. PHILLIMORE, *distinguished*.

Reg. v. Tristram (1899) 80 L. T. 414; 47 W. R. 639; 63 J. P. 391.—LAWRAVE and CHANNELL, JJ.

Pool v. London (Bishop) (1881) 14 Moore

P. C. 262; 7 Jur. (N.S.) 847; 4 J. T. 224;

9 W. R. 485.—P.C. ARCHBISHOP OF YORK; LORDS CRANWORTH, CHELMSFORD and KINGSDOWN, SIR E. RYAN and SIR J. COLERIDGE, *applied*.

Davey v. Hinde (1900) [1901] P. 95.—DR. TRISTRAM.

Davey v. Hinde, *discussed*.

St. David's (Bishop) v. **Lucy** (1699) 1 Salk.

134; 3 Salk. 90; Gibbons v. Cloyne (Bishop) (1706) Holt 599; and **Medwin**

and **Hurst**, Ex parte (1853) 22 L. J. Q. B.

169; 1 El. & Bl. 609; 17 Jur. 1178.—

CAMPBELL, C.J. (for the Court), *applied*.

Rex v. Tristram (1902) 71 L. J. K. B. 418; [1902] 1 K. B. 816; 86 L. T. 515; 50 W. R. 477.—

C.A. COLLINS, M.R., ROMER and MATHEW, L.J.J.; *reversing* (1901) 70 L. J. K. B. 565; [1901]

2 K. B. 141; 84 L. T. 473.—DARLING and CHANNELL, JJ.

TITHES.

Cunliffe v. Taylor (1816) 2 Price 320.—

THOMSON, C.B., *not followed*.

Masters v. Fletcher (1880) Youngs 25.—ALEXANDER, C.B.

Pocock v. Titmarsh (1721) Bunb. 102, *doubted*.

Dr. Graunt's Case (1614) 11 Co. Rep. 16 a, *discussed*.

Leyfield v. Tysdale (1614) Hob. Rep. 10;

S. C. *nom.* Whitaker and Tiddersdale v.

Leyfield, 1 Gwill. 261; Kynaston v.

Willoughby (1753) 3 Gwill. 891, n. 2; and

Kynaston v. Hattersley (1761) 3 Gwill.

890, *approved*.

Champneys v. Buchan (1857) 4 Drew. 104.

KINDERSLEY, v.-c.—It is difficult to determine on what principle that case [*Pocock v. Titmarsh*] was decided. And at all events it cannot be recognised as establishing a rule (contrary to all principle and authority) that a bill, simply asserting the plaintiff's right to receive certain annual payments from the defendants for the tithes of their houses, without alleging the foundation of the alleged right, can be maintained.—p. 124.

Att.-Gen. v Chelmondeley (or **Chomley**) (1765) 2 Eden 904; Ambler 510; 2 E. & Y. 293, *affirmed*, 7 Bio P. C. 34, *applied*.
Atterbury v Turner and Nottingham (Lord v Atterbury) (1684) 1 E. & Y. 543, *commented on*.
Thorp v Mattingley (1837) 8 L. J. Ex. Eq. 9; 2 Y. & C. 421.—**ALDERSON, B.** : *varied, non* Plowden v Thorpe (1840) 7 Cl. & F. 137, 1 West 42.—**H.L. (E.) COTTENHAM, L.C.** and **LORD BROUGHAM**.

Letts v. London and Blackwall Ry (1847) 5 Haic 605, 11 Jur. 609.—**WIGRAM, V.-C.** : *reversed, non* **London and Blackwall Ry. v Letts** (1851) 3 H. L. Cas. 470, 15 Jur. 995.—**H.L. (E.) TRURO, L.C.** and **LORD BROUGHAM**.

Skidmore v Bell (1608) 2nd Inst. 650, *dictum disapproved*.
Dunn v Burrell (1617) 1 E. & Y. 270; 1 Gwill 299.—**CH.** : *discovered*.
Ivatt v Warren (1618) 3 E. & Y. 1203, 3 Gwill 1054.—**EX.** : *approved*.
Vivian v. Cochrane (1855) 25 L. J. Ch. 553, 4 De G. M. & C. 818, 1 Jur. (N.S.) 809; 3 W. R. 254.—**COTTENHAM, L.C.** : *assisted by* **JUDGES** : *see* judgment of **WIGHTMAN, J.** : *reviewing all the cases.*

Fellowes v Clay (1843) 12 L. J. Q. B. 202, 4 Q. B. 313.—**DEMAN, C.J.** and **WILLIAMS, J.** : **PATTERSON and COLERIDGE, JJ.** : *dis-senting, referred to*.
Salkeld v Johnson (1849) 18 L. J. Ch. 493, 1 Mac. & G. 243, 1 H. & Tw. 329, 14 Jur. 1.—**COTTENHAM, L.C.** : *reversing* (1842) 11 L. J. Ch. 201, 1 Haic 196, 6 Jur. 216.—**WIGRAM, V.-C.** : *And see* 8 C. at law, (1846) 2 Man. Gr. & Sc. 749.—**FINDAL, C.J.** and **CRESSWELL, J.** : **COLT-MAN and LEE, JJ.** : *dis-senting*, and (1848) 18 L. J. Ex. 89, 2 Ex. 256.—**EX.**

Salkeld v. Johnson, referred to
Ely (Dean) v Bliss (1852) 2 De G. M. & G. 459.—**ST. LEONARDS, J.C.**

Salkeld v Johnson, observed on,
Eden v. Payne (1885) 52 L. T. 530, 33 W. R. 864.—**C.A.** : *reversing* (1884) 32 W. R. 285.—**KAY, J.**

BAGGALLAY, J.S. :—We have been very much pressed with **Salkeld v Johnson**, which seems to have had a good deal of influence on the learned judge. I am free to admit there may be certain passages here and there in the nature of *obiter dicta* which might be said to support the views of the respondents, but we must bear in mind that **Salkeld v Johnson** had no reference to the city of London, but to a case which undoubtedly, if the circumstances warranted it, was clearly within the provisions of 2 & 3 Will. 4, c. 100, because it was a claim in respect of tithes, part of which were clearly payable in kind, and part of which were agnate tithes which could hardly be regarded as tithes in kind. As regards that, there does not appear to have been any distinct question raised as to the agnate tithe and the other tithe. That is the distinction between the two cases. One would of course pay the greatest possible respect to anything that fell from Lord Cottenham in this or any other case, whether *obiter dicta* or neces-

sarily addressed to the decision of the case before him. At the same time we must bear in mind that even Lord Cottenham, although agreeing with the majority of the judges at common law, was differing from the others and from Wigram, V.-C., from whom the case originally came. The opinions of nine judges were one way, the way Lord Cottenham decided, and the opinions of five other judges were the other way. Therefore the case not appearing to be governed by the decision in **Salkeld v. Johnson**, it does not seem to me that the casual remarks made by Lord Cottenham are sufficient to bind us, although, if I thought they had a distinct bearing on the question now under discussion, I should be disposed to pay the greatest respect and attention to them. There is a strong contrast between the two cases, which is, that that case had no reference to the payment of tithes in the city of London—p. 534.

BOWEN, L.J. to the same effect. **FRY, L.J.** concurred.

Andrews v. Drever (1885) 3 Cl. & F. 314.—**H.L. (E.) LYNDBURST, L.C.** and **LORD BROUGHAM, affirming** 8 C. *non* **Bayley v. Drever** (1834) 1 A. & E. 499; 3 N. & M. 883.—**EX CH.** : *followed*.

St. Paul's (Warden) v Kettle (1813) 2 V. & B. 1.—**ELDON, L.C.** : **Antrobus v. East India Co.** (1806) 13 Ves. 9.—**GRANT, M.R.** : *affirmed*, (1813) 1 Dow 464.—**H.L. (E.) ELDON, L.C.** : and **Bennet v. Trespass** (1725) 1 Gilt. Cl. 191; 2 Gwill 653, *discussed*.

Payne v Esdaile (1888) 58 L. J. Ch. 209, 13 App. Cas. 613; 59 L. T. 568; 87 W. R. 278, 53 J. P. 100.—**H.L. (E.)**

LORD HERSCHEL :—This House, in **Andrews v. Drever**, gave their sanction to the rule that mere non-payment of tithes is, even as against a lay non-owner, no evidence to defeat his title, and Lord Eldon held in **St. Paul's (Warden) v Kettle** that in the case of a claim of this very payment under the statute of Hen. 8 [37 Hen. 8, c. 22], as in the instance of a claim of tithes more strictly, it is not sufficient for the defendant to say against the claim under the statute, as it would not be sufficient against the claim at common law, that the plaintiff never had received the 2s. 8d.—p. 301.

LORD MACNAGHTEN :—Sir W. Grant speaks of the title 'attaching upon' a house.—**Antrobus v. East India Co.** Lord Eldon speaks of houses as being 'exempt,' and of a house 'paying.' These may be merely convenient and compendious expressions, still they seem to me to show that in the minds of those who used them there was no substantial difference between the occupier paying in respect of the house, and the house itself being charged with the payment. There is, however, one case to which I will call your lordships' attention, where the nature of house tithes in the city of London came under consideration, and the circumstance that the inheritance would be bound or charged by the title formed the ground of decision. **Bennet v. Trespass** was a case under the Act of Hen. 8. The plaintiff claimed the statutory payment. The defence was that the houses for which it was claimed had paid a less rate before the Act, and that, therefore, according to the true construction of the Act, the defendant was not bound to pay more. Price, B., was in favour of

the plaintiff, but the rest of the Court of Ex. directed an issue, and their decision was sustained on appeal to this House—p. 304.

LORD FITZGERALD concurred.

Simmonds v. Heath, 62 L. J. Q. B. 415, 5 H. 550—LAWRANCE and COLLINS, JJ., *affirmed on different grounds*, (1893) 63 L. J. Q. B. 214, [1894] 1 Q. B. 29, 9 R. 29, 69 L. T. 442, 841; 12 W. L. R. 30, 122, 58 J. P. 180.—C.A. ESHER, M.R., LOPES and KAY, L.J.J. See Extraordinary Tithes Act, 1897 (60 & 61 Vict. c. 23).

BURIAL

Kemp v. Wicks (1899) 3 Phill. 264—SIR J.

NICHOLL, *followed*.

Escott v. Mastin (1842) 4 Moore P. C. 104, 6 Jur. 765—P.O. LORDS WYNFORD and BROUGHAM, HUSKING, J. and DR. LUSHINGTON, *affirming* N. C. *non*, Mastin v. Escott, 2 Curt. 692.

Escott v. Mastin, *discussed and applied*.

Tittmarsh v. Chapman (1844) 3 Curt. 840; 8 Jur. 626—SIR H. JENNER FUST.

Escott v. Mastin, *referred to*.

Perry Almshouses, In re (1898) 67 L. J. Ch. 206; [1898] 1 Ch. 391, 78 L. T. 108, 46 W. R. 360—STIRLING, J., *affirmed*, 68 L. J. Ch. 66; [1899] 1 Ch. 21; 79 L. T. 366—C.A. See CHARITY.

Reg. v. Sharpe (1857) 26 L. J. M. C. 47;

Dear & B 160, 3 Jur. (N.S.) 192; 5 W. R. 318, 7 Cox C. C. 214—C.C.R. ERLE, J. (for the Court), **Reg. v. Fox** (1811) 2 Q. B. 247; 1 G. & D. 566—Q.B., and **Reg. v. Scott** (1842) 2 Q. B. 248, n.—MAULE, J., *approved*.

Williams v. Williams (1882) 51 L. J. Ch. 385, 20 Ch. D. 659, 46 L. T. 275, 30 W. R. 438; 15 Cox C. C. 39, 46 J. P. 726—KAY, J.

Gilbert v. Buzzard (1821) 2 Hagg. (ous Rep.

333—SIR W. SCOTT, *referred to*.

Rex v. Lynn (1788) 2 Term Rep. 733, 1 R. R. 607; **Reg. v. Sharpe**, **Reg. v. Vann** (1851) 21 L. J. M. C. 39, 2 Den. C. C. 325, T. & M. 632, 15 Jan. 1030, 5 Cox C. C. 379—C.C.R. CAMPBELL, C.J. (for the Court), **Reg. v. Stewart** (1840) 4 P. & D. 349, 12 A. & E. 773—Q.B., and **Williams v. Williams**, *discussed and distinguished*.

Reg. v. Price (1884) 33 L. J. M. C. 51; 12 Q. B. D. 217, 33 W. R. 45, n.; 15 Cox C. C. 389.—STUPHIN, J.

Reg. v. Price, *confirmed*.

Reg. v. Stephenson (1884) 53 L. J. M. C. 176; 13 Q. B. D. 331; 52 L. T. 267, 33 W. R. 44, 49 J. P. 486.—C.C.R.

Reg. v. Price and Williams v. Williams, *referred to*.

Dixon, In re [1892] P. 386, 56 J. P. 481—DR. TRISTRAM.

Reg. v. Price and Gilbert v. Buzzard, *referred to*.

Kerr, In re [1891] P. 284—DR. TRISTRAM.

Pope, In re (1851) 15 Jur. 614.—DR. LUMHINGTON, *approved and applied*.

Reg. v. Tristram (1895) 67 L. J. Q. B. 857,

[1898] 2 Q. B. 371, 79 L. T. 71, 46 W. R. 653—WILLES and KENNEDY, JJ.

Reg. v. Tristram, *referred to*.
Druce v. Young (1898) [1899] P. 84—DR. TRISTRAM.

Foster v. Dodd (1897) 37 L. J. Q. B. 28, L. R. 3 Q. B. 67; 8 B. & S. 812, 854, 17 L. T. 614—Q.B., *referred to*.

Talbot, In re (1900) [1901] P. 1.—DR. TRISTRAM.

Palmer v. Exeter (Bishop) (1723) 1 Str. 576, and **Maidman v. Malpas** (1794) 1 Hagg. Cons. 205, *approved*. And see *post*, col. 960.

Kitching v. Cudingley (1868) L. R. 3 A. & E. 113 (*supra*, col. 948).

Blackmore, Ex parte (1880) 1 H. & Ad. 122,

followed.

Neville v. Bridget (1874) L. R. 9 Ex. 214; 43 L. J. Ex. 147; 30 L. T. 690, 22 W. R. 740.

BRAMWELL, B.—It was said that this fee was in truth a burial fee, and not due therefore except by immemorial custom, and that an express contract to pay such a fee was void.

Some of the authorities certainly countenance this view, and especially the passage cited from Gibson's Index, 2nd ed. p. 453. But the current of authorities is the other way. Thus we have the authority of Sir W. Scott in **Maidman v. Malpas**; **Palmer v. Exeter (Bishop)**, the opinion of Abney, J. in **Andriev v. Cudingley** (1745) Willes, 637, n. j., and that of Littledale, J. in **Blackmore, Ex parte**. And the text-writers upon the subject treat these cases as decisive. It may be that upon some occasion these authorities may be successfully questioned. But in the present case there is no appeal from our decision, and we should not, even assuming we disapproved of them—which I am far from saying that we do—be justified in running counter to them—p. 217.

PIGOTT, B. concurred.

Maidman v. Malpas, *approved*.

Batten v. Gedyre (1889) 58 L. J. Ch. 549, 41 Ch. D. 507 (*supra*, col. 948).

Bryan v. Whistler (1828) 2 M. & R. 318,

8 B. & C. 288, 6 L. J. (os) K. B. 102; 32 R. R. 389—K.B., and **Spencer v. Brewster** (1825) 3 Bing. 136; 10 Moore 494, 2 C. & P. 34, 3 L. J. (os) C. P. 203, 28 R. R. 613—BEST, C.J., *referred to*.

Ashby v. Harris (1868) 37 L. J. M. C. 164, L. R. 3 C. P. 523, 18 L. T. 719; 16 W. R. 869—BOVILL, C.J., WILLES and BYLES, JJ.

Ashby v. Harris, *distinguished and not applied*.

McGough v. Lancaster Burial Board (1888) 21 Q. B. D. 523, 57 L. J. Q. B. 568, 36 W. R. 822; 52 J. P. 740—C.A. ESHER, M.R., LINDLEY and BOWEN, L.J.J.

LINDLEY, L.J.—Therefore the case does not seem to come within the authority of **Ashby v. Harris**, when it was held that the grant must be taken under the circumstances to imply a right to keep in order and renew the plants which had been originally permitted to be planted as part of the monument erected under the terms of the grant. I think that decision goes rather far, but it does not seem to me to be in point. This is

not a question of the right to keep in repair and maintain that which must be taken to have been erected under the grant—p 827

BOWER, L.J.—The erection of monuments in the churchyard in the ordinary course is a matter of habitual practice, but as a matter of law, strictly speaking, the consent of the ordinary would seem to be a necessary condition of the legality of their erection, and, therefore, what Lord Coke says [3 Inst 202], as to the erection of monuments to the deceased in church or churchyard in a convenient manner being lawful, must be taken subject to the reservation pointed out by Lord Stowell in *Maidman v Malpas* (*supra*, col 958), viz., that the convenience of the erection is to be judged of by the ordinary.

It was argued that in *Ashby v Harris* it was decided that the right to place flowers or plant shrubs over the grave was incidental to the right of burial. As to that I say nothing, for it does not appear to me to touch this case—pp 828, 829.

Reg. v Walcott St. Swithun Overseers (1862) 31 L J M C 217, 2 B & S. 571, 6 L T 325, 10 W. R. 602—Q.B., commented on.

Reg. v. Tombridge Overseers (1884) 13 Q B D 339, 53 L J Q B 488, 11 L T. 179; 83 W. R. 24, 48 J P 740—C.A., reversing 52 L J Q B 595, 11 Q B D 134, 49 L T. 170, 31 W R 922—Q B D.

BRETT, M.R.—I cannot see that any of the cases which have been cited are at all in conflict with the decision we now come to, notwithstanding some expressions in the judgment of Blackburn, J in *Reg. v Walcott St Swithun Overseers*, which seem to be in favour of the view that a double burial board might be absurd, and some expressions of Crompton, J in that case seem to show a doubt in his mind whether they might not be unjust. But I cannot see the absurdity or injustice—p 843.

BAGGALLAY and LINDLEY, L.Js. to the same effect.

Vaughan v South Metropolitan Cemetery Co. (1860) 80 L J Ch. 265; 1 J. & H. 256; 7 Jur (N.S.) 159, 3 L T 727, 9 W R 228—WOOD, V.C., followed.

Bowyer v Stantial (1878) 3 Ex D 315, 8 C. *nom.* Bower v. South Metropolitan Cemetery Co., 38 L T 271—C.A. **BRAWWELL, BRETT and COTTON, L.JJ.**

Gough v Jones (1862) 9 Jur (N.S.) 62.—DR LUSHINGTON, *followed*.

Cronshaw v Wigan Burial Board (1873) 42 L J Q. B. 137, L R. 8 Q B. 217, 28 L T 283—EX CH.

Fitzgerald v Champneys (1861) 80 L J Ch. 777; 2 J. & H. 31; 7 Jur (N.S.) 1006; 5 L T. 233, 9 W R. 850.—WOOD, V.C., *followed*.

Tuckniss v Alexander (1868) 32 L J Ch 794, 2 Dr. & Sm. 614; 9 Jur. (N.S.) 1026; 8 L T 821, 11 W R. 938.—KINDERSLEY, V.C.

Tuckniss v Alexander and Hornby v Tockteth Park Burial Board (1862) 31 L J Ch 643; 31 Beav. 52, 5 Jur (N.S.) 531, 3 L T. 146, 10 W R. 550.—ROMILLY, M.R., *discussed*.

Stewart v. West Derby Burial Board (1866) 56 L J Ch 425; 84 Ch. D. 314; 56 L T. 380; 35 W. R. 268.—KAY, J.

Steeven v St Martin, Organs (1824) 2 Add 265.—SIR C ROBINSON, *explained*.
St John's, Walbrook v. Parishioners (1852) 2 Rob Ec. Rep 615, 16 Jur 646.—DR LUSHINGTON.

St George's, Hanover Square (Rector) v. Stuart (1740) 2 Stra 1126 *discussed*.
Campbell v Paddington (Parishioners) (1872) 2 Rob Ec Rep. 558; 16 Jur 646.—DR LUSHINGTON.

Campbell v Paddington (Parishioners), St. John's, Walbrook v Commissioners and St. George's, Hanover Square (Rector) v. Stewart, approved.
Reg. v. Twiss (1869) 38 L J Q B 228, L R. 4 Q B 407, 10 B & S. 298, 20 L T 622; 17 W R 766—COCKBURN, C.J. (for the Court).

Campbell v Paddington (Parishioners), followed

St. Gabriel, Fenchurch Street (Rector) v. City of London Real Property Co (1895) [1896] P 95.—LORD PENZANCE, and **Keet v Smith** (1875) 45 L J P C 10; 1 P D 78, 83 L T. 794, 24 W R 875.—FO CAIRNS, J.C., LORDS HATHERLEY and PENZANCE, KELLY, C.B., JAMES, L.J., SIR B PEACOCK and SIR J. HANNEN, *reversing* 44 L J. Ecc 70, L R 4 A & E 398—SIR R PHILLIMORE, *discussed*.

St Nicholas, Leicester (Vicar) v Langton (1898) [1899] P 19—CHANCELLOR OF DIOCESE OF PETERBOROUGH. See judgment, where all the cases are reviewed.

St. Benet, Sherehog, In re, and St. Nicholas, Acons, In re (1892) [1893] P 66, n.—DR TRISTRAM, *applied*.

St. Nicholas, Cole Abbey, In re (1892) [1893] P 58.—DR TRISTRAM.

Bettison, In re (1874) L R 4 A & E 294.—SIR R PHILLIMORE, **Hansard v St. Matthew, Bethnal Green** (1878) 4 P D 46.—DR TRISTRAM, **St. George's, Hanover Square, Burial Board v. Hall** (1879) 5 P D 42.—DR TRISTRAM, **Harper v. Forbes** (1859) 5 Jur (N.S.) 275.—DR LUSHINGTON, and **Reg. v Twiss** (*supra*), *discussed and approved*.

St. Mary Abbots v. Parishioners (1873) Tristram's Rep 17.—DR. TRISTRAM, **St. Botolph (Vicar) v. Parishioners, and St. Nicholas, Cole Abbey, In re, not followed**.
Plumstead Burial Ground, In re [1895] P 225—CHANCELLOR OF DIOCESE OF ROCHESTER.

St. Botolph (Vicar) v Parishioners; St. Andrew's, Hove (Vicar) v. Mawm (1894) [1895] P 228, n. (4).—DR. TRISTRAM; and **St. Nicholas, Leicester (Vicar) v Langton, referred to**.

Harper v Forbes; Reg. v Twiss; Campbell v Paddington (Parishioners), and St. George's, Hanover Square v Stuart, discussed.

Bettison, In re, followed.
Bideford Parish, In re, Bideford (Rector), Ex parte [1900] P 314; 64 J P 743.—SIR A. CHARLES (DEAN OF ARCHES).

Ecclesiastical Commissioners v. Kino (1880)
49 L. J. Ch. 529, 14 Ch. D. 213, 42
L. T. 201, 28 W. R. 544—*C.A. JAMES,
BUTT and COTTON, L.J., applied.*

**Ponsford and Newport District School Board,
In re** (1894) 49 L. J. Ch. 278, [1894] 1
Ch. 454; 7 R. 622; 70 L. T. 502; 42
W. R. 358.—*C.A. LINDLEY, KAY and
A. L. SMITH, L.J., referred to.*
**St. Saviour's Rectory Trustees and Oyler, In
re** (1886) 55 L. J. Ch. 269, 31 Ch. D. 412,
54 L. T. 9, 34 W. R. 224—*BACON, V.-O.,
explained.*

**Ecclesiastical Commissioners and New City of
London Brewery Co, In re** (1895) 64 L. J. Ch.
645, [1895] 1 Ch. 702; 18 R. 109, 72 L. T. 481;
43 W. R. 457.—*NORTH, J. See judgment at
length.*

**Ecclesiastical Commissioners and New City of
London Brewery Co, In re, followed.**
**St. Saviour's Rectory Trustees and Oyler, In
re, not followed.**

Att.-Gen. v. London Prochial Charities (1896)
65 L. J. Ch. 242, [1896] 1 Ch. 541, 71 L. T. 184;
44 W. R. 395—*STIRLING, J.*

VESTRY.

Rex v. Kent JJ. (1834) 4 L. J. M. C. 7; 4
N. & M. 299; *S. C. nom. Rex v. Adams*, 2
A. & E. 409.—*K B.*

EJECTMENT.

Goodwin v. Blackman (1697) 3 Lev. 384,
overruled.
Denn v. Buigess v. Purvis (1757) 1 Burr. 320.
—*K B.*

Doe d. Hurst v. Clifton (1856) 4 A. & E. 814,
S. C. nom. Doe d. Orchard v. Stubbs, 6 N. & M.
857.

Doe d. Cadwalader v. Price (1847) 16 L. J.
Ex. 159, 16 M. & W. 608; 11 Jur. 131.
—*PAULKE, B. (for the Court), approved.*
Cottrell v. Hughes (1855) 24 L. J. C. P. 107,
15 C. B. 532; 3 C. L. R. 496, 1 Jur. (N.S.) 448,
3 W. R. 248.—*JENNIS, C.J. (for the Court).*

Ive v. Scott (1841) 9 D. P. C. 993.—*WIGHT-
MAN, J., commented on.*
Pearce v. Cooker (1869) L. B. 4 Ex. 92; 38
L. J. Ex. 82; 20 L. T. 82.

KELLY, C.B.—It appears to me clear from *Ive v. Scott*, that the judgment is not evidence of the defendant's possession at all. There, it is true, the judgment by default immediately in question was in the action for mere profits itself. It was therefore unnecessary in that action to offer any evidence of the mere fact of actual possession at some time. The only dispute had been before the under-sheriff on a writ of inquiry as to the amount of damages. The under-sheriff had directed a verdict for nominal damages only, and the point decided was, that the defendants by suffering judgment by default in the action of trespass, had not admitted the days in the declaration during which he was alleged to have been in possession. The verdict, therefore, stood—a rule to set it aside being refused. The import-

ance of the case arises from the fact that the verdict, for nominal damages only, was not disturbed. Now, if the judgment in the action of ejectment, which must have been produced to prove the other part of the case, had been held to be evidence of the defendant's possession at the date of the writ, the under-sheriff's ruling must have been wrong, because the plaintiff would then have been entitled to the value of the premises from the time of the commencement of the action of ejectment, to the time when he obtained re-possession, *i.e.*, to something more than nominal damages; and the under-sheriff can only have been held to be right on the ground that proof of actual possession from that time was necessary, and that it had not been supplied. Therefore, notwithstanding any presumptions of law which ought to be made with regard to the regularity of the proceedings in ejectment, the plaintiffs, in my opinion, were, so far as the case depends on the judgment in the ejectment, without evidence of actual possession by the defendant at any time, and had no other evidence been adduced, would not be entitled to recover a verdict.—
p. 98

[**CHANNELL and CLARKE, B.B.**, considered that judgment by default in the ejectment was *probatum* *facit* evidence of the possession of the defendant at the date of the writ, though not from any period anterior to it.]

ELECTION.

Noys v. Mordaunt (1706) 2 Vern. 581, *dis-
tinguished.*
Incedon v. Northcote (1746) 3 Atk. 430;
Hearle v. Greenbank (1749) 1 Ves. sen. 367;
3 Atk. 715; **Forrester v. Cotten** (1760) Amb. 888, 1 Eden 532.

**Noys v. Mordaunt and Streetfield v. Street-
field** (1735) 1 Swanst. 447, *Cas. t. Talb.*
178, *applied.* *And see cols. 968, 970, 971.*
Cull v. Showell (1773) Amb. 727, *com-
mented on.*
Hearle v. Greenbank, distinguished.
Whistler v. Webster (1794) 2 Ves. 367; 2 R. R.
260.—*ARDEN, M.R. And see cols. 963, 965.*

Hearle v. Greenbank, followed.
Rich v. Cockell (1804) 9 Ves. 569; 7 R. R.
227.—*BLDON, L.C.*

**Hearle v. Greenbank and Rich v. Cockell,
followed.**
De Hurgh Lawson, In re (1885) 55 L. J. Ch. 46;
53 L. T. 522; 34 W. R. 39.

KAY, J.—That case (*Hearle v. Greenbank*) was followed by *Rich v. Cockell*, which is not a very distinct authority; but Mr. Jarman, at p. 419 of the 3rd edition (4th ed. p. 446) of his book, says "In order to raise a case of election, there must be a personal competency on the part of the author of the attempted disposition, as the doctrine is founded on intention which supposes such competency. Thus, under the old law, where personality was, and real estate was not, disposable by the will of a person under age, the heir of the infant testator was allowed to take his real estate in opposition to the will, without relinquishing a legacy bequeathed to him by the

same will. And though the disability of coverture is, in some respects, distinguishable from less absolute than that of infancy (a *few* *coverture* having, it is said, a *disposing* mind, but not a *disposing* power, while an infant has neither one nor the other), yet the principle seems, according to the authorities, to apply to the attempted dispositions of married women. If, therefore, a *few* *coverture*, having a testamentary power, makes an appointment by will in favour of her husband, and by the same will professes to bequeath to another personal estate to which her power does not extend, the husband may take the benefit appointed to him, and also defeat the intended bequest of the other property, by the assertion of his marital right. And he refers to *Rick v. Cockrell* in support of that proposition. Now, whether *Rick v. Cockrell* is a satisfactory and absolute decision or not, I find this statement, in a work of such high authority, to be the result of that case coupled with *Heavie v. Greenbank*, and seeing that there has since been no authority dissenting from it, I certainly do not feel strong enough to decide the other way.—p. 48.

Whistler v. Webster (*supra*), *approved*
And see *post*, col. 965.

Noys v. Mordaunt (*supra*), *explained*.

Heavie v. Greenbank (*supra*), *discussed*.

Thellusson v. Woodford (1806) 13 Ves. 209,
9 R. R. 175—ELDON, L.C., *affirmed*, non
Reidlesham v. Woodford (1813) 1 Dow. 249; 14
R. R. 82.

Noys v. Mordaunt and Streetfield v. Street-
field (*supra*), *referred to*
Cooper v. Cooper (*post*, col. 970).

Thellusson v. Woodford, *referred to*
Green v. Green (1816) 19 Ves. 665, 2 Mer. 86,
13 R. R. 227—ELDON, L.C.

Thellusson v. Woodford, *followed*.

Back v. Kett (1822) Jac. 534—M.R., *ques-*
tioned.

Churchman v. Ireland (1831) 1 Russ. & M. 250;
affirming 1 L. J. Ch. 172, 1 Sim. 520—
SHADWELL, V.-C.

[Contention is—that, when a person in his will says, "all my estates which I shall be possessed of," it is the same thing as if he had said, "all my estates, which being now mine, shall be mine till my decease;" in other words, "all that estate on which my will can operate"]

BROGHAM, L.C.—I must admit that *Back v. Kett* goes a certain way in support of that position; nor can I altogether reconcile the judgment there given with the prior case of *Thellusson v. Woodford*, which, if *Back v. Kett* be to stand as law, is certainly considerably broken in upon by the decision of Sir T. Plumer, *Thellusson v. Woodford* is referred to by his honour in terms of considerable doubt and hesitation, in a manner clearly showing, that, had it originally fallen to him to decide, he would have come to a different conclusion. Nevertheless, *Thellusson v. Woodford* is a case of the highest authority. . . . I cannot see the least foundation for the doubt attempted to be cast upon that case; and although, perhaps, *Thellusson v. Woodford* is not in necessary contrast with *Back v. Kett*, . . . certainly the doctrine laid down in that case is inconsistent with *Back v. Kett*, and with the argument urged at the bar in support of this appeal.—p. 238.

Brodie v. Barry (1813) 2 V. & B. 127; 13
R. R. 37—GRANT, M.R., *distinguished*.
Johnson v. Telford (1830) 1 Russ. & M. 244,
8 L. J. (O.S.) Ch. 91, 32 R. R. 207—LEACH,
M.R.

Back v. Kett; Johnson v. Telford, and
Tennant v. Tennant (1836) 1 L. & G.
Plunk. 531, *commented on and not followed*.
Churchman v. Ireland, *approved*.
Schroder v. Schroder (1854) 24 L. J. Ch. 510,
3 Eq. R. 97; 18 Jur. 987, 3 W. R. 55—CRAN-
WORTH, L.C., *affirming* Kay 578.—WOOD, V.-C.

Savill v. Savill (1846) 2 Coll. C. C. 721; 11
Jur. 723.—KNIGHT BRUCE, V.-C., *re-*
ferred to.
Campbell v. Ingilby (1857) 26 L. J. Ch. 651;
1 De G. & J. 393; 5 W. R. 837.—KNIGHT BRUCE
and TURNER, L.J.J.

Anderson v. Abbott (1857) 23 Beav. 457, 3
Jur. (N.S.) 833, 5 W. R. 381.—ROMILLY,
M.R., *Campbell v. Ingilby, and Savill v.*
Savill, *discussed*.
Willoughby v. Middleton (Lord) (1862) 31
L. J. Ch. 683; 2 J. & H. 344, 8 Jur. (N.S.) 1055;
6 L. T. 814; 10 W. R. 460.—WOOD, V.-C.

Birmingham v. Kirwan (1805) 2 Sch. & Lef.
444—REIDSDALE, L.C., *applied*.
Campbell v. Ingilby, *doubted*.

Willoughby v. Middleton, *facts corrected*
and principle applied.
Codrington v. Lindsay (1872) 42 L. J. Ch.
526, 1 L. R. 8 Ch. 578; 28 L. T. 177; 21 W. R.
182—CA. SELBORNE, L.C., JAMES and MELLISH,
L.J.J. (see judgments at length), *reversing* 27
L. T. 598—ROMILLY, M.R.; CA. *affirmed*, non.
Codrington v. Codrington (1875) 45 L. J. Ch. 660;
1 R. 7 H. L. 854; 84 L. T. 231, 24 W. R. 648
—H. L. (E.) CAIRNS, L.C., LORDS CHELMSFORD,
HATHERLEY and O'HAGAN. *And see post*,
col. 966.

Willoughby v. Middleton, *questioned*.
Smith v. Lucas (1881) 18 Ch. D. 531, 45 L. T.
460, 30 W. R. 451.—JESSEL, M.R., *distinguished*.
Wheatley, In re, Smith v. Spence (1884) 54
L. J. Ch. 201, 27 Ch. D. 606, 51 L. T. 681; 33
W. R. 275.—CHITTY, J.

Willoughby v. Middleton, *not followed*.
Wheatley, In re, Smith v. Spence, *approved*.
Yalden's Trusts, In re (1885) 31 Ch. D. 275,
55 L. J. Ch. 259; 53 L. T. 595, 34 W. R. 185—
O.A., *reversing* (1884) 54 L. J. Ch. 244, 28 Ch.
124, 51 L. T. 884, 39 W. R. 297—KAY, J.
FRY, L.J. (for self, BAKER, M.N. and BOWEN,
L.J.J.)—In *Willoughby v. Middleton*, the late
Lord Hatherley, then a V.-C., decided that a
married woman should be put to her election
between certain benefits derived under a will for
her separate use without any restraint on antici-
pation, and the life interest to her separate use
without power of anticipation given to her under
a settlement executed when she was an infant;
and the decision in this case was stated without
any expression of disapproval by Lord Selborne
in *Codrington v. Lindsay* (*supra*). On the other
hand, the late M.R., Sir G. Jessel, in *Smith v.*
Lucas (*supra*), criticised the decision of Lord
Hatherley in *Willoughby v. Middleton*, and
observed forcibly on the inconveniences which

would follow if that decision were to prevail; and this case before the M.R. was referred to without disapproval by Lord Selborne in the *H. L.* in *Child v. Child* [(1883) 8 App. Cas. 420, 427. See "HUSBAND AND WIFE"]—Chitty, J. in *Wheatley, In re*, has followed the late M.R. whilst Kay, J. has in the case now under appeal followed Lord Hatherley. In this conflict of opinion in the Courts of first instance, and, in the absence of any decision in the *H. L.* or in this Court, we find ourselves at liberty, and therefore bound to decide the question before us upon principle. Upon principle, we are of opinion, for the reasons already given, that the order of Kay, J. cannot be sustained, and we discharge the same, and declare that the appellant is not bound to elect—p. 281.

Whistler v. Webster (*supra*, col. 962), referred to
Wheatley, In re, and Vardon's Trusts, In re, distinguished. *And see* col. 966.

Brookbank, In re, Beauchamp v. James (1886) 56 L. J. Ch. 82, 84 Ch. D. 160, 55 L. T. 693; 83 W. R. 101.—KAY, J. *And see post*, col. 972.

Willoughby v. Middleton, questioned but followed.

Quence's Trusts, In re (1885) 61 L. J. Ch. 786, 53 L. T. 74; 83 W. R. 816.

CHITTY, J.—The case is not fairly distinguishable from that before V.-C. Wood, afterwards Lord Hatherley, in *Willoughby v. Middleton*, where the V.-C. held that a married woman who had by a marriage settlement executed by her when a minor, covenanted to settle after-acquired property, was bound to either bring into the settlement a separate legacy for her separate use or to make compensation out of property to which she was entitled under the settlement to her separate use without power of anticipation. The authority of that case has not been overruled. It was disapproved of by Jessel, M.R. in *Smith v. Lucas* (*supra*), and the principle upon which it proceeded was questioned by James, L.J. in *Tuscan v. Tuscan* [(1878) 47 L. J. Ch. 849, 9 Ch. D. 869, at p. 875. See "PORTION"]. It was not disapproved of by either Lord Selborne or Lord Cairns in *Codrington v. Codrington*, *Codrington v. Lendary* (*supra*), a case in which there was restraint on anticipation. But although *Willoughby v. Middleton* was not disapproved of by either of those learned judges, yet they both carefully examined the provisions of the settlement in *Codrington v. Codrington*, and such examination was apparently unnecessary if they had been simply adopting the decision in *Willoughby v. Middleton*. The strange result of the application of the doctrine of election and its consequences to a case where a married woman takes an interest under the settlement vested in her maliculously, is that it enables her in the result to deprive herself of the provision thus made for her. To take the case of a father settling an maliculous provision for his daughter, an infant at the time of her marriage, if the settlement contains what purports to be a covenant on her part, by which, however, she is not bound. Some one else, by bequeathing to her property for her separate use, enables her to deprive herself of what her father intended should be an maliculous provision. In my opinion that consequence of his decision escaped the attention of Lord Hatherley. . . . But whatever may be my own opinion on

the subject I consider that I am bound by Lord Hatherley's decision, and consequently I must make a declaration to the effect that the petitioner is bound to make compensation out of her life interest—p. 791.

Codrington v. Codrington (*supra*, col. 961), referred to.

Chesham (Lord), In re (*post*, col. 971), *Seaton v. Seaton* (1888) 57 L. J. Ch. 661; 18 App. Cas. 61; 58 L. T. 565, 86 W. R. 865.—H. J. (B.), LORDS HERSCHELL, WATSON, FITZGERALD and MACNAGHTEN. **Duncan v. Dixon** (1890) 59 L. J. Ch. 487, 44 Ch. D. 211, 62 L. T. 319, 88 W. R. 700.—KEENEVICH, J.

Codrington v. Codrington, applied.

Vardon's Trusts, In re (*supra*, col. 964), distinguished.

Carter v. Silber (1891) 60 L. J. Ch. 716; [1891] 3 Ch. 553, 65 L. T. 51, 89 W. R. 552.—ROMER, J.; *reversed*, 61 L. J. Ch. 491; [1892] 2 Ch. 278, 66 L. T. 473.—G. A. LINDLEY, BOWEN and KAY, L.J.J., which were affirmed, *nom. Edwards v. Carter* [1893] 68 L. J. Ch. 100, [1893] A. C. 360; 1 R. 218; 69 L. T. 153, 88 J. P. 4.—H. L. (B.). See "INTERNATIONAL LAW."

Carter v. Silber, explained.

Jones, In re, Fairington v. Forrester (1898) 63 L. J. Ch. 996, [1898] 2 Ch. 461, 3 R. 498, 69 L. T. 45.—NORTH, J.

Codrington v. Codrington, applied.

Vardon's Trusts, In re, and Carter v. Silber, discussed.

Hamilton v. Hamilton (1892) 61 L. J. Ch. 220; [1892] 1 Ch. 396, 66 L. T. 112, 10 W. R. 312.—NORTH, J.

Codrington v. Codrington, not applied.

Wheatley, In re (*supra*, col. 964), **Whitwell, In re, Senior v. Wilson, W.N.** (1890) 171.—CHITTY, J.; and **Vardon's Trusts, In re**, discussed and principle applied.
Hamilton v. Hamilton, distinguished.
Haynes v. Foster (1901) 70 L. J. Ch. 362; [1901] 1 Ch. 561; 84 L. T. 139, 49 W. R. 327.—KEENEVICH, J.

Wright v. Rutter (1795) 2 Ves. 678, 3 R. R. 24.—M.R., affirmed, *nom. Rutter v. Maelson* (1790) 4 Ves. 581.—THURLOW, L.C.

Beaulieu (Lord) v. Cardigan (Lord) (1766) Amb. 533, *reversed, nom. Montagu (Duke) v. Beaulieu (Lord)* (1767) 3 Bro. P. C. 277, discussed and explained.
Batrick v. Broadhurst (1790) 1 Ves. 171, 3 Bro. C. C. 88; 2 R. R. 100.

THURLOW, L.C.—I thought Lord Northampton tolerably well founded in that case, but it was determined otherwise in the *H. L.*, who decided that the right of election lasted fifty years. But all that was decided by it was, that, under circumstances, it may last till the whole affair is wound up and the trusts executed—p. 172.

Edwards v. Morgan (1824) 13 Price 782, M'Cle 541, affirmed, *nom. Morgan v. Edwards* (1827) 1 Bligh (N.S.) 401; **Dillon v. Parker** (1819) 1 Swans. 369, 1 Wils. K. B. 238, 18 R. R. 72, affirmed, **Jacob 505**; 1 Ch. & F. 308; 7 Bligh (N.S.) 826; **Padbury v. Clarke** (1850) 19 L. J. Ch. 538, 2 Mac. & G. 298, 2 Hall & Tw. 341.—

COTTENHAM, L.C. and Buttricks v Broadhurst (*supra*), discussed and distinguished. Worthington v Wignton (1855) 24 L. J. Ch. 773, 20 Beav. 67, 1 Jur. (N.S.) 1005.—ROMILLY, M.R. after argument compromised. (1855) 25 L. J. Ch. 171, 1 Jur. (N.S.) 1195, 4 W. R. 10.—L.J.

Buttricks v Broadhurst and Dillon v Parker, 1 Swanst. 381 (note by Mr Swanson), discussed.

Douglas v Douglas, Douglas v Webster (1871) 11 L. J. Ch. 74, L. R. 12 Eq. 617, 25 L. T. 530, 20 W. R. 55.

WICKENS, v.c.—It is perhaps too broadly stated by Lord Thurlow in *Buttricks v Broadhurst*, whose dictum has been adopted by Mr. Swanson in the note to *Dillon v Parker*, and other text writers, that the Court of Ch. will in all cases entertain a suit by a person put to election to ascertain the value of the objects between which election is to be made. No doubt there is in almost all cases jurisdiction in equity to compel a final election, so as to quiet the title of those interested in the objects of which one is to be chosen, and the Court, as a condition of compelling such a final election, secures to the person compelled to make it, all the information necessary to guide him in doing so. It is also generally, though not perhaps universally true, that a person for whose benefit conditions will be imposed by the Court, before it makes an order against him, can entitle himself to the benefit of the conditions by filing a bill, and offering by it to submit to the order.—p. 85

Blake v Banbury (1792) 1 Ves. 514, 4 Bro. C. C. 21, 3 R. R. 111, discussed.
Randolfe (Lord) v Parkyns (1818) 6 Dow 149.—H. L. (R.) ELDON, L.C.

Randolfe (Lord) v Parkyns, explained.
Phillips v Phillips (1861) 31 L. J. Ch. 321, 4 De G. F. & J. 298, 8 Jur. (N.S.) 145, 5 L. T. 655, 10 W. R. 236.—v.c., affirmed, L.C.

Randolfe (Lord) v Parkyns, discussed.
Wintour v Clifton (1856) 26 L. J. Ch. 218, 8 De G. M. & G. 641; 3 Jur. (N.S.) 75; 5 W. R. 129.—L.J.; and Pickersgill v Rodger (1876) 5 Ch. D. 163.—JESSEL, M.R., principle adopted.
Munich v Gabbett (1895) [1896] 1 Ir. R. 1.—PORTER M.R.

Plowden v Hyde (1852) 21 L. J. Ch. 329, 2 Sim. (N.S.) 171, 10 Jur. 512.—v.c.; reversed on *appeal*, 21 L. J. Ch. 796; 2 De G. M. & G. 684; 16 Jur. 825.—L.J., followed.

Jacob v Jacob (1898) 78 L. T. 825.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.J.

Carver v Bowles (1831) 2 Russ. & M. 801; 9 L. J. (O.S.) Ch. 91.—LEACH, M.R., applied. Kampf v Jones (1837) 7 L. J. Ch. 63; 2 Keen 756.—LANGDALE, M.R.; Blackett v Lamb (1851) 21 L. J. Ch. 46; 14 Beav. 482, 16 Jur. 142.—ROMILLY, M.R.; distinguished. Lassence v Tierney (1849) 1 Mac. & G. 551, 2 H. & T. 115; 14 Jur. 182.—L.C., followed. Harvey v Stacey (1852) 22 L. J. Ch. 23, 1 Drew 73; 16 Jur. 771.—v.c.

Carver v Bowles and Blackett v Lamb, discussed.
Moriarty v Martin (1852) 3 Ir. Ch. R. 26.—BLACKBURN, L.C.

Blackett v Lamb, followed.
Langslow v Langslow (1856) 25 L. J. Ch. 610, 21 Beav. 552, 2 Jur. (N.S.) 1057.—ROMILLY, M.R.

Carver v Bowles, followed.
Wooldridge v. Wooldridge (1859) 28 L. J. Ch. 689, Johns. 63, 5 Jur. (N.S.) 566.—WOOD, v.c.

Carver v Bowles and Blackett v Lamb, not applied.
Tomkyns v. Blanc (1860) 28 Beav. 422.—ROMILLY, M.R.

Blackett v Lamb and Wooldridge v. Wooldridge, followed.
Moriarty v Martin (*supra*), not applied.
King v King (1864) 15 Ir. Ch. R. 479.—BRADY, L.C. And see post, col. 970.

Moriarty v Martin, *disapproved*.
Churchill v Churchill (1867) 37 L. J. Ch. 92; L. R. 5 Eq. 44; 16 W. R. 182.

ROMILLY, M.R.—In *Carver v Bowles* Sir J. Leach held that no case of election arose; but the applicability of that case to others is supposed to be much impaired, unless the appointment be made in exactly the words to be found in that case. Accordingly, it seems to have been held . . . in *Moriarty v Martin* (indeed it is stated in Mr Jarman's work), that the decision in *Carver v Bowles* turned exclusively on the words which introduced the appointment by the testator, viz., "so far as I lawfully or equitably may or can order or appoint." I have considered this attentively, but . . . I am unable to see how the question of election can properly depend upon the testator expressing a doubt whether the disposition he desired to make was a legal and effective one. . . . I have, as carefully as I could, reconsidered my decision in *Blackett v Lamb* (*supra*). I have also read and considered *Moriarty v Martin*, and I must say that the result of so doing has induced me to concur with the observations made upon that case by Brady, L.C. in *King v King* (*supra*). I think that a very dangerous rule of construction would be introduced, and one which would lead to great difficulties and technicalities, if the Court were to hold that the construction of identically the same words in a will would be different if the testator in one case prefaced these words by saying that he made the bequest as far as he lawfully could or might, and omitted that preface in the other. It appears to me that these words are implied in every gift that a testator makes, and in consequence of them, to alter the person who is to take and raise a case of election, by introducing into the gift of the residue a condition that the residuary legatee shall not take it unless she gives effect to a prior invalid appointment, seems to me an absurdity in construction. To make the efficacy of such a charge depend upon the mere expression of a doubt in the testator's mind, as to the legality or invalidity of what he is attempting to do, would, in my opinion, in the construction of wills, be productive of great difficulty, and lead to much litigation. The object of all judicial decisions ought to be to simplify these rules as much as possible, and when a man by will executes a power vested in him by a prior instrument, it is to be assumed that he intends to execute that power legally, and only so far as he can do so legally, and the expression in the

will that such is his intention ought not, in my opinion, to vary the effect of it. Take the converse case—suppose the testator had expressly said, "I know that legally I cannot so exercise the power, but still I choose to do it," could the Court, on such a statement, engraft a condition, compelling the legatee, who also took other benefits under the will, to give effect to that invalid appointment, or abandon the other gifts? That would be a much stronger case than that suggested in *Mortuary v. Martin*, but I know of no case that is to that effect, or, indeed, proceeds upon any ground of that description, with the exception of the construction put on *Carver v. Bowles* in *Mortuary v. Martin*. That case seems to me to stand alone; all the other authorities are against raising the question of election in such a case, and this is confirmed by *Woodbridge v. Woodbridge* (*supra*), which is in every material particular the same as the case before me, and where the V-C lays down the same principle.—p. 96.

Mortuary v. Martin, not followed.

Carver v. Bowles, explained.

Wollaston v. King (1869) 38 L. J. Ch. 392, L. R. 8 Eq. 165, 20 L. T. 1003, 17 W. R. 641.—JAMES, V-C. And see *post*, cols. 971, 972.

Carver v. Bowles, commented on, Cynningham's Settlement, in re (1871) 40 L. J. Ch. 247, L. R. 11 Eq. 324; 24 L. T. 124, 19 W. R. 381.—MALINS, V-C., applied, *McDonald v. McDonald* (1875) L. R. 2 H. L. (Sc.) 482.—CAIRNS, L.C. LORDS HATHERLEY and SELBORNE.

Carver v. Bowles and *Woodbridge v. Woodbridge* (*supra*), distinguished.

White, in re, White v. White (1882) 22 Ch. D. 555, 52 L. J. Ch. 232; 48 L. T. 151; 18 W. R. 451. FYZ, J.—The general rule as regards appointments . . . has been stated by Sir W. M. James, when V-C, in *Wollaston v. King* (*supra*), in these terms, adopting the words of the judgment in *Whistler v. Webster* (*supra*, col. 962), that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it, whereby any disposition is made showing an intention that such a thing should take place. But there is a class of cases which at first sight appear to be in conflict with the generality of that rule. That class of authorities consists of *Carver v. Bowles*, *Woodbridge v. Woodbridge*, and other cases of the same description, including . . . *Wollaston v. King* . . . In those cases the testator had exceeded the power vested in him by directing that certain property which he had in the first place appointed absolutely to an object of the power, should be held upon trusts or subject to conditions in favour of persons who were not objects of the power, but who would probably be objects of any settlement or provision which might be made by the appointee . . . The conclusion which the Court arrived at was, that as there was an absolute gift to the object of the power, that must prevail, and the modifications which were not valid in law must be rejected, and the moment the Court arrived at that conclusion it was apparent that no case of election arose, because the object of the power was the only person who takes, and there is no conflict between him and a person who is not an object of it. Therefore in those cases the whole question as to election fell to the ground.—p. 559.

Carver v. Bowles and *King v. King* (col. 968), not applied.

White, in re, White v. White, followed.

King v. King (1884) 13 L. R. Ir. 531.—CHATTERTON, V-C.

Carver v. Bowles, applied, *Dowglass v. Waddell* (1886) 17 L. R. Ir. 184—V-C., referred to, *Cunawshaw, in re* (1890) 59 L. J. Ch. 395, 43 Ch. D. 615; 62 L. T. 489, 38 W. R. 600.—NORTH, J., explained, *Warrand's Trustees v. Warrand* (1901) 3 Fraser 369.—COURT OF SESSION.

Darlington (Earl) v. Pulteney; Cavan (Lady) v. Pulteney (1797) 3 Ves. 384; 3 R. R. 8, and *Grissell v. Swinchoe* (1860) L. R. 7 Eq. 201; 17 W. R. 438.—JAMES, V-C., explained.

Cooper v. Cooper (1874) 44 L. J. Ch. 6; L. R. 7 H. L. 53; 30 L. T. 409; 22 W. R. 713.—H. L. (S), affirming, with certain variations in the decree, (1870) 40 L. J. Ch. 5, L. R. 6 Ch. 15, 23 L. T. 488, 19 W. R. 85.—L. J., who reversed 39 L. J. Ch. 525, 22 L. T. 430, 18 W. R. 600.—STUART, V-C.

CAIRNS, L.C.—The general rule of the Court on this subject is expressed by Lord Talbot in *Streetfield v. Streetfield* (*supra*, col. 962), and by Lord Keeper Cowper in *Nags v. Mordaunt* (*supra*, col. 862). Lord Talbot says: "When a man takes upon him to devise what he had no power over under a supposition that his will will be acquiesced under, the Court compels the devisee, if he will take advantage of the will, to take entirely but not partially under it, as was done in *Nags v. Mordaunt*, there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the deviser hath made." And Lord Keeper Cowper says, in *Nags v. Mordaunt*: "In all cases of this kind, where a man is disposing of his estate among his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party acquit and relieve the other."—p. 10.

LORD HATHERLEY, who concurred, said: I apprehend that the difficulty which has been supposed to exist in this case arises in a great measure from something which has been thrown out in other cases, and notably in . . . *Cavan (Lady) v. Pulteney*, with reference to the non-application of the doctrine of election to what in that case was called a derivative interest. But the derivative interest in that case was simply this—A lady having been put to her election the question was whether her husband who was tenant by courtesy under her election in the estate which she elected to take was again to be put to his election in respect of an interest which he took under the will, and which those who argued for the election said he ought not to be allowed to benefit by, unless he gave up his interest as tenant by the courtesy.—p. 15.

LORD O'HAGAN, who also concurred, said: It was also put as a distinction, and pressed upon the House, that the derivative character of the property here made a difference. I have been unable to see a distinction between the derivative character of property which comes to the heir by reason of the law, just as much as it comes to the next of kin by reason of the law, and the derivative character of property which comes by devise. I see no such distinction, and I think

that when the authorities are looked to it will be seen that, as in *Grissell v. Swinhoe*, if the property devolves after the death of the testator on testatrix, whether it be by heirship or by devise, then the derivative character becomes material to the case. But, under the circumstances of this case, we have a property to be ascertained, which was vested in these appellants before the death of the testatrix, and therefore this case is wholly different from *Grissell v. Swinhoe*, and from any other case that can be cited—p. 16.

LORD MONCRIEFF, in concurring, said. In *Grissell v. Swinhoe*, . . . the distinction was quite clearly brought out between the double right to take under the will, and to defeat part of its provisions emerging when the will comes into operation, and a subsequent succession to or acquisition of some right which would have that effect after the legacy, or the benefits bestowed by the will, had become unconditionally and fully vested. That is quite a different case. I do not say what the law applicable to it may be.—p. 17.

Wilson v. Townsend (Lord) (1795) 2 Ves 693.—LOUGHBOROUGH, L.C., distinguished.

Wall v. Wall (1847) 16 L. J. Ch 305, 15 Sim 520; 11 Jur. 403—SHADWELL, V.-C., commented on.

Robinson v. Wheelwright (1856) 25 L. J. Ch. 385, 6 De G. M. & G 535, 2 Jur. (N.S.) 554, 4 W. R. 427—CHASWORTH, L.C., KNIGHT BRUCE and TURNER, L.J.

Wall v. Wall, overruled.
Williams v. Mayne (1867) 16 R. 1 Eq 519; 16 W. R. 173—WALSH, M.B.

Wall v. Wall, commented on.
Robinson v. Wheelwright, discussed.
Hule v. Jarman (1895) 64 L. J. Ch 779, [1895] 2 Ch 419, 13 R. 610, 73 L. T. 20; 48 W. R. 618—NORTH, J.

Cooper v. Cooper (supra), referred to.
Barber, in re, *Dauder v. Chapman* (1879) 11 Ch. D. 442, 40 L. T. 649, 27 W. R. 818—FRY, J.

Streetfield v. Streetfield (supra, col. 962).
Ker v. Wauchope (1810) 1 Bigh 1—H.L. (80), *Wollaston v. King* (col. 969); and *Cooper v. Cooper*, referred to.

Wilson v. Townsend (Lord), not followed.
Williams v. Mayne, distinguished.
Chesham (Lord), in re, *Cavendish v. Ducre* (1896) 55 L. J. Ch 401, 81 Ch D. 460; 54 L. T. 154, 34 W. R. 321.

CHITTY, J.—In that case [*Wilson v. Townsend* (Lord)] the election was to take against the instrument, and the bill was dismissed. The observations relied on are, at the utmost, mere dicta, and they are not even dicta in favour of compensation where the election is to take under the instrument, but of forfeiture. At the time when that decision was given, it had not been finally decided that election to take against the instrument did not involve forfeiture, but merely gave a right to compensation out of the interest given by the instrument. The dictum relied on is—“If the party is under restraint, and cannot accomplish that” (viz., give up the specific thing to which he has a paramount title), “it is the misfortune of the party, but the consequence is, that while he continues in that situation, his claim must be barred.” This, apparently, points to personal incapacity and certainly involves

forfeiture. The dictum cannot be supported as it stands.

That case [*Williams v. Mayne*] is distinguishable from the present. It was admitted that a case of election arose and that the married woman was bound to give up her interest in the fund if she accepted the legacy, and it was considered that she would be capable of binding her interest in the fund when it fell into possession. The question then resolved itself into this, whether she was bound to elect while her interest under the settlement was reversionary, or whether the time for electing ought not to be postponed until she could bind her interest under the settlement—pp. 175–176.

Cooper v. Cooper, referred to.
Woodleys, Minors, in re (1892) 29 L. R. 11, 304—O.A.; *Holland v. Chambers* (1893) [1893] 2 Ir. R. 285—O.A.

Cooper v. Cooper and *Holland v. Chambers*, applied.
Tevlin v. Gilsenan (1901) [1902] 1 Ir. R. 511.—O.A.

Wollaston v. King (supra) referred to, White, in re (col. 969). Dictum adopted, *Handcock's Trusts*, in re (1888) 23 L. R. 11, 34—O.A. ASHBOURNE, I.C., FITZGIBBON, BARRY and NAISH, L.J., discussed. *Abbott*, in re, *Peacock v. Figgott* (1892) 62 L. J. Ch 46, [1893] 1 Ch. 54; 3 R. 72, 67 L. T. 794, 41 W. R. 154—STIRLING, J., followed. *Tredennick v. Tredennick* (1899) [1900] 1 Ir. R. 354—V.-C.

Brooksbank, in re, *Beaulerik v. James* (supra, col. 965), *Cooper v. Cooper*; and *Wollaston v. King*, discussed.

Handcock's Trusts, in re, commented on.
Bradshaw, in re, *Bradshaw v. Bradshaw* (1902) 71 L. J. Ch. 230. [1902] 1 Ch 496, 85 L. T. 268—KEKEWICH, J.

Boyd v. Heinzelman (1813) 1 V. & B 381.—ELDON, L.C., overruled.

Mills v. Fry (1814) 3 V. & B 9; G. Cooper 107—ELDON, L.C., applied.
Anon (1817) 2 Madd 395.

PLUMER, V.-C.—In *Boyd v. Heinzelman*, Lord Eldon is reported to say, that the Court does not in these cases decide, but always refers it to the master. In the last case, however, *Mills v. Fry*, Lord Eldon says, “If upon that application [to discharge the order to elect] it appears, that they [the suits] are not for the same matter, the Court does not refer it to the master.” As the two cases are irreconcilable, I communicated with the L.C. on the subject, and I am warranted in saying, that what is promulgated in *Mills v. Fry* is the true rule.—p. 396.

ELECTION LAW.

1. PARLIAMENTARY
 - a. REGISTRATION OF VOTERS.
 - b. ELECTION OF MEMBERS.
2. MUNICIPAL

1. PARLIAMENTARY.

- a. REGISTRATION OF VOTERS
City and Borough Voters

Bradley v. Baylis (1881) 61 L. J. Q.B. 183; 8 Q. B. D. 196; 46 L. T. 268, 30 W. R.

823, Colt. 163; 45 J. P. 847.—C A. JESSEL, M. R., BAGGALLAY, BRETT, COTTON and LINDLEY, L. J., *dictum dissented from*

Anokett v. Baylis (1882) 52 L. J. Q. B. 104, 10 Q. B. D. 577, 48 L. T. 843; 31 W. R. 233; Colt. 289; 47 J. P. 356.—C A. BAGGALLAY, L. J., SIR J. HANNEN and LINDLEY, L. J.

BAGGALLAY, L. J.—There could be no possible doubt as to the application of the principles laid down in *Bradley v. Baylis* but for certain remarks made by Brett, L. J. ["supposing during the qualifying year one of these lodgers leaves, and the owner thereupon, as *he* *assuredly* must, resumes the control over that unit part, according to my view of the statute, immediately by that act of his those people left in the house, who had been householders, became lodgers again" (the words in italics do not appear in the Law Journal reports)] of which a view has been taken which was never contemplated by the Lord Justice at the time. No doubt the language used by his lordship would at first sight bear the construction which has been sought to be put upon it by the appellant, but I cannot think that such a case as the present was contemplated by his lordship. I think that by resuming control over that portion which had been previously let was meant assuming complete control over it, as if the landlord had continued to reside in the house during the qualifying year. That certainly would be the view I should draw from the observations of the Master of the Rolls as to the consideration what might or might not constitute a lodger. I think that the Court did not intend to give anything like an exhaustive definition of those who occupy as lodgers as distinguished from those who occupy other than as lodgers. But it was there indicated that regard must be had to the particular circumstances of each case and to the cases decided previously. I feel bound to go further and say, that if Brett, L. J. intended to use the language in the sense contended for, I must respectfully dissent from him. It was no portion of his judgment, and was only in the form of an illustration.—p. 108.

Bradley v. Baylis, referred to.

Stribling v. Halse (1885), *infra*, col. 971.

Dobson v. Jones (1844) 5 M. & G. 112; 8 Scott (N. R.) 80, 1 Lutw. Reg. Cas. 105; Barr. & Alm. 243, 13 L. J. C. P. 126, *followed*.

Fox v. Dalby (*ex Dally*) (1874) 44 L. J. C. P. 42; 18 L. R. 10 C. P. 285, 31 L. T. 478, 28 W. R. 244; 2 Hopw. & C. 261.—C. P.

Simpson v. Wilkinson (1844) 7 Man. & G. 50, 1 Lutw. 188; 14 L. J. C. P. 49; 8 Scott (N. R.) 814, 8 Jur. 1126, *affirmed and distinguished from*, *Heartley v. Banks* (1859) 5 C. B. (N. S.) 40; 28 L. J. C. P. 144, 5 Jur. (N. S.) 492, 7 W. R. 342; K. & G. 219, and *Freeman v. Gainsford* (1861) 11 C. B. (N. S.) 68; 31 L. J. C. P. 33, 8 Jur. (N. S.) 717, 5 L. T. 611.

Roberts v. Percival (1864) 18 C. B. (N. S.) 36, 34 L. J. C. P. 84; 11 Jur. (N. S.) 40, 11 L. T. 603, 13 W. R. 265, H. & P. 121.—C. P.

Simpson v. Wilkinson and Roberts v. Percival, *followed*.

Heartley v. Banks, distinguished

Fryer v. Bodenham (1869) 38 L. J. C. P. 185;

L. R. 4 C. P. 529, 19 L. T. 645; 17 W. R. 294, 1 Hopw. & C. 204.—C. P.

Torish v. Clark (1886) 18 Ir. L. R. 285.—C. A., *followed*.

Nicholson v. Yeoman (1889) 59 L. J. Q. B. 104, 24 Q. B. D. 145, 61 L. T. 813; 54 J. P. 166. 1 Fox 150.—COLERIDGE, C. J., MATHEW and WILLS, JJ.

Townshend v. St. Marylebone (Overseers) (1871) 41 L. J. C. P. 25, 18 7 C. P. 143, 25 L. T. 749, 20 W. R. 148, 1 Hopw. & C. 606; and *Druitt v. Gosling* (1888) 58 L. J. Q. B. 109; 60 L. T. 325, Fox 123.—COLERIDGE, C. J., MANISTY, and HAWKINS, JJ., *approved and followed*.

Begley v. Butcher (1897) 67 L. J. Q. B. 326; [1898] 1 Q. B. 67, 77 L. T. 525; 46 W. R. 189; 1 Smith 137.—RUSSELL, C. J., WRIGHT and DARLING, JJ.

Stribling v. Halse (1885) Colt. 409, 55 L. J. Q. B. 15, 18 Q. B. D. 246; 54 L. T. 268; 49 J. P. 727.—COLERIDGE, C. J., GROVE and CAVE, JJ.; and *Hasson v. Chambers* (1885) 18 L. R. 11, 68—C. A., *followed*. *Alexander v. Burke* (1887) 22 L. R. 11, Ir. 413.—C. A.

Hasson v. Chambers. See *now* (as to four months' absence only) 64 & 55 Vict. c. 11, s. 2.

Stribling v. Halse, *discussed*.

Barnett v. Hickmott (1895) Fox 412, 64 L. J. Q. B. 407, [1895] 1 Q. B. 691; 15 R. 236, 72 L. T. 286, 48 W. R. 284, 59 J. P. 230.—RUSSELL, C. J. and WILLS, J.

LORD RUSSELL, C. J.—It was argued on behalf of the appellant that this case was concluded by *Stribling v. Halse*. I cannot assent to that view, while recognising that we ought to be bound by that case so far as it extends. In that case each shop assistant had a separate furnished bedroom structurally completely separate as a room, and no one person in his occupation of his particular bedroom shared light, air, warmth or ventilation with any other room. It is stated in the judgment in *Stribling v. Halse* that a doubt which had been expressed by the present M. R. when L. J. was removed by a decision of the Court of Appeal; but there is no reported case to this effect, and a rigorous search made at my instance has failed to discover any record of such a case. The doubt there referred to was whether a person could be said to separately occupy a bedroom as a dwelling-house where he dwelt partly in the bedroom and partly in other rooms. I share this doubt, especially in a case in which other rooms, for meals, and other purposes, are shared in common. I should nowhere have referred to this doubt, but for the facts—first, that the case which is said to have removed this doubt cannot be found, and, secondly, because in the Irish case of *Hasson v. Chambers* (18 Ir. L. R. 68) two of the five learned judges in the Court of Appeal expressly dissented from *Stribling v. Halse*, and the majority, while acquiescing in it, can hardly be said to have approved of it. Nor, in my opinion, is the doubt referred to removed by the 5th section of the 41 & 42 Vict. c. 26—pp. 410, 411.

Barnett v. Hickmott, *approved*.

Clintebuck v. Taylor (1896) 1 Smith 59, 65 L. J. Q. B. 314, [1896] 1 Q. B. 395; 74 L. T.

177; 44 W. R. 531; 60 J. P. 278.—C.A. *ESHER, M.R. and LOPEZ, L.J., RIGBY, L.J. dissenting*

Cook v. Humber (1862) 11 C. B. (N.S.) 38; 31 L. J. C. P. 73, K. & G. 413; 8 Jur. (N.S.) 698, 6 L. T. 838, 10 W. R. 429, n., *commented on*.

Thompson v. Ward (1871) 40 L. J. C. P. 169, L. R. 6 C. P. 327, 24 L. T. 679, 1 Hopw. & C. 530, 587, 19 W. R. C. L. Dig. 58.—C.P.

Cook v. Humber and Stamper v. Sunderland (Overseers) (1868) 37 L. J. M. C. 137; L. R. 3 C. P. 388; 18 L. T. 682, 16 W. R. 1063.—C.P., *adopted*

Barnes v. Peters (1869) 1 Hopw. & C. 251, 38 L. J. C. P. 266; L. R. 4 C. P. 539, 17 W. R. 970.—C.P.

Cook v. Humber and Thompson v. Ward, considered

Stamper v. Sunderland (Overseers), discussed.
Boon v. Howard (1874) 43 L. J. C. P. 115; L. R. 9 C. P. 277; 30 L. T. 382, 22 W. R. 535, 2 Hopw. & C. 208.—C.P.

Cook v. Humber; Thompson v. Ward and Stamper v. Sunderland (Overseers), considered.

Bradley v. Baylis (1881) 51 L. J. Q. B. 183; 8 Q. B. D. 195, 46 L. T. 253, 30 W. R. 823; 45 J. P. 847; *Colt 163—C.A. JESSEL, M.R., BAGGALLAY, BRETT, COTTON and LINDLEY, L.J.*

Toms v. Lockett (1847) 5 C. B. 23, 2 Lutw. Reg. Cas. 19, 17 L. J. C. P. 27, 11 Jur. 993, *held partly overruled*

Pacey v. Maclean (1869) L. R. 5 C. P. 252, 39 L. J. C. P. 115; 1 Hopw. & C. 371, 22 L. T. 213, 18 W. R. 732.—C.P.

BRETT, J.—Cook v. Humber (supra) has been supposed to have overruled *Toms v. Lockett*; but it does so only so far as that the Court rather approve of what was thrown out by Williams, J. than of the opinion pronounced by the other judges. The latter case, so far as it goes, stands as an authority to show that a warehouse, shop, or counting-house may be part of a house, that is, that those words are to be construed according to their ordinary and popular meaning—p. 262.

Toms v. Lockett, dictum adopted.

Morton v. Palmer (1881) 61 L. J. Q. B. 7; 45 L. T. 426, 30 W. R. 116.—C.A.

Barnes v. Peters (1869) 1 Hopw. & C. 251; 38 L. J. C. P. 266, L. R. 4 C. P. 539; 17 W. R. 970.—C.P., *not followed*.

Byrne v. McDonough (1874) Ir. R. 1 Reg. Ap. 175.—EX. CH.

Cullen v. Patterson (1886) 18 L. R. Ir. 274, *approved*

Hersant v. Halse (1886) 56 L. J. Q. B. 44; 18 Q. B. D. 412; 56 L. T. 337; 35 W. R. 603; 51 J. P. 135, Fox, 12.—COLERIDGE, C.J., POLLOCK, B. and SMITH, J.

Hersant v. Halse, followed.

Jones v. Kent (1888) 58 L. J. Q. B. 106; 22 Q. B. D. 204; 60 L. T. 820, 37 W. R. 303; 1 Fox 109.—COLERIDGE, C.J., MANISTY and HAWKINS, JJ.

Agnew v. Reilly (1853) 2 Ir. C. L. R. 560.—EX. CH., and **Maldowney v. Malcolmson** (1864) 15 Ir. C. L. R. 375.—EX. CH., *discussed*

Maldwin v. Streeter (1869) L. R. 4 C. P. 488,

38 L. J. C. P. 180; 1 Hopw. & C. 157, 19 L. T. 827, 17 W. R. 380.—C.P.

McGaffigan v. Biddall (1890) 28 L. R. Ir. 257.—C.A., *followed*

Palmer v. Wade (1893) [1894] 1 Q. B. 268, Fox 323, 10 R. 416, 70 L. T. 407; 58 J. P. 511.—COLERIDGE, C.J., LAWRENCE and COLLINS, JJ.

Abel v. Lee (1871) 40 L. J. C. P. 154, L. R. 6 C. P. 365, 23 L. T. 814, 19 W. R. 625.—C.P., *explained and distinguished*

Cull v. Austin (1872) L. R. 7 C. P. 227, 41 L. J. C. P. 153, 1 Hopw. & C. 741, 26 L. T. 767, 20 W. R. 883.—C.P.

BRETT, J. (for the Court).—In that case, Abel, the appellant, claimed, in 1870, to be placed on the register under sect. 3 of the Representation of the People Act, 1867. It was conceded that he was duly qualified in all other respects, but it was objected that he was disqualified by reason of not having paid a rate made in respect of the qualifying premises on the 18th of June, 1869, made, therefore, before the commencement of the qualifying year. The answer relied on to this objection was, that, after October, 1869, that is to say, during the qualifying year, the payment of this rate was duly excused. The revising barrister disallowed the vote. It was argued on the appeal that the only rates which it was necessary that the proposed voter should have paid were those made and allowed within the qualifying year, and that the excusal by magistrates, whenever made, from payment of any rate, relieved the proposed voter from the obligation, as matter of qualification, of having paid such rate. Both of these arguments were overruled by the Court on the ground of the difference of the words used in the sub-sect. of sect. 3, and on the largeness of the words used in sub-sect. 4. Inasmuch as the rate in question, viz. that of June, 1869, was made after the 5th of January of the year preceding the qualifying year, the question under discussion in the present case was not raised in that case. The expressions of the judges were pointed to the argument that payment was only required of the rates made within the qualifying year. In that case it was necessary to point out the largeness of the words used in sect. 3 of the Representation of the People Act, 1867; in this case it has been necessary to consider how far that largeness required limitation—p. 240.

Re v. Mitchell (1893) 10 East 511, *discussed*.

Ford v. Hart (1873) L. R. 9 C. P. 278, 48 L. J. C. P. 24; 29 L. T. 685; 23 W. R. 169; 2 Hopw. & C. 107.—C.P.

BRETT, J.—The only decision which raises any difficulty in my mind is *Re v. Mitchell*. But that arose upon different words from those which govern the present case. Here the question is, whether under sect. 32 of the Reform Act there has been a sufficient residence. There, the question was, whether there was a right to vote as an inhabitant under a charter. As I understand that case, it was held that, on the proper construction of the charter, a person might be an inhabitant without dwelling in the borough. Inasmuch as he had his house and establishment there, and his family, it was considered that he

was what would be generally meant by an inhabitant, and would be commonly called so, and so was within the meaning of the charter. It does not appear to me that that case can govern the construction of the Act we are now considering.—p 276

Ford v. Hart, followed

Rex v. Mitchell, not followed

Ford v. Barnes, Ford v. Elmsley (1885) 55 L. J. Q. B. 24, 16 Q. B. D. 254, 53 L. T. 675, 31 W. R. 78. Colt 396, 50 J. P. 37.—COLERIDGE, C.J., GROVE and CAVE, JJ.

CAVE, J. (reading the judgment of the whole Court).—We were pressed on the one side with the case of *Ford v. Hart*, and on the other side with the case of *Rex v. Mitchell*. In our judgment, the case falls within the principle laid down in *Ford v. Hart*. If the two cases are inconsistent, we think the latter decision should be followed.

Atkinson v. Collard (1885) 55 L. J. Q. B.

18, 16 Q. B. D. 254; 53 L. T. 670; 34 W. R. 75; Colt 375, 50 J. P. 23.—COLERIDGE, C.J., GROVE and CAVE, JJ., and *Ford v. Barnes, Ford v. Elmsley, followed*

Spittall v. Brook (1886) Fox 22; 56 L. J. Q. B. 48, 18 Q. B. D. 426, 56 L. T. 364, 35 W. R. 520.—COLERIDGE, C.J., POLLOCK, B. and SMITH, J.

Ford v. Barnes and Spittall v. Brook, followed

Donoghue v. Brook (1887) Fox 100, 57 L. J. Q. B. 123, 58 L. T. 411.—COLERIDGE, C.J., POLLOCK, B. and HAWKINS, J.

Ford v. Barnes. See now 54 & 55 Vot. c. 11, s. 2 (as to four months' absence only)

County Voters

Davis v. Waddington (1844) 7 Man. & G.

45, n. 14 L. J. C. P. 45, commented on *Fernie v. Scott* (1871) 41 L. J. C. P. 20, L. R. 7 C. P. 202, 1 Hopw. & C. 718, 25 L. T. 886, 20 W. R. 235—C.P.

Gadsby v. Barrow (1841) 7 Man. & G. 21;

8 Scott (N.R.) 799, Barr. & Arn. 283, 1 Lutw. Reg. Cas. 112; 14 L. J. C. P. 51, 8 Jur. 1081.—C.P., *distinguished*.
Huckle v. Exor (1871) 41 L. J. C. P. 42, L. R. 7 C. P. 193; 1 Hopw. & C. 680; 25 L. T. 800; 20 W. R. 235.—C.P.

Murray v. Thornley (1846) 2 C. B. 217, 1

Lutw. Reg. Cas. 496, Barr. & Arn. 742, 15 L. J. C. P. 155, 10 Jur. 270—C.P., and *Hayden v. Tiverton Overseers* (1846) 4 C. B. 1; 1 Lutw. Reg. Cas. 510, 16 L. J. C. P. 88, 10 Jur. 950.—C.P., *followed*

Heelis v. Blain (1864) 18 C. B. (N.S.) 90, 34

L. J. C. P. 88, H. & P. 180; 11 Jur. (N.S.) 18, 11 L. T. 450, 18 W. R. 202—C.P., *distinguished*

Webster v. Ashton-under-Lyne Overseers, Orme's Case (1872) L. R. 8 C. P. 281, 42 L. J. C. P. 88, 2 Hopw. & C. 60, 27 L. T. 652, 21 W. R. 171.—C.P.

BOVILL, C.J.—Now, after these two decisions [*Murray v. Thornley* and *Hayden v. Tiverton*], I think it is hopeless for the respondent in this

case to contend that we are not bound by what has been treated as the law ever since the year 1846, viz., that the possession of a rent-charge, to satisfy the Reform Act, must be a possession in fact. The question afterwards arose in a different form. In *Heelis v. Blain*, a new view of the matter was suggested, viz., that when the grant of the rent charge did not take effect at common law, but by the Statute of Uses (27 Hen. 8, c. 10), the statute executed the use in possession; and so the grantee became at once in actual possession. The case was argued entirely upon that footing. The rent-charge there undoubtedly came within the statute, and it was held that the person to whose use the grantee was seized was, by the effect of the Statute of Uses, to be deemed to be in possession of the rent-charge so as to satisfy the words "actual possession" in sect. 26 of the Reform Act. So far from dissenting from the previous cases of *Murray v. Thornley* and *Hayden v. Tiverton*, the Court expressly adopt them, and hold that the possession to satisfy sect. 26 must be an actual possession, but they came to the conclusion that the claimant in the case then before them was to be deemed to have been in such actual possession by the operation of the Statute of Uses.—p 295

Heelis v. Blain, followed

Webster v. Ashton-under-Lyne Overseers, Hatfield's Case (1873) 42 L. J. C. P. 146, L. R. 8 C. P. 306, 2 Hopw. & C. 89; 28 L. T. 901; 21 W. R. 637—C.P.

Heelis v. Blain, followed

Lowcock v. Broughton Overseers (1883) Colt 335, 53 L. J. Q. B. 144, 12 Q. B. D. 369, 51 L. T. 399, 32 W. R. 247.—COLERIDGE, C.J., HAWKINS and MATHEW, JJ.

Webster v. Ashton-under-Lyne Overseers,

Orme's Case (supra), referred to
Navill v. Bethell (1902) 71 L. J. Ch. 652, [1902] 2 Ch. 523, 47 L. T. 191, 50 W. R. 580—C.A. COLLINS, M.R., STIRLING and HARDY, L.JJ.

Copland v. Bartlett (1848) 6 C. B. 18, 18

L. J. C. P. 50, 13 Jur. 127—C.P., and *Beamish v. Stoke* (1861) 11 C. B. 29; 21 L. J. C. P. 9; 2 Lutw. Reg. Cas. 189, 16 Jur. 587; 16 J. P. 160—C.P., *considered*

Robinson v. Dunkley (1865) 15 C. B. (N.S.) 478; 33 L. J. C. P. 57; 1 Hopw. & C. 1, 9 Jur. (N.S.) 1342, 9 L. T. 481, 12 W. R. 202, 28 J. P. 488—C.P., *followed*.

Rollleston v. Cope (1871) L. R. 6 C. P. 292, 40 L. J. C. P. 160, 1 Hopw. & C. 160; 24 L. T. 390, 19 W. R. 927, 35 J. P. 406—C.P.

BOVILL, C.J.—[The learned judge stated the facts of the above three cases (see p. 298).] It was contended before us that *Robinson v. Dunkley* was at variance with the two previous decisions, and virtually overruled them. It is difficult to reconcile those decisions, and still more difficult to distinguish the present case in principle from *Robinson v. Dunkley*. The question is certainly involved in much doubt also, but for the decision in the last case, I should have had no hesitation in adding, as the reviving barister has done in this case, upon the authority of *Copland v. Bartlett* and *Beamish v. Stoke*, and upon the reasons of the very learned and eminent judges who decided those cases. The

later case, however, of *Robinson v Dunblay* having been decided, I think it is better to abide by that decision. There are also strong arguments in support of it.—p. 300.

Hinde v Charlton (1866) 36 L. J. C. P. 79, L. R. 2 C. P. 104, 15 L. T. 172, 15 W. R. 226; 12 Jur. (N.S.) 1008.—C.P. *considered*.
Coverdale v Charlton (1875) 48 L. J. Q. B. 123, 4 Q. B. D. 104, 40 L. T. 88, 27 W. R. 257.—C.A., COTTON, L.J. *dissenting*.

Bennett v Blaine (1863) 15 C. B. (N.S.) 518, 33 L. J. C. P. 63, 10 Jur. (N.S.) 130; 9 L. T. 506, 12 W. R. 175, H. & P. 35.—C.P. *followed*.

Baxter v Brown (or **Baxter v Newman**) (1854) 7 Man. & G. 198, 14 L. J. C. P. 193; 8 Scott (N.R.) 1019; 1 Lutw. Reg. Cas. 120, n., 9 Jur. 829.—C.P. *discussed and distinguished*.

Watson v Black (1855) 55 L. J. Q. B. 31, 16 Q. B. D. 270; 51 L. T. 17, 34 W. R. 274, Colt. 418.—COLERIDGE, C.J., GROVE and CAVE, JJ.

CAVE, J. (delivering the judgment of the Court).—The case of *Baxter v Brown* was relied on. That case has been sometimes doubted and sometimes distinguished. If the Court there meant to lay down the principle that members of an association cannot by agreement among themselves divest themselves of any equitable interest in lands purchased for the purposes of the association, and cannot vest those lands in trustees free from such equitable interest, that case is opposed to a cloud of authorities, and is not law. If, however, the Court there only meant to decide that in that case the parties had not agreed to divest themselves of their equitable interests, the case is distinguishable. In the case now under consideration it is clear that the members meant to vest the freeholds in the trustees free from any equitable interest in the individual members in the land itself, and to give to the members of the association an interest in the profits of the concern only. There is nothing contrary to law in such an arrangement, but one consequence of it is that the individual members have no equitable interest in the freeholds vested in the trustees, and consequently the decision of the revising barrister was correct and must be affirmed.—p. 35.

Tepper v Nichols (1864) 18 C. B. (N.S.) 121; 34 L. J. C. P. 61, H. & P. 202, 11 Jur. (N.S.) 18; 11 L. T. 509; 13 W. R. 270.—C.P. *followed*.

Wadmore v. Dear (or **Putney Overseers**) (1871) 41 L. J. C. P. 49; 13 W. R. C. P. 212; 26 L. T. 28; 20 W. R. 239.—C.P.

Capell v Aston (1849) 8 C. B. 1; 19 L. J. C. P. 28; 4 C. P. 49; 13 W. R. C. P. 212; 26 L. T. 28; 20 W. R. 239.—C.P.

Saunders v. Seaton (1880) 50 L. J. C. P. 117; 43 L. T. 438, 29 W. R. 289, 45 J. P. 22, 1 Colt. 135.—GROVE, LINDLEY and LOPES, JJ.

Smith v. Hall (1868) 15 C. B. (N.S.) 485; H. & P. 175; 15 L. J. C. P. 59; 9 Jur. (N.S.) 1840, 9 L. T. 415; 12 W. R. 172.—C.P., *principle applied*.

Harrison v. Carter (1876) 46 L. J. C. P. 57; 2

C. P. D. 26; 35 L. T. 511, 25 W. R. 182; 2 Hopw. & C. 324.—C.P.

Smith v. Hall, *adopted*.
Cowen v. Kingston-upon-Hull (Town Clerk) (1896) *infra*.

Harrison v. Carter, *followed*.
Baker v. Monmouth (Town Clerk) (1885) 53 L. T. 668, 34 W. R. 64; 49 J. P. 776.—COLERIDGE, C.J., GROVE and CAVE, JJ.

Harrison v. Carter and Baker v. Monmouth (Town Clerk), *followed*.
Edwards v. Lloyd (1887) 57 L. J. Q. B. 121, 20 Q. B. D. 302, 58 L. T. 409, 52 J. P. 519; 1 Fox 54.—COLERIDGE, C.J., POLLOCK, B. and HAWKINS, J.

Harrison v. Carter; Baker v. Monmouth (Town Clerk); and **Edwards v. Lloyd**, *distinguished*.

Cowen v. Kingston-upon-Hull (Town Clerk) (1896) 66 L. J. Q. B. 183; [1897] 1 Q. B. 273, 75 L. T. 593, 1 Smith 96; 45 W. R. 418; 61 J. P. 356.—HAWKINS, CAVE and WRIGHT, JJ.

HAWKINS, J.—In *Harrison v. Carter* the lands forming the charity estate were devised to and vested in trustees—persons other than the claiming voter. Here they are vested in the brethren themselves, and the brethren, so long as they are such, live in houses of which they are for the time legal owners, and, though their right to occupy is dependent on the will of the trustees, the power of removal has never yet been exercised. Again, here the funds are to be distributed to feeble, old, or necessitous persons—necessitous not necessarily meaning persons in extreme poverty. In *Harrison v. Carter* they were to be shared by the poorer inhabitants, and the particular voter whose vote was questioned was so needy as that (the money being distributed according to actual necessity) he was awarded the largest amount distributed to any one family. There was also this further fact in *Harrison v. Carter*, that before 1867 the person who was removed from the register had never been in a condition to claim a vote, the house he occupied being of insufficient value, whereas in the present case the claimant had with his predecessors, for a longer period than 1892, been uninterruptedly allowed to vote in respect of the same qualification until 1896. In *Baker v. Town Clerk of Monmouth* poverty and inability to maintain themselves by their own exertions were found as the condition of the claimants to vote, and each occupant of an almshouse was required to wear a badge, and it was not suggested that any occupant had any freehold interest in the house he occupied. Following these two cases, *Edwards v. Lloyd* and *Doe v. Kent* might also be cited as supporting to some extent the objection of the respondent. Those cases, however, are distinguishable in their material facts from that now before us. . . . On the other hand *Smith v. Hall* strongly supports the case of the appellant to have his name upon the register.

CAVE, J.—Another case is cited by the revising barrister, that of *Baker v. Town Clerk of Monmouth*, to the decision of which I was myself a party. That case is not to be found in the regular reports, and I feel some difficulty about it. If it merely follows *Harrison v. Carter*, it is unnecessary to consider it, but if it is to be

taken as dissenting from *Harison v Carter*, and as laying down that a person though legally entitled to participate in such funds is not entitled to vote, then I think it is wrong

Chorlton v Lings (1868) 88 L. J. Q. P. 25; L. R. 4 C. P. 374, 19 L. T. 534; 17 W. R. 281; 1 Hopw. & C. L.—C.P., applied
Borersford-Hope v Sandhurst (Lady) (1869) 58 L. J. Q. B. 316, 23 Q. B. D. 79; 61 L. T. 160, 37 W. R. 548, 53 J. P. 805—C.A. COLERIDGE, C.J., ESHER, M. R., COTTON, LINDLEY, FRY and LOPES, L.J.

Chorlton v Lings, referred to
Reg (Moore) v Abbott (1896) [1897] 2 I. R. 362.—Q. B.D.; affirmed, C.A.

Bridges v. Miller (1887) 57 L. J. Q. B. 123, 20 Q. B. D. 287, 58 L. T. 408, 36 W. R. 509; Fox 47, 52 J. P. 518—COLERIDGE, C.J., POLLOCK, B. and HAWKINS, J., and **Smith v. Chandler** (1888) 58 L. J. Q. B. 103, 22 Q. B. D. 208; 60 L. T. 327, 37 W. R. 351, 53 J. P. 199, Fox 129—COLERIDGE, C.J., MANISTY and HAWKINS, JJ., distinguished.

Prosscott v. Lee (1890) 68 L. J. Q. B. 908, [1890] 2 Q. B. 273, 81 L. T. 43; 47 W. R. 690; I. Smith 197—C.A. LINDLEY, M. R., SMITH and ROMER, L.J.

LINDLEY, M. R.—The objector did not put in the notice his place of abode, which was out of London, but he inserted his business address, which was within the borough. . . . The revising barrister has found as a fact that no one was misled by what was done, and he amended the notice by putting in the real place of abode of the objector. The question is whether he had power to do this. . . . In *Bridges v. Miller* the Court held that there was no power to amend so as to turn what was really a bad objection into a good one. That is an intelligible decision, but it does not apply in the present case. *Smith v. Chandler* was a case of a notice of claim by a lodger claimant which was bad. Whether it could have been amended I do not know, because I have not sufficiently examined the provisions as to lodger votes. But the *ratio decidendi* was that there was a rival form intentionally used by the agents who would not use the parliamentary form, and that which they used was clearly bad. Here there is a good objection, and, if the objector had given his right address, one to which the revising barrister must have given weight. I entertain no doubt that in this case there was power to amend, and the appeal must be dismissed.

Notice of Objections.

Woollett v. Davis (1847) 4 C. B. 115, 16 L. J. C. P. 185; 1 Lutw. Reg. Cas 607; 11 Jur 477, followed
Humphrey v. Earle (1887) 67 L. J. Q. B. 124, 20 Q. B. D. 294; 58 L. T. 408, 36 W. R. 510, 52 J. P. 518, 1 Fox 39—COLERIDGE, C.J., POLLOCK, B. and HAWKINS, J.

Humphrey v. Earle, distinguished
Sheldon v. Fletcher (1847) 17 L. J. C. P. 34; 5 C. B. 14; 2 Lutw. Reg. Cas. 11, 11 Jur 949—C.P., followed.

Hicks v. Stokes (1892) [1898] 1 Q. B. 121; 5 I. R. 96, 41 W. R. 123, Fox 903, 57 J. P. 678—COLERIDGE, C.J., HAWKINS and CAVE, JJ.

COLERIDGE, C.J.—According to the authority of *Sheldon v. Fletcher*, and according to good sense, I think that the objectors' places of abode were sufficiently described. The decision in *Sheldon v. Fletcher* seems to me to be directly in point. We have been pressed with *Humphrey v. Earle*, but the distinction between that case and the present is that there there was no finding that the persons objected to had not been misled, and the Court seem to have thought that the omission of the word "the" before "churchyard" might have misled them into supposing that the address did not refer to the churchyard in Petersfield, whereas here the revising barrister has found, as a fact, that no one has been misled or inconvenienced by the omission.

Tudball v. Bristol (Town Clerk) (1843) 5 M. & G. 5, 7 Scott (N. R.) 486, 1 Lutw. Reg. Cas 7; 13 L. J. C. P. 43, 7 Jur. 1041; Bair. & Atk. 8—C.P., approved.

Bright v. Devonish (1866) 36 L. J. C. P. 71; L. R. 2 C. P. 102; 12 Jur. (N. S.) 1019, 15 L. T. 471, 16 W. R. 225—C.P.

Parkinson v. Brophy (1864) 15 I. R. L. R. 346.—EX. CH., *dissenting from*

Jones v. Jones (1865) L. R. 1 C. P. 140, 35 L. J. C. P. 94, 1 H. & K. 841; H. & P. 320, 12 Jur. (N. S.) 123, 13 L. T. 633; 14 W. R. 204—C.P.

ERLE, C.J.—We are to assume that the Legislature has a reasonable intention, and when the words of the Act are not express we are to interpret them as to give effect to those intentions. It was on this ground that the Court held that the place of abode of the objector was essential, and that the year should be given in the date, as inconvenience might arise to the person objected to by their omission. I cannot see that it can make the smallest difference to any one whether the day of the date coincides with the day on which the signature is actually written or not. Such being the ground of the English decisions, the question came before the Irish Court in the case of *Parkinson v. Brophy*. There is no body of judicial men for whom I have a higher respect than the Irish judges, but I do not think that the Act so clearly requires the exact day of the signature to be inserted as the majority of the judges in that case thought it did, and we must therefore look to the purpose of the Act, and I agree with Hayes, J., and think that the present case is distinguished from those previously decided by the fact that it can be of no importance to any one whether the date contains the exact day of the signature of the notice or not, and I am of opinion, therefore, that it is not necessary that it should do so—p. 143.

Jones v. Jones, distinguished
Smith v. Chandler (1888) 58 L. J. Q. B. 103; 22 Q. B. D. 208, 60 L. T. 327, 37 W. R. 351, 53 J. P. 199, Fox 129—COLERIDGE, C.J., MANISTY and HAWKINS, JJ.

Allen v. Greensall (1817) 4 C. B. 100, 16 L. J. C. P. 142, 11 Jur. 476, 1 Lutw. Reg. Cas 592—C.P., followed.

Gifford v. St Luke's, Chelsea (1889) 59 L. J. Q. B. 98, 24 Q. B. D. 141, 61 L. T. 810; 54 J. P. 230, 1 Fox 189—COLERIDGE, C.J., MATTHEW and WILLS, JJ.

Childs v. Cox (1887) 20 Q. B. D. 290; 58 L. T. 338; 36 W. R. 605, Fox 84.—

COLERIDGE, C.J., POLLOCK, B. and HAWKINS, J., *overruled*
Kemp v. Wanklyn (1894) 63 L. J. Q. B. 520; [1894] 1 Q. B. 583, 9 R. 925; 70 L. T. 478, 42 W. R. 369, Fox 360, 58 J. P. 605.—C.A. *ESHER, M.B., LOPES and DAVEY, L.J.*, *reversing* (1893) [1894] 1 Q. B. 265.—COLERIDGE, C.J., LAWRENCE and COLLINS, J.J.

LOPES, L.J.—*Childs v. Cox* was, in my judgment, wrongly decided and ought to be reversed. The Court there says that the case shows that on August 20th no "ordinary course of post" existed; but that is not so. There was an "ordinary course of post," by which the notices would have been delivered in time, if nothing had been done to intercept them.

Revising Barrister

Bartlett v. Gibbs (1848) 5 Man. & G. 81, 7 Scott (N.R.) 609; 13 L. J. C. P. 40; Barr & Arn 98, 1 Lutw. Reg. Cas. 73.—C.P. and *Onions v. Bowdler* (1817) 5 C. B. 65; 17 L. J. C. P. 70, 2 Lutw. Reg. Cas. 59; 11 Jur. 1041.—C.P. *considered*
Bentley v. Watson (1871) L. R. 7 C. P. 163, 41 L. J. C. P. 15, 1 Hopw. & Colt 591, 25 L. T. 806, 20 W. R. 145.—C.P.

WILLES, J.—The cases of *Bartlett v. Gibbs* and *Onions v. Bowdler* must be taken in connection with the decision in *Flounders v. Donnor* (2 C. B. 63, see col. 984) and *Hitchins v. Brown* (2 C. B. 25). In *Flounders v. Donnor*, *Eric, J.* seems to have been of opinion that, if the number had been supplied, the barrister would have been bound to amend. Both the cases of *Bartlett v. Gibbs* and *Onions v. Bowdler* are cases in which the character of the qualification would have been changed by the amendment because the claim was in respect of the occupation of one house, whereas the real qualification was in respect of the occupation of two houses. In the one case there was no reference at all to the first house, in the other, no reference to the second. The real qualification was totally different from that described.—p. 168

Bartlett v. Gibbs and *Onions v. Bowdler*, *applied*

Bentley v. Watson (and see *infra*), *distinguished*.

Porrett v. Lord (1879) 49 L. J. C. P. 176; 5 C. P. D. 65, 42 L. T. 28, 28 W. R. 393, Colt 46; 44 J. P. 186.—C.P.D., *dissented from*.

Foskett v. Kaufman (1885) 55 L. J. Q. B. 1, 16 Q. B. D. 279, 54 L. T. 64; 34 W. R. 90, Colt 406, 50 J. P. 484.—C.A.

ESHER, M.B.—My view of sect. 24 and its effect with regard to sub-sect. 13 of sect. 28 (41 & 42 Vict. c. 26) would make the decision in *Porrett v. Lord* too strict, and one with which the reasons for our decision are inconsistent. Therefore, we ought to declare that in our opinion that decision is too strict, and one with which we cannot agree.

[COTTON and BOWEN, L.JJ., agreed with Lord Esher in his remarks upon *Porrett v. Lord*, and followed the case of *Bartlett v. Gibbs*]

Foskett v. Kaufman, *followed*.

Plant v. Potts (1890) 60 L. J. Q. B. 33, [1891] 1 Q. B. 258, 68 L. T. 730; Fox 208, 65 J. P. 277.—C.A. *ESHER, M.B., LOPES and KAY, L.JJ.*

Bartlett v. Gibbs, Foskett v. Kaufman, and Plant v. Potts, *followed*.

Harcum v. West Ham (Town Clerk) (or *Hilary*) (1894) 63 L. J. Q. B. 306, [1894] 1 Q. B. 579; 9 R. 271, 70 L. T. 605, 42 W. R. 321; Fox 345, 58 J. P. 510.—C.A. *LINDLEY, KAY and SMITH, L.JJ.*

Foskett v. Kaufman, Plant v. Potts and Hitchins v. Brown (1845) 15 L. J. C. P. 38; 2 C. B. 25; 9 Jur. 1058.—C.P., *discussed*

Soutter v. Rodenick (1895) 65 L. J. Q. B. 145; [1896] 1 Q. B. 91, 73 L. T. 576, 44 W. R. 205; 1 Smith 22, 36.—*RUSSELL, C.J., GRANTHAM and WILLIAMS, JJ.*, *WILLIAMS, J. dissenting in part*. See judgment.

Foskett v. Kaufman and Bentley v. Watson (*supra*, col. 983), *applied*.

Kitchen v. Johnson (1898) 68 L. J. Q. B. 11, [1899] 1 Q. B. 85, 79 L. T. 422; 47 W. R. 110.—*RUSSELL, C.J., WILLS and LAWRENCE, JJ.*

Foskett v. Kaufman, *dicta followed*

Lord v. Fox (1891) 61 L. J. Q. B. 60, [1892] 1 Q. B. 199, 65 L. T. 617, Fox 266.—*COLERIDGE, C.J., WRIGHT and COLLINS, JJ.*, *not followed*

Goodrich v. Great Gimsby (Town Clerk) (1901) 71 L. J. K. R. 99, [1902] 1 K. B. 301, 85 L. T. 588, 50 W. R. 170, 65 J. P. 758.

LORD ALVERSTONE, C.J.—In *Foskett v. Kaufman* the Court of Appeal virtually decided that where such a declaration has been made the revising barrister has power to make an alteration in the description of the qualification, which he could not otherwise have made. . . . It is true that in *Lord v. Fox*, where the voter had made a declaration, a Divisional Court . . . held that the revising barrister had no power to alter the description of the qualification. In that case, however, the important fact that a declaration had been made was not prominently brought to the attention of the Court. If the decision in that case conflict, with the view I have expressed, it seems inconsistent with the judgments of the Court of Appeal in *Foskett v. Kaufman*. In my opinion we are bound by the latter case and should follow it.—p. 101. *DARLING and CHANNELL, JJ.* concurred

Flounders v. Donnor (1846) 2 C. B. 63; 15 L. J. C. P. 81; Barr. & Arn 588; 1 Lutw. Reg. Cas. 385; 10 Jur. 207.—C.P., *dicta confirmed*

Bailow v. Mumford (1866) 36 L. J. C. P. 65, L. R. 2 C. P. 81, 12 Jur. (N.S.) 984; 15 L. T. 441, 15 W. R. 221.—C.P.

Birks v. Allison (1862) 32 L. J. C. P. 51; 13 C. B. (N.S.) 24; 9 Jur. (N.S.) 692; 7 L. T. 786, 11 W. R. 90.—C.P., *dicta applied*

Wear River Commissioners v. Adamson (1877) 47 L. J. Q. B. 193; 2 App. Cas. 748, 37 L. T. 543; 26 W. R. 217; 8 Asp. M. C. 621.—H.L. (E).

Davies v. Hopkins (1857) 3 C. B. (N.S.) 376, 27 L. J. C. P. 6; 4 Jur. (N.S.) 690; 6 W. R. 68.—C.P., *followed*

Leonard v. Alloways (1878) 48 L. J. C. P. 81, 40 L. T. 197.—C.P.

Davies v. Hopkins, *distinguished*.

Hersant v. Hale (1886) 56 L. J. Q. B. 44, 18 Q. B. D. 412; 56 L. T. 337, 35 W. R. 503; 61

J. P. 185, Fox 12.—COLERIDGE, C.J., POLLOCK, B. and SMITH J

Stowe v Jolliffe (1874) 43 L. J. C. P. 265, 1 L. R. 9 C. P. 754, 30 L. T. 795, 22 W. R. 911.—C.F., *followed*
Hayward v Scott (1879) 49 L. J. C. P. 167; 5 C. P. D. 281, 28 W. R. 988; 44 J. P. 122, 1 Coll. 76.—C.F.

Foster v Mulhall (1859) 10 Ir. C. L. R. 532 —EX CH. *disallowed and explained*
 Williams v. Blakeley (1902) 1 Smith 304, 48 L. T. 281; 51 W. R. 127, 67 J. P. 11 —ALVERSTON, C.J., WILLES and CHANNELL, JJ

b ELECTION OF MEMBERS

Groves v Groves (1820) 8 Y. & J. 163 —EX CH. EQ. *observed upon*.
 Cave v Mackenzie (1877) 46 L. J. Ch. 564, 37 L. T. 218

JESSETT, M.R.—In *Groves v Groves*, with deference to Alexander, C.B., who was a very considerable lawyer, I should have arrived at an opposite conclusion upon the facts as stated, that the defendant had not paid anything for the estate, and did not say who had, and that the plaintiff had always been in possession —p. 565

Roswell v. Stewart (The Wigton Case) (1874) 1 Ct. of Sess. Cases, 4th series, 925, *partially disallowed from*.
 Woodward v. Sarsons (1875) 32 L. T. 867, 44 L. J. C. P. 298, 1 L. R. 10 C. P. 738.

LORD COLERIDGE, C.J. (for the Court).—We are aware that in so applying the principles we have deduced from the statute, we are acting apparently in opposition to some of the decisions in *The Wigton Case (Roswell v. Stewart)*, but there may have been evidence in that case which does not exist in the previous one, and which made many of the marks there evidence of identification which the mere presence of such marks here does not. If this was not so we respectfully differ from the strict view taken by the majority of the learned judges who decided that case, and adhere to the view of Lord Benbow given in that case.—p. 878.

Woodward v. Sarsons, approved
 Phillips v. Goff (1886) 55 L. J. Q. B. 512, 17 Q. B. D. 805; 35 W. R. 197, 50 J. P. 614 —COLERIDGE, C.J. and DENMAN, J.

Pickering v James (1875) L. R. 8 C. P. 489, 42 L. J. C. P. 217, 29 L. T. 210, 21 W. R. 786, *considered*

Ackers v. Howard, Thornbury Division of Gloucestershire Election Petition, In re (1880) 16 Q. B. D. 739, 56 L. J. Q. B. 278; 34 W. R. 609; 54 L. T. 651; 50 J. P. 619 —COLERIDGE, C.J., HAWKINS and MATHEW, JJ.

HAWKINS, J. (for the Court).—It is not necessary for the decision of the present case for us to determine whether or not it is the duty of the presiding officer to look at the ballot paper of a voter, and see that it is marked with the official mark before it is placed in the box; nor what course he should pursue if a voter attempted to put in the ballot box a voting paper which is obviously without an official mark. This is a matter upon which the judges of the Court of Common Pleas were equally divided in the case of *Pickering v. James*, Bovill, C.J. and Grove, J., entertaining the opinion that no such duty is

cast upon the presiding officer, Keating and Brett, J.J. entertaining the opposite view. We think it right, however, to say that we adopt the latter view, which certainly is most in accordance with what seems to us to have been the intention of the legislature.—p. 751.

Elkins v. Onslow, Guildford Petition (1868) 19 L. T. 538 —WILLES, J. in Chambers, *disallowed*.

Munro v. Balfour (1892) [1893] 1 Q. B. 113; 5 R. 29, 67 L. T. 526, 41 W. R. 143; 67 J. P. 789.—COLERIDGE, C.J. and WILLES, J.

COLERIDGE, C.J.—[should yield implicit deference to that great authority, Willes, J., if it were in point in the present case; in my opinion, however, it clearly is not. It is true that the *Guildford Petition* was a case of a claim of a scrutiny, but the petitioner further asked that, if in the course of the scrutiny anything would have invalidated the election, then the election should be invalidated, although the claim of the petitioner was for a scrutiny only. Under those circumstances, Willes, J. thought that the petition contained matter which brought it within the operation of rule 6 as well as of rule 7. I need do no more than say that the facts of the present case are wholly different [the part of the petition in question simply claiming the seat and not that the election should be invalidated].

Munro v. Balfour, followed

Leatham v. Barber (1883) 52 L. J. Q. B. 512; 10 Q. B. D. 293; 31 W. R. 428, 48 J. P. 23, *distinguished*

Rushmore v. Isaacson (1892) [1893] 1 Q. B. 118; 5 R. 88; 41 W. R. 121, 57 J. P. 790.—POLLOCK, B. and HAWKINS, J.

POLLOCK, B.—It is clear that the case of *Howford (Leatham v. Barber)*, a small borough, which would be kept in a state of ferment until the trial of the petition was over, affords but a very slender analogy to the present case. Stepany is a large and populous division, and there is no reason to suppose that it would be greatly disturbed by the proceedings in connection with the petition. It is essential that time should be allowed the respondent to get up his case, and, if this were an isolated case, I cannot doubt that ten days would not be longer than would be reasonably necessary —p. 120.

Munro v. Balfour, approved.

Furness v. Beresford (1895) 67 L. J. Q. B. 417; [1896] 1 Q. B. 495; 73 L. T. 137, 46 W. R. 369. —C.A. SMITH, CHITTY and COLLINGS, L.JJ.

Wells v. Wren, Wallingford Election Petition, In re (1860) 48 L. J. C. P. 681, 5 C. P. D. 546.—O.P., *followed*

Moore v. Kennard, Salisbury Election Petition, In re (1885) 52 L. J. Q. B. 285, 10 Q. B. D. 290, 48 L. T. 236, 31 W. R. 610, 47 J. P. 843.—POLLOCK and MANISTY, JJ.

Carter v. Mills (1871) 48 L. J. C. P. 111; 1 L. R. 9 C. P. 117, 22 W. R. 318.—C.F., *distinguished*.

Marshall v. James, Taunton Election, In re (1874) 43 L. J. C. P. 281; 1 L. R. 9 C. P. 702; 22 W. R. 738, 30 L. T. 574.—C.F.

Peel v. Hill, Tamworth Election Petition.
In re (1870) 39 L. J. C. P. 89, L. R. 5
C. P. 172, 22 L. T. 98, 18 W. R. 605—
C. P. followed.

Tillet v. Stracey (1870) 39 L. J. C. P. 93,
L. R. 5 C. P. 185; 22 L. T. 101, 18 W. R. 631—C. P.

Cooper v. Slade (1856) 6 El. & Bl. 447, 25
L. J. R. 321, 2 Jur. (N.S.) 1076—EX. CH.;
reversed, (1856) 6 H. L. Cas. 746, 27 L. J. Q. B.
449, 4 Jur. (N.S.) 791, 6 W. R. 461—H. L. (E.)

Cooper v. Slade, applied.

Milnes v. Bale (1875) 44 L. J. C. P. 336; L. R.
10 C. P. 591, 33 L. T. 174, 23 W. R. 660—C. P.

Drinkwater v. Deakin, Launceston Petition.
In re (1871) 43 L. J. C. P. 365; L. R. 9

C. P. 626, 30 L. T. 832—C. P. applied.

Beresford-Hope v. Sandhurst (Lady) (1889) 58
L. J. Q. B. 314, 23 Q. B. D. 79, 61 L. T. 160;
37 W. R. 548, 53 J. P. 805—C. A. (*infra*).

Reg. v. Price (1871) L. R. 6 Q. B. 411; 24
L. T. 387—Q. B. *discussed from*

Reg. v. Holl (1881) 50 L. J. Q. B. 763, 7
Q. B. D. 376—C. A. **BRAMWELL, BRETT AND
COTTON, JJ.** *affirming* 45 L. T. 69, 46 J. P.
53—**COLERIDGE, C. J.** **MANISTY AND BOWEN, JJ.**
BRAMWELL, J. J.—I think the case of *Reg. v.*
Price was wrongly decided, and I have so strong
an opinion on it that I must give utterance to it
notwithstanding the opinion of the learned
judges there.

2 MUNICIPAL

**Reg. v. Exeter Corporation, Dipstale, Ex
parte (1868)** L. R. 4 Q. B. 114; 19 L. T.
492—DAIL COURT, *followed*

**Purves v. Wimbledon and Putney Common
Conservators (1890)** 62 L. T. 529—**KEENEWICH, J.**

McGlean v. Pritchard (1887) 20 Q. B. D.
285; 58 L. T. 337, 36 W. R. 508; Fox
94, 52 J. P. 519—**COLERIDGE, C. J.**, **POL-
LOCK, B.** and **HAWKINS, J.**, *distinguished*

Marsh v. Estcourt (1889) 59 L. J. Q. B. 100
24 Q. B. D. 147, 38 W. R. 495; 54 J. P.
294, 1 Fox 157—**COLERIDGE, C. J.**, **WILLS** and
MATHEW, JJ.

WILLS, J.—In the case referred to the
occupation was admitted to be occupation by
virtue of service. Here the labourers were not
required to reside in the cottages, but were
allowed to reside in them as a privilege. It
would be an abuse of language to call residence
under such conditions occupation by virtue of
service.

Reg. v. Mitchell (1809) 10 East 511, *super-
seded by* 54 & 55 Vict. c. 11, s. 2

Reg. v. Harrauld (1872) 41 L. J. Q. B. 173,
L. R. 7 Q. B. 361; 26 L. T. 616, 20 W. R. 328—
Q. B. See Local Government Act, 1894 (56 & 57
Vict. c. 73), s. 45

Reg. v. Rochester Corporation (1867) 27
L. J. Q. B. 45; 7 El. & Bl. 910, 3 Jur.
(N.S.) 707—Q. B. *followed*.

Reg. v. North Berley Overseers (1858) 27
L. J. M. C. 275; El. & Bl. & El. 519; 4 Jur. (N.S.)
784—Q. B.

Beresford-Hope v. Sandhurst (Lady) (1889)
58 L. J. Q. B. 314; 23 Q. B. D. 79, 61

L. T. 150, 37 W. R. 548, 53 J. P. 805—
C. A., *applied*

De Souza v. Cobden (1891) 60 L. J. Q. B. 533—
[1891] 1 Q. B. 687; 65 L. T. 130; 39 W. R. 451;
55 J. P. 765—C. A. **COLERIDGE, C. J.**, **BESHER, M. L.**
and **FRY, L. J.**

Beresford-Hope v. Sandhurst (Lady) See
London Government Act, 1899 (62 & 63 Vict.
c. 14), s. 2

Lewis v. Carr (1876) 46 L. J. Ex. 814; 1
Ex. D. 484; 36 L. T. 44, 24 W. R. 940—
C. A., *followed*

Fletcher v. Hudson (1881) 51 L. J. Q. B. 48;
7 Q. B. D. 611, 46 L. T. 125, 30 W. R. 349;
46 J. P. 372—C. A.

**Nell v. Longbottom, Leath Municipal
Election, In re (1894)** 63 L. J. Q. B. 490,

[1894] 1 Q. B. 767; 10 R. 193; 70 L. T.
499—**MATHEW AND GAY, JJ.**, *followed*.

Bland v. Buchanan (1901) 70 L. J. K. B. 496,
[1901] 2 K. B. 75, 84 L. T. 390, 19 W. R. 601;
65 J. P. 404—**DARLING AND CHANNELL, JJ.**

Reg. v. Bangor Corporation (1886) 56 L. J.
Q. B. 326; 18 Q. B. D. 819, 35 W. R.
158; 51 J. P. 51—C. A. (*affirmed in H. L.*,
infra, *nom.* **PRITCHARD v. Bangor Corpora-
tion**), *followed*

Reg. v. Douglas (1898) 67 L. J. Q. B. 406;
[1898] 1 Q. B. 560, 78 L. T. 194; 46 W. R.
377; 62 J. P. 277—**RUSSELL, C. J.** and **WRIGHT, J.**

Reg. v. Coaks (1854) 3 El. & Bl. 249; 2
C. L. R. 947, 28 L. J. Q. B. 133, 18 Jur.
378—Q. B. *discussed*

Pritchard v. Bangor Corporation (1888) 57
L. J. Q. B. 313, 13 App. Cas. 241, 68 L. T. 602;
37 W. R. 103, 62 J. P. 564—**H. L.** (E. LORDES
HALSBURY, L. C., **WATSON, FITZGERALD, HEN-
SCHILL AND MACNAGHTEN.**

LORD HENSHILL.—I quite agree . . . that
it is not necessary on the present occasion to
come to any conclusion as to whether that case
was rightly decided, or whether if rightly decided
it is applicable, having regard to the altered
legislation with which we have to deal. But it
seems to me that, so far as regards the question
whether an alderman is capable of standing as a
candidate for the office of councillor, the case of
Reg. v. Coaks was not a considered decision of
the Court of Q. B. According to the report of
the case to which our attention has been called,
it was assumed, and was necessarily assumed,
that the candidate was ineligible because it had
been so determined in another proceeding, as I
understand, with reference to the particular case
and the particular individual. The decision,
therefore, if it be a decision of the Court of Q. B.
with regard to the eligibility or non-eligibility of
an alderman, was pronounced in an earlier case
of which no report appears to be forthcoming
except one contained in the local papers of the
period, and, so far as we have learned from the
information which has been afforded to us, the
case really was not argued there, because the
learned counsel who appeared to contend in
favour of the eligibility of the alderman intimated
that they should have great difficulty in
doing so, and practically abandoned the case,
upon which of course the decision followed
against them—pp 321, 322.

Monks v. Jackson (1876) 46 L. J. C. P. 162;
1 C. P. D. 689, 35 L. T. 95—C. P. D.; and

Pritchard v. Bangor Corporation (*supra*),
Antagonised

Harford v. Lynskey (1899) 68 L. J. Q. B. 599,
[1899] 1 Q. B. 852, 80 L. T. 417, 17 W. R. 653;
63 J. P. 263

WRIGHT, J. (for self and BRUCE, J.).—We are unable to discover any material difference between the language of the Acts on which *Monks v. Jackson* was decided and the language of the Act of 1882, on which this case depends; and although the considerations which have led us to a conclusion in favour of the present petitioner's right to maintain his petition were not presented to the Court in *Monks v. Jackson*, we ought to follow the decision in that case if it can be supported since the *Bangor Case* (see *per* Lord Herschell at p. 257), and if it is in point. We think, though not without doubt, that it is not in point. The decision was that the petitioners had not been nominated in fact, and therefore were not qualified to petition. Here the petitioner was duly nominated in fact. His nomination was in form regular, and he was therefore a candidate, and in our opinion qualified to maintain this petition—not, of course, for the purpose of claiming the seat, but for the purpose of showing that there was no valid election, as any of the persons who voted at the election might have done, whether they had a right to vote or not. Our decision does not involve the proposition that in every case a person whose nomination has been rejected on the ground of disqualification or want of qualification can maintain a petition. We do not understand it to be laid down in the *Bangor Case* that a nomination cannot ever be rejected except for informality in the form or presentation of it. If the nomination paper is on the face of it a mere abuse of the right of nomination, or an obvious unreality, as, for instance if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection.—p. 603.

Howes v. Turner, 45 L. J. C. P. 550; 1 C. P. D. 670; 35 L. T. 58, *distinguished*

Line v. Warren (1886) 14 Q. B. D. 73—*MATHEW and DAY, JJ.*; *affirmed* in C.A. (*infra*)

Line v. Warren (1886) 54 L. J. Q. B. 291,
14 Q. B. D. 73, 548, 53 L. T. 446; 49
J. P. 516—C.A. BRETT, M.R., COTTON
and LINDLEY, L.J.J., *affirming* MATHEW
and DAY, JJ. *followed*.

Beresford-Hope v. Sandhurst (Lady) (1889) 58
L. J. Q. B. 316; 23 Q. B. D. 79, 61 L. T. 150,
37 W. R. 548; 63 J. P. 806—C.A. COLERIDGE,
C.J., ESHER, M.R., COTTON, LINDLEY, FRY and
LOPES, L.J.J.

Line v. Warren, *unapplied*

Harmon v. Park (1880) 50 L. J. Q. B. 227,
6 Q. B. D. 328, 44 L. T. 81; 29 W. R.
750, 45 J. P. 456—C.A. SELBORNE, L.C.,
RAGGALLAY and BRETT, L.J.J., *reversing*
DENMAN and LINDLEY, JJ., *explained*.
Shaw v. Beckett (1898) 62 L. J. Q. B. 375,
[1893] 2 Q. B. 59; 4 R. 425, 69 L. T. 827, 41
W. R. 497, 57 J. P. 805—C.A. ESHER, M.R.,
LOPES and SMITH, L.J.J.; *affirming* 5 R. 884,
[1893] 1 Q. B. 779; 63 L. T. 688, 41 W. R. 497.
—*EWKINS and CAVE, JJ.*

SMITH, L.J.—*Harmon v. Park* was decided
upon an Act which enacted that the decision of

the Court of Common Pleas should be final when
it gave its decision upon a special case, and it
was therein held that there was an appeal upon
a decision upon an interlocutory matter not
raised by special case, but this decision was before
the Act of 1881, which makes the decision of the
Divisional Court final upon questions of law, no
matter how raised, unless special leave to appeal
be given. The cases of *Line v. Warren* (*ante*,
col. 889) and *Union v. McMullen* ([1881] 1 Q. B.
494), cited in argument do not apply to the
present point

Harmon v. Park, *followed*
Monkswell (Lord) v. Thompson (1898) 67
L. J. Q. B. 248; [1898] 1 Q. B. 358, 77 L. T.
707.—C.A. CHITTY and COLLINS, L.J.J. *But see*
Judicature Act, 1894 (57 & 58 Vict. c. 16).

Maude v. Lowley (1874) 43 L. J. C. P. 103,
L. R. 9 C. P. 165, 29 L. T. 924—C.P.,
followed.
Clark v. Wallend (1883) 52 L. J. Q. B. 321;
48 L. T. 762, 31 W. R. 551; 47 J. P. 551.—
GROVES, LOPES and MATHEW, JJ.

ESTATE.

1. ESTATE IN FEE SIMPLE.
2. ESTATE TAIL.
3. ESTATE FOR LIFE.
4. ESTATE PUR AUTRE VIE.
5. JOINT TENANCY AND TENANCY IN COMMON.

1. ESTATE IN FEE SIMPLE

Smith v. Parker (1778) 2 W. Bl. 1230.—
DE GREY, C.J.

Twoedale (Marchioness) v. Coventry (Earl)
(1783) 1 Bro. C. C. 240.—THURLOW, L.C.

Cunningham v. Moody (1748) 1 Ves. sen.
174.—HARDWICKE, L.C.

Goodright d. Larmer v. Searle (1766) 2

Wils. 28.—K.B.
Applied

Jenkins d. Harris v. Pritchard (1757) 2
Wils. 45.—K.B., *corrected*.

Doe d. Andrew v. Hutton (1804) 3 B. & P. 648.
ALVANLEY, C.J., noticed a mistake in the
report of *Jenkins v. Pritchard* which case is
there said to have been determined in favour of
the defendants, whereas all the reasoning shows
that it must have been determined in favour of
the lessors of the plaintiffs.—p. 668

Doe d. Oldham v. Wolley (1828) 8 B. & C.
22; 5 C. *nom* *Doe v. Deskin*, 2 M. & Ry.
195; 3 C. & P. 402; 6 L. J. (os) K. B.
286; 32 R. R. 329.—K.B. *followed*

Richards v. Richards (1781) 15 East 294, n;
13 R. R. 475, n., *commented on*.

Greaves v. Greenwood (1877) 2 Ex. D. 289, 45
L. J. R. 795; 46 L. J. Ex. 252, 36 L. T. 1, 25
W. R. 639, *affirmed*, C.A. COCKBURN, C.J.,
RAGGALLAY and BRETT, JJ.

BRAMWELL, B.—*Richards v. Richards* was
referred to, which is "In *apportioning* the lessor of
the plaintiff claimed as heir by descent, and
showed the death of his elder brothers, but not
that they died without issue—*Curia*, this must

likewise be proved." That may be taken to be right, it being a matter reasonably within the capability of proof by the plaintiff, not being without the time of living memory, and the persons who were dead being his elder brothers only. I should, with all respect, therefore say that what the Court said so far was right, for it was a thing which the plaintiff could prove, and if he does not prove it, the jury would say they were not satisfied that he is the heir. So in this particular case negative evidence as to the more recent relatives is necessary, and that has been given. The note goes on to say, "The plaintiff must remove every possibility of title in another person." But that cannot possibly be correct. There must be some inaccuracy, for all the plaintiff can be called upon to do is to give evidence to show that it is improbable there are any preferable descendants. With respect to this note, which is very short, I must say that I differ from it, except as to the first part of it.—p. 293 AMPHLETT, B. concurred

Greaves v Greenwood (*supra*), *applied*
 Lyell v Kennedy (1837) 56 L. J. Q. B. 303,
 18 Q. B. D. 796, 56 L. T. 847, 35 W. R. 725.—
 C. A. See "LIMITATIONS" (Stats of).

Doe d Clarke v Clarke (1795) 2 H. Bl. 899,
referred to.
 Goodale v Gawthorne (1854) 23 L. J. Ch. 878,
 2 Sm. & Giff. 375, 2 W. R. 680.—STUART, V.-C.

Goodale v Gawthorne *not followed*.
Basset v Basset (1744) 3 Atk. 208.—HARD-
 WICKS, L.C., *applied*.
 Richards v Richards (1860) 29 L. J. Ch. 863,
 John 754, 6 Jur. (N.S.) 1145.—WOOD, V.-C.

Descent.

Gilpin's Case (1629) Cro. Car. 161, *con- sidered*.
Doe d Pratt v Timins (1818) 1 B. & Ald. 530.—K.B.

Cooper v France (1850) 19 L. J. Ch. 313,
 14 Jur. 214.—SHADWELL, V.-C., *discussed*
and applied.
 Matson, in re, James v Dickinson (1897) 66
 L. J. Ch. 885, [1897] 2 Ch. 509, 77 L. T. 69.—
 KEKEWICH, J. See Lunacy Act, 1890 (53 Vict
 c. 5), s. 342.

Baker, in re, Pursey v Holloway (1898) 79
 L. T. 343.—STIRLING, J., *followed*.
Berens v Fellows (1887) 56 L. T. 391.—
 KAY, J., and **Cooper v France**, *com- mented on*.
Garland v Beverley (1878) 47 L. J. Ch. 711,
 9 Ch. D. 213, 38 L. T. 911, 26 W. R. 718.
 —FRY, J., *approved*.
Owen v Gibbons (1902) 71 L. J. Ch. 388;
 [1902] 1 Ch. 636, 86 L. T. 571.—C. A. V. WIL-
 LIAMS, STIRLING and COZENS-HARDY, L.J.

Selby v Alston (1797) 3 Ves. 358, 4 R. R. 10.—
 ARDEN, M.R., *referred to*. Douglas, in re, Wood
 v Douglas (1884) 54 L. J. Ch. 421; 28 Ch. D.
 327; 53 L. T. 181; 33 W. R. 390.—PEARSON, J.;
followed and applied. Selous, in re, Thomson
 v Selous, 70 L. J. Ch. 402, [1901] 1 Ch. 921;
 84 L. T. 818; 49 W. R. 440.—FARWELL, J. See
 judgment.

2 ESTATE TAIL.

Giffard v Hort (1804) 1 Sch. & Lef. 386.—
 REDFORD, L.C., *commented on*.
Lansdowne (Marchioness) v Beauman (1829)
 1 Moll. 89.—HART, L.C.

Mandeville's Case, Co. Litt. 256, *followed*.
Road Nightingale v Quartley (1787) 1 Term
 Rep. 630, *distinguished*.
Wright v Vernon (1851) 2 Drew. 439, 2 W. R.
 693.—KINDERSLEY, V.-C.

Mandeville's Case and Wright v Vernon,
distinguished.
Moore v Sinkin (1885) 55 L. J. Ch. 305; 81
 Ch. D. 95, 53 L. T. 815; 34 W. R. 251.

PEARSON, J.—*Mandeville's Case* was discussed
 by Kindersley, V.-C., in *Wright v Vernon*. In
 delivering judgment the V.-C. says: "I do not
 propose to discuss the merits of the original
 decision, though perhaps it might not be very
 difficult to show that the exigency of the statute
De Donis, which presumptively directed that the
 will of the donor should always for the future be
 observed, left no alternative but to decide *Mandeville's Case* as it was decided, inasmuch as, when
 the estate was limited to the heirs special of a
 particular ancestor without any estate of freehold
 limited to the ancestor himself (either expressly
 or by implication), it was impossible to effectuate
 that expressed will of the donor and to make
 the estate pass through the whole series of heirs
 designated, except by regarding the limitation as
 if it were an estate tail which had originally
 vested in, and had descended from, the ancestor
 himself, and yet the first taker must take as
 purchaser, because no estate did in fact vest in
 or descend from the ancestor. Obedience to the
 positive injunction of the statute *De Donis* appears
 to have necessitated the creation of this anomalous
 kind of entail which Lord Hale fitly terms
 a *quasi* entail, partaking of the opposite qualities
 of purchase and descent." Then he said that
Mandeville's Case had been recognised as law and
 followed for at least five centuries, and he de-
 clined to depart from it. But *Mandeville's Case*
 and the statute *De Donis* related to an estate
 limited to special heirs, and not to an ordinary
 estate in fee; and you cannot by any process of
 reasoning apply the rule there laid down to an
 ordinary case in which the limitation is, not to
 heirs special, but to heirs general.—p. 306.

3. ESTATE FOR LIFE.

Sitwell v Bernard (1801) 6 Ves. 520; 5 R. R.
 374.—ELDON, L.C., *explained and distin- guished*.
Angerstein v. Martin (1823) T. & R. 232; 2
 L. J. (O.S.) Ch. 88, 24 R. R. 32.—ELDON, L.C.;
Hewitt v. Morris (1823) T. & R. 241; 2 L. J.
 (O.S.) Ch. 87, 24 R. R. 39.—ELDON, L.C.

Sitwell v Bernard, *followed*.
Campbell, in re, Campbell v. Campbell (1898)
 62 L. J. Ch. 878, [1898] 3 Ch. 468, 69 L. T.
 184.—STIRLING, J.

Angerstein v. Martin and Hewitt v. Morris,
discussed.
Sitwell v. Bernard, *principle applied*.
Allhusen v. Whittell (1887) 56 L. J. Ch. 929;
 L. R. 4 Eq. 295; 16 L. T. 695.—WOOD, V.-C.

Allhusen v. Whittell, followed.
Lambert v. Lambert (1873) 43 L. J. Ch. 106,
L. R. 16 Q. 320; 21 W. R. 748.—BACON, V.-C.

Gresley v. Chesterfield (Earl) (1851) 13
Beav. 288.—LANGDALE, M.R., and *Barnes*
v. *Bond* (1898) 32 Beav. 653.—ROMILLY,
M.R., *not followed.*

Allhusen v. Whittell, followed.
Marshall v. Crowther (1874) 2 Ch. D. 199; 23
W. R. 210.

HALL, V.-C.—[The principle of that case was
here applied to real estate.]

Allhusen v. Whittell, distinguished.
Harrison, In re, Townson v. Harrison (1889)
59 L. J. Ch. 169; 43 Ch. D. 55, 61 L. T. 762, 38
W. R. 265.

NORTH, J.—[The decision in *Allhusen v. Whittell*
does not furnish me with much assistance in the
present case, for it was based on the principle
that the tenant for life of the residue of a
testator's estate is not tenant for life of the whole
estate, but of the whole estate *minus* something,
and that something must be ascertained before it
can be said of what he is tenant for life. He is
not tenant for life of the whole estate, and he is
not entitled to receive the whole income, and the
rule in *Allhusen v. Whittell* was adopted as a
convenient and fair rule—for ascertaining the
share of the estate which really represented residue,
and of which the tenant for life was entitled
to receive the income, as distinguished from the
entire estate. The rule, in my opinion, does not
apply to a case like the present.—p. 172.

Allhusen v. Whittell and Harrison, In re,
Townson v. Harrison, explained.
Bacon, In re, Gissell v. Leathes (1898) 3 R.
455, 62 L. J. Ch. 445; 68 L. T. 522, 41 W. R.
478.

KIRKWHICH, J.—[The judgment of Wood, V.-C.
in *Allhusen v. Whittell* has from its date been
regarded as establishing the rule applicable to
such circumstances as there occurred. The only
point in which it approaches the present case is
that respecting contingent legacies, and all that
the V.-C. did as regards them was to hold that,
although a proper amount must be set apart to
meet contingent legacies when payable, the
tenant for life of the residue out of which
those legacies would ultimately be taken was
entitled to the income of the fund set apart
until required for that purpose.—*Harrison,*
In re, before North, J., is really only another
example of the application of the same principle.
I do not quite understand what the
learned judge means by saying that he did not
think the tenant for life entitled to have the
estate sold by his bid, but he certainly did not
intend that the tenant for life should not have a
real charge with all its incidents. In this in-
stance, also, in my endeavour to make sure what
was intended and done, I sent for the order, but it
has never yet been drawn up. The registrar's note
informed me that counsel was to prepare minutes.
I therefore communicated with the counsel, and
he has been good enough for my benefit to com-
municate with his clients. It appears that the
omission to draw up the order was the result of
a natural and reasonable reflection that it would
be better to realise the estates first, and work out
the rights of the parties with reference to actual
values thus ascertained.—pp. 461, 462.

O.G.

Allhusen v. Whittell, not applied.

Crawley v. Crawley (1845) 1 L. J. Ch. 265;
7 Sum. 427; 40 R. 170.—SHADWELL,
V.-C., *applied.*

Whitehead, In re, Paddock v. Lucas (1894) 63
L. J. Ch. 229, [1894] 1 Ch. 678, 8 R. 142, 70
L. T. 122, 42 W. R. 491.—STIRLING, J.

Crawley v. Crawley, followed.

Pope, In re, Sharp v. Marshall (1900) 70 L. J.
Ch. 26; [1901] 1 Ch. 64; 19 W. R. 122.—FAR-
WELL, J.

Nightingale v. Lawson (1785) 1 Bro. C. C.
440, 1 Cox 181.—THURLOW, L.C.; *Verney*
v. *Verney* (1750) Amb. 88, 1 Ves. sen.
428.—HARDWICK, L.C.; and *Stone v.*
Theod (1787) 2 Bro. C. C. 243.—THURLOW,
L.C., *discussed.*

White v. White (1804) 9 Ves. 554; 4 R. 161.
—ELDON, L.C.

Nightingale v. Lawson, followed.

Giddings v. Giddings (1826) 3 Russ. 241, 27
R. 78.—M.R.; *Bradford v. Brownjohn* (1868)
38 L. J. Ch. 10; L. R. 3 Ch. 711, 19 L. T. 248;
16 W. R. 1178.—WOOD and SELWYN, L.J.J.,
varying 37 L. J. Ch. 198.—STUART, V.-C.

Howe v. Dartmouth (Earl) (1802) 7 Ves. 137,
6 R. R. 196.—ELDON, L.C., *not applied*, *Holland*
v. *Hughes* (1809) 16 Ves. 111.—GRANT, M.R.;
applied, *Dimes v. Scott* (1827) 4 Russ. 195; 28
R. 46.—LYNDHURST, L.C.

Dimes v. Scott, discussed. And see post,
col. 995.

Douglas v. Congreve (1886) 6 L. J. Ch. 51, 1
Keen 410.—LANGDALE, M.R. *See judgment,*
where a number of cases are discussed.

Howe v. Dartmouth (Earl), explained.
Alcock v. Sloper (1833) 2 Myl. & K. 999; 39
R. R. 334.—LEACH, M.R. *And see post.*

Howe v. Dartmouth (Earl), not applied.
Collins v. Collins (1835) 2 Myl. & K. 708, 39
R. R. 337.—LEACH, M.R.

Alcock v. Sloper, distinguished.
Bethune v. Kennedy (1835) 1 Myl. & Cr. 114.
—PERYS, M.R.

Collins v. Collins, approved.
Alcock v. Sloper, distinguished.

Howe v. Dartmouth (Earl), explained and
applied. And see post, cols. 995—998.
Pickering v. Pickering (1839) 8 L. J. Ch. 336,
4 Myl. & Cr. 289; 3 Jur. 341, 743.—COTTENHAM,
L.C., *affirming* 3 Beav. 81.—LANGDALE, M.R.

Pickering v. Pickering, distinguished.
Benn v. Dixon (1840) 9 L. J. Ch. 259, 10 Sim.
686; 4 Jur. 575.—SHADWELL, V.-C.

Alcock v. Sloper; Collins v. Collins;
Bethune v. Kennedy, and Pickering v.
Pickering, distinguished. And see post.
Lichfield v. Baker (1840) 13 Beav. 447.—
COTTENHAM, L.C., *reversing in part*, 9 L. J. Ch.
281, 2 Beav. 481.—LANGDALE, M.R.

Howe v. Dartmouth (Earl) (and see post) and
Pickering v. Pickering, explained.
Mills v. Mills (1835) 4 L. J. Ch. 266, 7 Sim.
501.—SHADWELL, V.-C., *discussed.*
Hinves v. Hinves (1844) 8 Haic. 609.—
WIGRAM, V.-C.

Hinves v Hinves (*supra*), discussed, Macdonald r Irvine (*post*, col 996); Pitcairn, in re, Brandreth r Colvin (*post*, col 997).

Alcock v Sloper; Collins v Collins; Bethune v Kennedy; and Pickering v Pickering (*supra*), followed.
Burton r Mount (1848) 2 De G. & Sm 383, 12 Jur. 984.—KNIGHT BROOK, V-C.

Pickering v Pickering, referred to, Bland, in re, Miller & Bland (*post*, col. 998); Van Straubenzee, in re, Boustead r Cooper (*post*, col. 998).

Howe v Dartmouth (Earl) (*supra*, col. 994), applied, Meyer r Simonson (1852) 21 L. J. Ch. 678; 5 De G. & Sm. 723.—PARKER, V-C.; Blann r Bell (1852) 22 L. J. Ch. 236, 2 De G. M. & G. 775, 16 Jur. 1103.—KNIGHT BROOK AND GRANTWORTH, L.J.

Howe v Dartmouth (Earl), explained.
Dimes v Scott (1827) 4 Russ 495; 28 R. R. 46.—L.C. (*and see* col. 994), Taylor v Clark (1841) 11 L. J. Ch. 189, 1 Hare 161, 6 Jur. 76.—WIGRAM, V-C.; and Sutherland v Oocko (1844) 14 L. J. Ch. 71; 1 Coll 498, 8 Jur. 1088.—KNIGHT BROOK, V-C., followed.

Douglas v Congreve (1836) 6 L. J. Ch. 51, 1 Keen 410.—LANGDALE, M.R., *not followed*.
Morgan r Morgan (1851) 14 Beav. 72.—ROMITLY, M.R. *And see post*, col. 996.

Howe v Dartmouth (Earl), observed on.
Holland v Hughes (1809) 16 Ves. 111.—GRANT, M.R.; Chaplin, Ex parte (1839) 8 Y. & C 397.—ALDERSON, B., and Dimes v Scott, distinguished.
Burd r Fardell (1855) 26 L. J. Ch. 21, 2 De G. M. & G. 628, 1 Jur. (N.S.) 1214, 4 W. R. 40 [TRINER, L.J., held that Lord Eldon's observation, in *Howe v Earl of Dartmouth*, that "what the Court will decree it expects from trustees and executors" must be understood to have been made with reference to the state of the facts before him.]

KNIGHT BROOK, L.J. to the same effect

Howe v Dartmouth (Earl), referred to *And see post*, col. 996.

Hope r Hope (1855) 1 Jun. (N.S.) 770, 3 W. R. 617.—KIN EMBLEY, V-C. *And see post*, col. 998.

Morgan v Morgan (*supra*), explained.
Dimes v Scott, not applied. *And see post*.
Moxley r Mendham (1856) 2 Jur. (N.S.) 998.—WOOD, V-C.

Morgan v Morgan, distinguished, Wearing r Wearing (*post*, col. 998), discussed, Macdonald r Irvine (*post*, col. 996); referred to, Pitcairn, in re, Brandreth r Colvin (*post*, col. 997).

Dimes v Scott (*supra*), commented on.
Bulkeley r Stephens (1863) 3 N. R. 105; 10 L. T. 225.—STUART, V-C.

Meyer r Simonson (1852) 21 L. J. Ch. 678; 5 De G. & Sm 723.—PARKER, V-C. (*and see post*, col. 997); and **Dimes v Scott**, applied.

Brown r Gellatly (1867) 1 L. R. 2 Ch. 751, 17 L. T. 181; 15 W. R. 1188.—CARNS, L.J. *And see post*, col. 997.

Howe v Dartmouth (Earl) (*supra*), held not applicable.
Greaves r Smith (1871) 29 L. T. 708; 22 W. R. 388.—BACON, V-C.

Howe v Dartmouth (Earl), applied.
Thursby r Thursby (1875) 14 L. J. Ch. 289; 1 L. R. 19 Eq. 895; 32 L. T. 187; 23 W. R. 500.—BACON, V-C. *See judgment*, where the cases are discussed.

Howe v Dartmouth (Earl) and **Mackie v Mackie** (1845) 5 Hare 70; 9 Jur. 753.—WIGRAM, V-C., referred to.

Lean r Lenn (1875) 32 L. T. 305.—BACON, V-C.; Rowles, in re, Rowles r Bebb (*post*, col. 1005).

Howe v Dartmouth (Earl), rule stated and applied.
Macdonald r Irvine (1878) 8 Ch. D. 101; 47 L. J. Ch. 494; 38 L. T. 155; 26 W. R. 381.—C.A. [BAGGALLAY, L.J. (*disc.*), considered the circumstances of the case not to warrant the application of the rule, THURSTON, L.J., and JAMES, L.J., held it to be applicable.]

THURSTON, L.J.—The rule itself is a simple one, founded upon the presumption, that where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, much persons are to enjoy the same thing in succession, and effectuating the presumed intention of the testator by the conversion into investments approved by the Court of so much of the personality as is at the death of the testator of a wasting, or perishable, or insecure nature, and also of reversionary interests. It has been said that the leaning of the judges of the Court of Chancery in the more modern cases has been against rather than in favour of the application of the rule, and no doubt Wigram, V-C., in *Hinves v Hinves* (*supra*, col. 994) takes that view, while the late M.R., in *Morgan v Morgan* (*supra*, col. 993), says that "the effect of the latter cases has been to allow small indications of intention to prevent the application of the rule"; but on the other hand Lord Romilly, when in the latter case he is dealing with the contention that the burden of proof does not lie more upon those who oppose than those who support the application of the rule, and that, being a question of construction, it is for the Court to look into the will and discover the testator's real meaning, uses the following words in the same page: "In one sense this is certainly true, but still in my opinion the rule of law is, that unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe v Dartmouth (Earl)* is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the Court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done the rule must apply"—p. 121.

Brown r Gellatly (*supra*), distinguished, Fisher v Gilpin (1869) 38 L. J. Ch. 280.—ROMITLY, M.R.; followed, Potter r Baddeley (1877) 5 Ch. D. 542.—HALL, V-C. *And see post*.

Howe v Dartmouth (Earl), held inapplicable.
Leonard, in re, Theobald r King (1881) 48 L. T. 664; 29 W. R. 234.—BACON, V-C.

Howe v Dartmouth (Earl), held inapplicable.
Brown v Gellatly (supra), Meyer v Simonson (supra, col 995), and Kirkman v Booth (1818) 18 L J Ch 25, 11 Beav 273; 13 Jun 625 — LANGDALE, M.R., distinguished.

Chancellor, in re, Chancellor v Brown (1831) 26 Ch. D. 42. 53 L J Ch. 443; 31 L T. 39, 32 W R. 405.—C.A.

[Testator had directed that the profits of his personal estate, until conversion, were to be treated as income.]

COTTON, L.J.—In both these cases [*Brown v Gellatly* and *Meyer v Simonson*] there was no direction that the profits of the estate, pending conversion, were to be paid to the tenant for life. In *Kirkman v Booth* the executors carried on the business for thirteen years to make profits, not with a view to a sale within a reasonable time as a going concern—p 45. DOWEN and MAY, L.J.J. concurred. *And see post, col 999.*

Meyer v Simonson, followed.
Eaton, In re, Dames v Eaton (1894) 10 Times L R. 594.—KEENEWICH, J.

Meyer v Simonson and Brown v Gellatly, rule in, approved.

Wentworth v Wentworth (1899) 69 L J. P. C. 13, [1900] A C 163, 81 L T. 682.—P.C.

LORD MACNAGHTEN (for self, LORDS ROBINSON, MORRIS, DAVEY and ROBERTSON).—In this country in the case of income producing property directed by will to be converted, but retained for a time unconverted, for the benefit of the estate, it has been the practice of the Court to put a value on the property and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent on such value. That was the rule laid down by Parker, V.-C., in *Meyer v Simonson* and followed by Lord Cairns in *Brown v Gellatly*. Their lordships think that the principle of those cases ought to be applied to the present case but they do not think that it would be expedient to hamper the Court by laying down any fixed rule as to the rate of interest to be allowed to the tenants for life on the estimated value of the capital of the property.—p 16

Porter v Baddeley (supra), distinguished.
Sheldon, In re, Nixon v Sheldon (1888) 58 L J. Ch. 25, 89 Ch D. 50, 59 L T. 183, 37 W R. 26.—NORTH, J.

Sheldon, In re, Nixon v Sheldon, applied.
Porter v Baddeley and Brown v Gellatly (supra), distinguished.

Thomas, In re, Wood v Thomas (1891) 40 L J. Ch. 781, [1891] 3 Ch. 482, 65 L T. 142, 40 W R. 75.—KEENEWICH, J.

Thomas, In re, Wood v Thomas, not applied
Whitehead, In re, Peacock v Lucas (1894) 63 L J. Ch. 229, [1894] 1 Ch. 678 (supra, col 994).

Howe v Dartmouth (Earl) (supra, col 994), not applied.

Pickup v Atkinson (1846) 15 L J. Ch. 213; 4 Hare 624; 10 Jur. 303.—WIGRAM, V.-C., and Sewell's Estate, In re (1870) 40 L J. Ch. 185, L R. 11 Eq. 80, 23 L T. 885.—ROMILLY, M.R., referred to.

Pitcairn, In re, Bradstreet v Colvin (1895) 65 L J. Ch. 120, [1895] 2 Ch. 199, 73 L T. 430; 44 W R. 200.—NORTH, J.

Howe v Dartmouth (Earl), applied.
Harris v Poyner (1852) 21 L J. Ch. 915; 1 Drew. 174, 16 Jun 880.—KINDERLEY, V.-C., and Craig v Wheeler (1860) 29 L J. Ch. 374, 8 W R. 173.—KINDERLEY, V.-C., approved and followed.

Howe v Gifford (1853) 17 Beav. 507, 2 W R. 45.—ROMILLY, M.R., Goodenough v Tremamonde (1840) 2 Beav. 512.—LANGDALE, M.R.; Wearing v Wearing (1856) 23 Beav. 99.—M.R.; and Vanehell v Roberts (1863) 32 Beav. 140.—M.R., commented on.

Game, In re, Game v Young (1897) 66 L J. Ch. 805; [1897] 1 Ch. 881, 76 L T. 450, 45 W R. 172.—STIRLING, J.

Howe v Dartmouth (Earl), considered.
Bland, In re, Miller v Bland (1899) 68 L J. Ch. 745; [1899] 2 Ch. 386.

STIRLING, J.—I am not prepared to say that the rule in *Howe v Dartmouth (Earl)* can never apply to a case of an absolute gift subject to an executory limitation, but I think that the inference as to the intention of the testator upon which that rule is based is weaker in such a case than when the testator has given his property to persons successively as tenants for life and remaindermen. And, even in a case where the rule in *Howe v Dartmouth (Earl)* is strictly applicable, an inference of an intention to the contrary has been drawn from the terms of the gift over. That was very much discussed by Cottonham, L.C. in *Pickering v Pickering (supra, col 994)*, where he considers *Cullins v Cullins (supra, col 991)*.—p 746

Howe v Dartmouth (Earl), not applied.
Hammerley, In re, Hensman v Hammerley (1899) 81 L T. 150.

STIRLING, J.—It is very remarkable that, notwithstanding the long period during which *Howe v Dartmouth (Earl)* has been in existence, there is no case where it has been applied to a gift which is vested, but liable to be divested on the happening of an event. It seems to me that in that case the inference is much less strong in favour of the supposed wish of the testator, and considering the nature of the rule which that case has given rise to, I am by no means desirous of extending it to a case to which it has not yet been extended.—p 151

Howe v Dartmouth (Earl), discussed.
Parloe v Parloe (1900) 82 L T. 547.—STIRLING, J.

Howe v Dartmouth (Earl), rule in, discussed and not applied.

Hope v Hope (supra, col 995), considered.
Van Strubenzen, In re, Boursted v Cooper (1901) 70 L J. Ch. 825; [1901] 2 Ch. 779, 85 L T. 541.

COZENS-HARDY, J.—Now, so far as I am aware, the rule in *Howe v Dartmouth (Earl)* has never been applied except to a disposition by will of residuary personal estate given *en masse* to be enjoyed by several persons in succession. The Court assumes an intention that the legacies should enjoy the same thing in possession, and, as the only mode of giving effect to such intention, it directs the conversion into permanent authorised investments of all such parts of the

residuary estate as are of a wasting or reversionary or unauthorised character—see *Pickering v. Pickering* (*supra*, col. 994) and *Macdonald v. Reid* (*supra*, col. 996). But the rule does not apply to any bequest which is specific, as distinguished from residuary. On principle, I can see no reason for applying the rule in the present case. The covenant to settle after-acquired property is a contract which has to be performed in strict accordance with its terms. It operates upon that which must be regarded as a specific property—namely, the lady's share in her father's estate. [His lordship then discussed *Hope v. Hope*, and continued.] *Hope v. Hope* is important as indicating that in the opinion of the V.-C. the rule does not apply to a marriage settlement, but I cannot treat it as a positive decision to that effect—pp. 826, 827.

Chancellor, In re, Chancellor v. Brown (*supra*, col. 997), explained.

Crowther, In re, Midgley v. Crowther [1895] Ch. 56, 64 L. J. Ch. 537; 18 R. 496; 72 L. T. 62, 43 W. R. 571.

CHITTY, J.—In that case it was only necessary to decide whether the postponement of the sale of the business for some years with a view to its sale as a going concern was justified, and the A. held that it was, and that the profits belonged to the tenant for life.—p. 61

Crowther, In re, Midgley v. Crowther, considered.

Chancellor, In re, applied.

Smith, In re, Arnold v. Smith (1893) 65 L. J. Ch. 269; [1896] 1 Ch. 171; 74 L. T. 14, 44 W. R. 280.

NORTH, J.—I do not think that *Crowther, In re*, goes so far as to show that in this case the sale could be postponed for an indefinite time. There are no special words in the will in that case as here as here. Whether *Crowther, In re*, has at gone too far I will not stop to consider. But what is suggested does seem to me to go beyond that decision. All I can do is to do what the A. did in *Chancellor, In re*. The trustees are not bound to sell immediately. I do not think it will be unreasonable that they should have two years.—p. 270.

Fowler, In re, Fowler v. Odell (1881) 16 Ch. D. 723, 44 L. T. 99, 29 W. R. 891.—*rev. J. distinguished*

in their hands they must apply them for this purpose. If it had been a decision between tenant for life and remaindermen, I should have had some difficulty in following it. But I consider it is no authority in the present case—p. 140.

BOWEN and PRY, L.J. to the same effect

Courtier, In re, Coles v. Courtier, applied.
Baring, In re, Jeune v. Baring (1892) 62 L. J. Ch. 50; [1893] 1 Ch. 61, 3 R. 37, 67 L. T. 702, 44 W. R. 87.—*KEKEWICH, J.*

Baring, In re, Jeune v. Baring, not followed.
Kingham v. Kingham (1896) [1897] 1 Ir R. 170—**CHATTERTON, V.-C.** And *see post*.

Baring, In re, commented on
Courtier, In re, distinguished
Redding, In re, Thompson v. Redding (1897) 66 L. J. Ch. 460, [1897] 1 Ch. 876, 76 L. T. 889, 46 W. R. 457—**STIRLING, J.**

Baring, In re, and Redding, In re, Thompson v. Redding, discussed.

Courtier, In re, considered and followed.
Tomlinson, In re, Tomlinson v. Andrew (1897) 67 L. J. Ch. 97, [1898] 1 Ch. 232; 78 L. T. 12; 46 W. R. 299.—**KEKEWICH, J.**

Courtier, In re, and Kingham v. Kingham (*supra*), considered.

Baring, In re, and Tomlinson, In re, Tomlinson v. Andrews, differed from

Betty, In re, Betty v. Att.-Gen. (1899) 68 L. J. Ch. 135, [1899] 1 Ch. 821; 80 L. T. 675.—**NORTH, J.**

Courtier, In re, discussed.

Baring, In re, explained

Betty, In re, Betty v. Att.-Gen., followed

Tomlinson, In re, not followed

Gjeus, In re, Cooper v. Gjeus (1899) 68 L. J. Ch. 142; [1899] 2 Ch. 54, 80 L. T. 689, 47 W. R. 535.

KEKEWICH, J.—The case arose before me in *Baring, In re*. . . There was a tenant for life of leasehold property with no provision in the will for that tenant for life bearing the burdens attaching to such leasehold property, such as the payment of rent, repairs and insurance. There I was pressed by the able counsel for the plaintiffs (Sir H. Davey and Mr. Ingle Joyce) with the argument which is stated in the margin. *Out point*

ents in their hands towards the repairs. No question was decided there between the tenant for life and the remaindermen; only that the trustees, having the property in their hands and having the duty to receive the rents and profits, and also the duty to keep that part of the estate in repair, and having nothing but rents and profits

downed by *Courtier, In re*, which decided that a tenant for life was not bound to do anything at all, but that it must come out of the estate. Then the question came before Stirling, J. In *Redding, In re*. Stirling, J. thought that I had misinterpreted the decision in *Courtier, In re*.

The property in *Courtier, In re*, was not in

a good and proper state of repair; there were things which ought to be done to make the lease a good one, and that was the point which the C.A. decided. Stirling, J. thought that the decision of the C.A. was confined to that, and did not understand it as absolving the tenant for life from liability from the date of the testator's death onwards. Of course the judgment of Stirling, J. deserves the respect of the profession and of myself, and it received the respect of myself in *Twissman, In re*. . . I read *Courtier, In re*, again, with all the case that I could give to it, in view of the decision of Stirling, J., and I was unable to see that the C.A. had not decided upon the ground which I thought they had decided. There it remains *Barry, In re*, was not appealed. Now the question comes again before North, J., in *Betty, In re*, and he has given an elaborate judgment after full argument. It was a considered judgment. He has gone into the cases before that of *Courtier, In re*, my comments upon which he has considered, and he has gone into the law generally with reference to a tenancy for life of leaseholds. Thus he approaches *Courtier, In re*, from a judicial aspect, and says that it cannot be intended to introduce new law, and that that is the view expressed by the judges who decided it. Therefore, says North, J., I can quite accept *Courtier, In re*, by limiting it to the state of things existing at the testator's death, without giving it the more extensive view which Kekewich, J. proposed to do. And then North, J. refers to *Ecob v. Milla* ([1898] A.C. 390, 67 L.J. (h. 97—P.C.)), and also to a case which, although not binding upon me, is yet entitled to respect and attention, namely, *Kingham v. Kingham*, where the V.-C. of Ireland also stated that I had misconstrued *Courtier, In re*, and says "I am of opinion that a tenant for life, whether legal or equitable, is within the maxim, *Quæritur, &c.*" The view I take is that I am not entitled, as a judge, to say that my view of the decision in *Courtier, In re*, is the right one. I find that Stirling and North, J., and the V.-C. of Ireland all think differently from myself, so I am bound to arrive at the conclusion that I am wrong, and I will act upon that assumption. I do not profess to say that I do not still think that the decision in *Courtier, In re*, is capable of two interpretations, but I give way. . . I must therefore decide that the tenant for life must take these burdens, including insurances, as the lease contains a covenant to insure.—p. 443.

Courtier, In re, referred to.

Thomas, In re, *Wetherall v. Thomas* (1900) 69 L.J. Ch. 198. [1900] 1 Ch. 319; 48 W.R. 409.—BYRNIE, J.

Betty, In re (supra), distinguished.

Partly and Hopkin's Arbitration, In re (1899) 69 L.J. Ch. 190. [1900] 1 Ch. 160. 81 L.T. 807; 48 W.R. 345, 61 J.P. 137.

NORTH, J.—In *Betty, In re*, the leasehold estate was given to the testator's daughter for life, and she was not bound to do any repairs necessary when her interest commenced, as those repairs had to be borne by the estate of the testator, but she was held liable to indemnify the testator's estate against the breach of covenants during the continuance of the tenancy for life. The question there was between the person interested in the leaseholds and the testator's estate . . .

In the present case there is a claim by a person taking leaseholds as legal tenant in remainder against a tenant for life for loss sustained by the person in remainder on finding the property out of repair, and having to make herself safe by putting it into repair. I asked if there was any precedent for any such action, and no case has been cited to me. It is entirely distinct from *Betty, In re*, and comes within *Cartwright, In re, In re v. Newman*, [1889] 55 L.J. Ch. 590; 41 Ch. D. 539. See "WASTE." It is quite true that the latter was a case of freeholds and not leaseholds, but that does not seem to me to make any difference in principle. That case decided that the estate of a legal tenant for life of land was not liable for permissive waste, and that no action in respect of such waste would lie by the remainderman in fee against the executor of the tenant for life.—p. 191.

Tewart v. Lawson (1874) 43 L.J. Ch. 673; 13 R. 18 Eq. 490; 22 W.R. 822.—HALL, V.-C., followed.

Norton v. Johnstone (1887) 55 L.J. Ch. 222; 80 Ch. D. 649, 34 W.R. 13.—FRANSON, J.

Tewart v. Lawson, not applied.

Biggar v. Eastwood (1886) 19 L.R. Ir. 49.—O.A. NATH, L.C., FITZGERALD and BARRY, J.J.

Tewart v. Lawson, principle adopted.

Green, In re, Baldock v. Green (1886) 58 L.J. Ch. 157, 40 Ch. D. 610, 60 L.T. 225, 37 W.R. 300.—STIRLING, J.

Tewart v. Lawson, Norton v. Johnstone and Green, In re, Baldock v. Green, distinguished.

Honywood v. Honywood (1901) 71 L.J. Ch. 174. [1902] 1 Ch. 347; 86 L.T. 214.—BYRNIE, J. See post, col. 1003.

Tracy v. Hereford (Lady) (1786) 2 Bro. C.C. 129.—THURLOW, L.C., applied.

Pearshyn (Lord) v. Hughes (1799) 5 Ves. 99.—ARDEN, M.R.; and **Caulfield v. Maguire** (1845) 2 Jo. & Lat. 141; 6 L.J. Eq. 164.—SUGDEN, L.C., observed on.

Sharslow v. Gibbs (1844) 23 L.J. Ch. 451, Kay 333; 2 Eq. R. 314. 18 Jur. 330.

WOOD, V.-C.—Lord Alvanley [*Pearshyn (Lord) v. Hughes*] considered it to have been established by *Tracy v. Hereford (Lady)* that a tenant for life in remainder must bear all arrears of interest which accrued during the life of the preceding tenant for life. In *Caulfield v. Maguire*, Lord St. Leonards observed that he thought Lord Alvanley had extracted from *Tracy v. Hereford (Lady)* a rule not established there, and not necessary for his decision in *Pearshyn (Lord) v. Hughes*. His lordship therefore considered that he was unfettered by any authority.—p. 453.

Tracy v. Hereford (Lady), explained.

Kensington (Lord) v. Bouvier (1850) 29 L.J. Ch. 637; 7 H. L. Cas. 557, 6 Jura. (N.S.) 105.—H.L. (N.). CAMPBELL, L.C., LORDS BROUGHAM and GHELMESFORD, LORDS CRANWORTH and WENSLEYDALE dissenting.

Revel v. Watkinson (1748) 1 Ves. sen. 93.

Tracy v. Hereford (Lady), and Caulfield v. Maguire, referred to.
Honywood v. Honywood (1901) 71 L.J. Ch. 174; [1902] 1 Ch. 347; 86 L.T. 214.—BYRNIE, J. See post, col. 1003.

Syer v. Gladstone (1885) 30 Ch D 614, 34 W. R. 565—PEARSON, J., *referred to*.
Hotchkys, In re, Freke v. Calmaidy (1886) 55 L. J. Ch 546, 82 Ch D 108, 55 L. T. 110; 34 W. R. 569—C.A. COTTON, LINDLEY and LOPES, L.Js.

Hotchkys, In re, Freke v. Calmaidy, commented on.
Conway v. Penton (1888) 58 L. J. Ch 282, 40 Ch D 512, 59 L. T. 928; 37 W. R. 156—KEKEWICH, J.

Hotchkys, In re, referred to
Parnell v. Boyd [1896] 2 Ir. R. 5.—Q.B.D.; *affirmed*, C.A.

Hotchkys, In re, followed
Syer v. Gladstone, discussed and distinguished

Frewen v. Law Life Assurance Society (1890) 65 L. J. Ch 787, [1896] 2 Ch 511, 75 L. T. 17; 44 W. R. 682

NORTH, J.—In *Guthrie v. Watford* [(1883) 52 L. J. Ch 165, 22 Ch. D 573] Fry, J. points out that where two distinct gifts are made by a will to one person, he can, as a rule, take one and disclaim the other, but his right to do so may be rebutted by a manifestation of a contrary intention on the part of the testator, and that a single and undivided gift is *prima facie* evidence of such intention. . . . Next in order of date comes *Syer v. Gladstone*. The headnote looks something like the same point, but after reading the case carefully in the Law Reports and in the Weekly Reporter, I cannot find anything in the decision to justify the headnote. . . . I find no reference whatever to the income of the mortgage arising from the sale of the furniture. . . . I think the decision really was that the sisters were bound to indemnify the estate to the extent of the amount they actually received from the property, but that they were not bound to put their hands into their pockets to make up any deficiency. . . . The next case is *Hotchkys, In re*. . . . What was done about repairs is immaterial here, but there are certain observations by the L.J. as to the effect of two estates being continued in one devise. . . . Lindley, L.J. says that the tenant for life had one aggregate property given to her, and distinguishes *Syer v. Gladstone* on the ground that there were two gifts reaching the case as if the headnote were correct—p. 789.

Hotchkys, In re, and Frewen v. Law Life Assurance Society, principle applied.

Honywood v. Honywood (1901) 71 L. J. Ch. 174; [1902] 1 Ch. 817, 86 L. T. 214

BYRNE, J.—Apart from any question arising from the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing during the same life tenancy (see *Revel v. Watkinson* (*supra*, col. 1002) and *Wray v. Hereford* (*Lady*) (*supra*, col. 1002) and the judgment of Lord St. Leonards in *Chesterfield v. Miquire* (*supra*, col. 1002) where he sums up the result of the earlier authorities). Where, as in the present case, several estates are included in the same settle-

ment the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates—*Frewen v. Law Life Assurance Society and Hotchkys, In re*. It appears to me upon principle that the tenant for life of several estates included in the same devise remains liable as between himself and the remaindermen to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of a part of the property. . . . *Trevar v. Lawton* (*supra*, col. 1002), *Norton v. Johnstone* (*supra*, col. 1002), and *Green, In re* (*supra*, col. 1002), appear to me to have little bearing upon the present question. They establish that where there is a trust created for payment of debts out of the income of a testator's estate either by means of accumulation or otherwise, and the debts are in fact lawfully paid out of *corpus*, the event not being provided for in the will, there is no equity on the part of the remaindermen to have the *corpus* recouped out of income. No question arose as to any equity which possibly might have arisen had there been arrears of income not kept down—pp. 177, 178.

Hotchkys, In re, referred to
Fairlough v. Johnstone (1865) 16 Ir. Ch. R. 442.—M.R.; **Syer v. Gladstone** (*supra*), and **Frewen v. Law Life Assurance Society, explained and applied**

Kensington (Baron), In re, Longford (Earl) v. Kensington (Baron) (1901) 71 L. J. Ch. 170, [1902] 1 Ch. 208; 85 L. T. 577, 50 W. R. 201.—PARWELL, J. See judgment at length

Wilkinson v. Duncan (1857) 26 L. J. Ch. 495; 23 Beav. 469, 3 Jur. (N.S.) 580; 5 W. R. 398—ROMILLY, M.R.; and **Beavan v. Beavan** (1869) 52 L. J. Ch. 961, n; 24 Ch. D. 649, n; 49 L. T. 263, n.—ROMILLY, M.R., *followed*.

Wright v. Lambert (1877) 6 Ch. D. 649; 26 W. R. 206

BACON, V.-C.—[Counsel had contended that the rule in *Wilkinson v. Duncan*, as to the mode of calculating the interest of a tenant for life, was no longer the law of the Court since *Beavan v. Gollatly* (*supra*, col. 985), but he afterwards abandoned the point, and Bacon, V.-C. decided against him.]

Beavan v. Beavan, followed
Chesterfield's (Earl) Trusts, In re (1883) 52 L. J. Ch. 958; 24 Ch. D. 643; 49 L. T. 261; 32 W. R. 361.—CHITTY, J.

Chesterfield's (Earl) Trusts, In re, applied
Hobson, In re, Walker v. Approach (1886) 55 L. J. Ch. 422, 53 L. T. 627; 34 W. R. 70—KAY, J.; **Godden, In re, Tange v. Fox** (1892) 62 L. J. Ch. 489; [1893] 1 Ch. 292, 3 R. 67, 68 L. T. 116; 41 W. R. 282.—**NORTH, J.**, *Hengler, In re, Frowde v. Hengler* (1892) 62 L. J. Ch. 283; [1893] 1 Ch. 586, 3 R. 207, 68 L. T. 84; 41 W. R. 491.—**KEKEWICH, J.**, *Goodenough, In re, Marland v. Williams* (1895) 65 L. J. Ch. 71 [1895] 2 Ch. 537; 13 R. 454, 73 L. T. 318.—**KEKEWICH, J.** (*and see post*), *Moley, In re, Moley v. Haig* (1895) 64 L. J. Ch. 727, [1895] 2 Ch. 758, 15 R. 680, 73 L. T. 151; 44 W. R. 140.—**KEKEWICH, J.**

Chesterfield's (Earl) Trusts, In re, applied.**Goodenough, In re, Marland v. Williams** (*supra*), followed

Rowlls, In re, Rowlls v. Bebb, Walters v. Treasury Solicitor (1900) 69 L. J. Ch. 562, [1900] 2 Ch. 107, 82 L. T. 633, 48 W. R. 562—C.A., reversing STIRLING, J.

LINDLEY, M. R.—*Macfie v. Macfie* (*supra*, col. 996) covers and decides a point which, but for that, would be a little difficult—that is to say, whether this clause relating to the produce of the unsold real estate and outstanding personal estate can apply to property which does not yield income. That was a difficulty which was solved in *Macfie v. Macfie* by the V.-C. of England, who held that it did, and Stirling, J. has taken the same view. The decision rests upon this principle—that if you look at the will as a whole, the tenant for life is, to take the income of the residuary estate for better or for worse. *Hove v. Dartmouth* (Earl) (*supra*, col. 991) does not apply against the tenant for life or in his favour. In other words, if the property is yielding more income than the tenant for life is entitled to, she is to have it, and if less, then she is to go without it.—p. 565

WATKIN, L. J.—If I had to deal simply with the question of construction, I should have hesitated a good deal before I came to the conclusion that Stirling, J. was wrong in treating *Macfie v. Macfie* as a decision covering this case. It is not necessary to say anything from my point of view about that, and I must be held not to express any opinion about it.—p. 568

COLLINS, L. J. concurred

Chesterfield's (Earl) Trusts, In re, application of, considered

Searle's Settlement Trusts, In re (or Searle, In re, Searle v. Baker) (1900) 69 L. J. Ch. 712; [1900] 2 Ch. 829, 83 L. T. 364, 49 W. R. 44—KENNEDY, J., Van Straubenzee, In re, Boustead v. Cooper (1901) 70 L. J. Ch. 825; [1901] 2 Ch. 779, 85 L. T. 511—COXEN & HARDY, J.

Turner v. Newport (1846) 2 Ph. 14; 4 P. Coop. 147.—OTTENHAM, L. C., reversing (1844) 14 Sim. 82.—SHADWELL, V.-C.; considered, Cox v. Cox (1860) 38 L. J. Ch. 569, L. R. 8 Eq. 343; 17 W. R. 190.—JAMES, V.-C. (and see *post*), followed, Cleveland's (Duke) Estate, In re, Hay v. Wolmer (1895) 65 L. J. Ch. 29; [1895] 2 Ch. 542, 18 R. 715, 73 L. T. 313—KREWECH, J., disallowed, Alston, In re, Alston v. Houston (*post*, col. 1006), Stewart v. Kingsale (*post*).

Moore, In re, Moore v. Johnson (1885) 54 L. J. Ch. 482; 33 W. R. 447.—PEARSON, J., and Foster, In re, Lloyd v. Carr (1890) 45 Ch. D. 629, 63 L. T. 443, 39 W. R. 81—KAY, J., referred to.

Cox v. Cox (*supra*), principle applied.

Brid. In re, Evans, In re, Dodd v. Evans (1901) 70 L. J. Ch. 514, [1901] 1 Ch. 916, 84 L. T. 294; 49 W. R. 599.

PARKWELL, J.—The authorities are in a somewhat unsatisfactory condition, and I feel considerable difficulty in reconciling the decision of Pearson, J. in *Moore, In re*, with that of Kay, L. J. in *Foster, In re*. The principle applicable to cases like the present is expressed in *Cox v. Cox*—viz. that neither tenant for life nor remainderman shall obtain an advantage over the other—p. 315

Cox v. Cox, principle applied.

Stewart v. Kingsale [1902] 1 Ir. R. 198—PORTER, M. R.

Moore, In re, followed

Foster, In re, referred to.

Barker, In re, Barker v. Barker (1897) 32 L. J. N. C. 569; W. N. (1897) 154—STIRLING, J.

Foster, In re, followed.

Lyon v. Mitchell (1896) 34 L. J. N. C. 185; W. N. (1899) 27—NORTH, J.

Moore, In re, and Lyon v. Mitchell, followed.

Foster, In re, not followed.

Alston, In re, Alston v. Houston (1901) 70 L. J. Ch. 869; [1901] 2 Ch. 684.—KREWECH, J. See judgment.

I. ESTATE PUR AUTRE VIE

Doe d. Lewis v. Lewis (1842) 11 L. J. Ex. 306; 9 M. & W. 662; 6 Jur. 375.—EX., distinguished.

Wall v. Byrne (1845) 2 Jo. & Lat. 118, 7 Ir. Eq. R. 578.—SUGDEN, L. C.

Philpotts d. Philpotts v. James (1784) 8 Dougl. 425.—K. B., and Wall v. Byrne, explained.

Sheppard, In re, Sheppard v. Manning (1897) 66 L. J. Ch. 445; [1897] 2 Ch. 67; 76 L. T. 756; 45 W. R. 475.

ROMER, J.—Two cases were relied on by counsel for the heirs-at-law. With regard to *Wall v. Byrne*, whether or not it was rightly decided—a question which I need not consider—it is no authority on the case now before me. The proposition stated by Sugden, L. C. was this: "Where a man has an estate pur autre vie, limited to him and his heirs, and devises that estate, by words which, without words of limitation, would pass the *quasi* inheritance, and the devisees die intestate, the persons to take are the heirs and not the personal representatives of the devisee." Assuming this proposition to be correct, it is no authority, because here the testator was not entitled to an estate pur autre vie limited to him and his heirs—he was entitled in fee. And if the English decision referred to in that case was *Philpotts v. James*, whether or not that case was an authority for the decision in *Wall v. Byrne*, it is no authority in the present case, for it is not in point. It was a case of a lease for lives limited to one and his heirs. The owner of the estate died, having by his will devised "all and singular my freehold lease" to his nephew, and on the nephew's death it was held that his heir-at-law, and not his legal personal representative, became entitled. Lord Mansfield's judgment shows the ground of the decision: "The words of the will of T. James are general. He gives all his freehold lease. It is the same as if he had added 'heirs.'" That is to say, it was, in effect, a case of the heir being specially mentioned—p. 446.

Philpotts v. James, referred to.

Wall v. Byrne and Blake v. Jones (1813) 1 H. & Br. 227, n. followed.

Doe v. Lewis, commented on.

Mountcashell (Earl) v. More-Smith (1896) 65 L. J. P. C. 164; [1896] A. C. 168; 74 L. T. 321.—H. L. (IR.), HALSBURY, L. C., LORDS WATSON, HERSCHMAN, MACNAGHTEN, MORRIS and DAVEY; affirming S. C. nom. *More-Smith v. Mountcashell* (Earl)

[1895] 1 Ir. R. 44.—C.A. WALKER, L.C.,
PALLIS, C.B. and FITZGIBBON, L.J., *dis-*
tinguished.
King, in re, King v. King (1898) [1899] 1
Ir. R. 30.—C.A. ASHBOURNE, L.C., FITZGIBBON
and HOLMES, L.J.s

5. JOINT TENANCY AND TENANCY IN COMMON

Edwards v. Fashion (1712) Prec. Ch. 332;
Aveling v. Knipe (1815) 19 Ves. 440, 13
R. R. 240.—GRANT, M.R.; and Harris v.
Fergusson (1849) 16 Sim. 308.—SHAD-
WELL, V.-C. *explained.*
Robinson v. Preston (1858) 27 L. J. Ch.
395, 4 J. K. & J. 605, 4 Jur. (N.S.) 186—
WOOD, V.-C., *followed.*
Hughes's Trusts, in re (1871) 24 L. T. 415—
MALINS, V.-C.
Robinson v. Preston, *discussed.*
Palmer v. Rich (1896) 66 L. J. Ch. 69, [1897]
1 Ch. 134; 75 L. T. 484, 45 W. R. 205—
STIRLING, J.

Aveling v. Knipe, *referred to.*
National Society for the Distribution of
Electricity by Secondary Generators v. Gibbs
(1899) 68 L. J. Ch. 603, [1899] 2 Ch. 289, 80
L. T. 524, 47 W. R. 518.—COZENS-HARDY, J.;
reversed, C.A. See "PATENT."

Bracebridge v. Cook (1572) Co. Litt. 185 b,
followed.
Barton's Will, in re (1852) 10 Hare 12, 16
Jur. 631.—TURNER, V.-C.

Barton's Will, in re, and Armstrong v.
Armstrong (1869) 38 L. J. Ch. 468, L. R.
7 Eq. 518, 20 L. T. 776; 17 W. R. 570—
JAMES, V.-C., *discussed.*
Caldwell v. Fellowes (1870) 39 L. J. Ch.
618, L. R. 9 Eq. 410, 22 L. T. 235, 18
W. R. 486.—JAMES, V.-C., *followed.*
Baillie v. Treharne (1881) 60 L. J. Ch. 295,
17 Ch. D. 388; 44 L. T. 247; 20 W. R. 729—
MALINS, V.-C.

Caldwell v. Fellowes, *applied. And see*
post.
May v. Hook (1773) 2 Co. Litt. 246 (b) note,
discussed.
Burnaby v. Equitable Reversionary Society
(1883) 54 L. J. Ch. 466, 28 Ch. D. 416, 52
L. T. 350, 33 W. R. 639.—PEARSON, J.

Barton's Will, in re, *approved.*
Baillie v. Treharne, *disapproved.*
Butler's Trusts, in re, Hughes v. Anderson
(1888) 58 Ch. D. 286; 57 L. J. Ch. 643, 59 L. T.
386, 36 W. R. 817.—C.A.
LINDLEY, L.J.—The only intelligible rule to
apply is that pointed out in Plowden (*Brace-*
bridge v. Cook), which is an intelligible working
rule. If property be vested in a woman and
another, or others, as joint tenants, and she
afterwards marries, what is the effect of her
marriage upon that property? If the effect is to
vest the property in the husband then there will
be a severance of the joint tenancy. That is the
view of Lord Coke, Plowden, and everyone. If
on the other hand the act of marriage does not
vest the property in the husband, then there is
no severance. That is the view of Lord Coke,
Plowden, and everyone except Malins, V.-C., who

in *Baillie v. Treharne* did hold that marriage
effected a severance of the joint tenancy in a
wife's *chose in action*. I think that was an
oversight on the part of the learned judge.
There is no authority in favour of the respon-
dents' view except that case. Although it is
true that *Barton's Will, in re*, and *Armstrong v.*
Armstrong (*supra*) may have been decided on the
ground that the fund was reversionary, which
was a good ground, still the other ground, viz.,
that it was a *chose in action*, might have been
taken. At any rate, there is nothing in other
decision against the rule I have suggested—
p. 293

COTTON and DOWN, L.J.J. to the same effect.

Caldwell v. Fellowes (*supra*, col. 1007),
principle applied.
Brown v. Bandle (1796) 3 Ves. 256—
ARDEN, M.R., *followed.*
Hewitt, in re, Hewitt v. Hallett (1893) 63
L. J. Ch. 182; [1894] 1 Ch. 362, 8 R. 70; 70
L. T. 393, 42 W. R. 233.—NORTH, J.

M'Mahon v. Burrell (1848) 3 Hare 97—
V.-C., *varied*, 2 Ph. 127, C. P. Cooper 457—
COTTENHAM, L.C., *corrected*, 5 Hare 322—V.-C.;
discussed. Henderson v. Eason (1851) 21 L. J.
Ch. 42, 17 Q. B. 701, 16 Jur. 518—EX. CH.,
Kennedy v. De Trafford (1887) 66 L. J. Ch. 413;
[1897] A. C. 180, 76 L. T. 127, 45 W. R. 671—
H.L. (E)

ESTOPPEL.

- 1 BY RECORD.
- 2 BY DEED.
- 3 BY MATTERS IN PARS

1. BY RECORD.

Blackham's Case (1708) 1 Salk. 290; Thomas
v. Koterliche (1740) 1 Ves. sen. 333—
HARDWICK, L.C.; and Boucher v. Taylor
(1778) 4 Bro. P. C. 708.—H.L. (E), *dis-*
puted and followed.
Kingston's (Duchess) Case (1776) 2 Sm.
L. C. (7th edition) 761, 20 How. St. Tr.
537, 1 Leach C. C. 146; 1 East P. Q. 468,
explained.
Barrs v. Jackson (1845) 14 L. J. Ch. 493; 1
Ph. 582, 9 Jur. 609.—LYNDHURST, L.C.;
reversing (1842) 2 Y. & O. C. C. 585.—KNIGHT
BRUCE, V.-C.

Barrs v. Jackson, *principle applied.*
Nelson v. Couch (1868) 33 L. J. C. P. 46; 15
C. B. (N.S.) 99; 10 Jur. (N.S.) 366; 8 L. T. 577;
11 W. R. 964.—WILLES and BYLES, JJ. *And*
see post, col. 1010

Kingston's (Duchess) Case, and Barrs v.
Jackson, *opinion of V.-C., adopted.*
Reg. v. Hartington Middle Quarter (Inhabitants)
(1856) 24 L. J. M. C. 98; 4 Bl. & Bl. 780;
3 C. L. R. 551, 1 Jur. (N.S.) 589; 3 W. R. 285.—Q.B.

Reg. v. Hartington (Inhabitants), *doubted.*
Reg. v. Hutchings (1881) 50 L. J. M. C. 35;
6 Q. B. D. 300; 44 L. T. 364, 29 W. R. 724, 45
J. P. 504.—O.A.; *reversing* S. C. *nom.* Reg. v.
Hutchings (1880) 49 L. J. M. C. 64, 5 Q. B. D.
365; 42 L. T. 716, 28 W. R. 595.—LUSH and
FIELD, JJ.

SELBORNE, L.C.—But here there is no proceeding *in rem*, no question of status, and if the case which was quoted to us of *Reg v. Hartington (Inhabitants)* was correctly decided (as to which I feel considerable doubt), it is not relevant. The principles of the law of estoppel by a judgment, *inter partes*, to which alone I think it necessary to refer, may be taken from *De Grey, C.J.*'s opinion in the *Duchess of Kingston's Case*, and from that of Knight Bruce, V.C. in *Baird v. Jackson*. The decision in the latter case was reversed, but on a ground not at all touching the statement of principles contained in it—p. 37 BAGGALLAY and BRETT, L.J. concurred.

Kingston's (Duchess) Case, *applied*, *Routledge v. Hislop* (*post*); *Prustman v. Thomas* (1884) 53 L. J. P. 109; 9 P. D. 210, 51 L. T. 848, 32 W. R. 842.—C.A. BAGGALLAY and COTTON, L.J.; *referred to*, *O'Grady v. Synna* [1900] 2 Ir. R. 602—Q.B.D.; *affirmed*, C.A.

Barr v. Jackson (*supra*), *referred to*, *McDonnell v. McDonnell* (1886) 17 L. R. 582.—CHATTERTON, V.-C.; *Stephenson v. Garnett* (1808) 67 L. J. Q. B. 447; [1898] 1 Q. B. 677, 78 L. T. 371, 46 W. R. 410.—C.A. A. L. SMITH, CHITTY and COLLINS, L.J.; *Reg v. Ollis* (1900) 69 L. J. Q. B. 918, [1900] 2 Q. B. 758, 83 L. T. 251, 49 W. R. 76, 64 J. P. 518—C.C.R.

Backland v. Johnson (1854) 23 L. J. C. P. 204, 15 C. B. 145; 2 O. L. R. 704, 18 Jur. 775, 2 W. R. 585—C.P., *followed*.
Routledge v. Hislop (1860) 29 L. J. M. C. 90, 2 EL. & EL. 649, 6 Jur. (N.S.) 398, 2 L. T. 53, 8 W. R. 363—Q.B.

Routledge v. Hislop, *followed*.
Flitters v. Allfrey (1874) 44 L. J. C. P. 73, L. R. 10 C. P. 29; 31 L. T. 878, 28 W. R. 442.—BRETT and GROVE, JJ.

Reg v. Hartington (Inhabitants) (*supra*), and **Flitters v. Allfrey**, *disapproved*.
Irish Land Commissioners v. Ryan [1900] 2 Ir. R. 563—C.A.

Brown v. Wootton (1805) 3 Cro. Jac. 73, Yelv. 67, Moor 762, *distinguished*.
Lechmere v. Fletcher (1833) 2 L. J. Ex. 219, 1 Cr. & M. 623, 3 Tyr. 450—EX.

Brown v. Wootton, *disapproved*.
King v. Hoare (1844) 14 L. J. Ex. 29; 13 M. & W. 494; 2 D. & L. 382. *And see* cols. 1012, 1013. **PARKIE, B.** (for the Court)—It has been held, that if two commit a joint tort, the judgment, against one is of itself, without execution, a sufficient bar to an action against the other for the same cause.—*Brown v. Wootton*; and though, in the report in Yelverton, expressions are used, which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet, upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Popham, C.J. states the true ground, he says, "If one hath judgment to recover in trespass against one, and damages certain," that is converted into certainty by the judgment, "although he be not satisfied, he shall not have a new action for this trespass by the same reason, *contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against

the other, and the difference betwixt this case, and the case of debt and obligation against two, is, because there every of them is chargeable and liable to the entire debt, and, therefore, recovery against one is no bar against the other, until satisfaction"—p. 32.

King v. Hoare, *distinguished*, **Waterfall, Ex parte** (*or Jones, Ex parte*), *Morrison, In re* (1851) 20 L. J. Bk. 5; 4 De G. & Sm. 189, 15 Jur. 214.—KNIGHT BRUCE, V.-C., *approved*, **Backland v. Johnson** (1854) 23 L. J. C. P. 204, 15 C. B. 145, 2 O. L. R. 784, 18 Jur. 775, 2 W. R. 565—C.P.

Brown v. Wootton and King v. Hoare, *followed*.
Bunsmead v. Harrison (1872) 41 L. J. C. P. 190, L. R. 7 C. P. 547, 27 L. T. 99; 26 W. R. 784.—EX. CH. *See* "TROVER."
[*Note*.—*Brown v. Wootton* has been extensively denied by the American Courts (*Sheldon v. Kibbe* (1819) 3 Connecticut 214, *Lovely v. Murray* (1865) 3 Wallace 1; *Stoss v. Dickinson* (1862) 5 Allen 20; *Brown v. Cambridge* (1862) 3 Allen 47.)

Drake v. Mitchell (1808) 3 East 251, 7 R. L. 449.—K.B., *followed*.
Bell v. Banks (1841) 3 Man. & G. 258, 3 Scott (N.R.) 497—C.P.

King v. Hoare and Drake v. Mitchell, *referred to* (*and see* col. 1012).
Bennondsey Vestry v. Ramsey (1871) 40 L. J. C. P. 206; L. R. 6 C. P. 247, 24 L. T. 429, 19 W. R. 774—C.P.

Bennondsey Vestry v. Ramsey, *approved and followed*.
Plumstead Board of Works v. Ingoldby (*or Planet Building Society*) (1872) 42 L. J. Ex. 50, L. R. 8 Ex. 63, 27 L. T. 656; 21 W. R. 77.—EX., *affirmed*, (1873) 42 L. J. Ex. 136, L. R. 8 Ex. 174, 29 L. T. 375, 21 W. R. 817—EX. CH.

King v. Hoare, *approved*.
Kendall v. Hamilton (1879) 4 App. Cas. 504; 48 L. J. C. P. 705, 41 L. T. 418, 28 W. R. 927.—H.L. (R.) CATRIS, L.C., LORDS HATHERLEY, SELBORNE and GORDON, LORD PENZANCE dissenting. *See* judgments, and *see post*.

Nelson v. Couch (col. 1008), *explained*.
Brunsdon v. Humphrey (1884) 53 L. J. Q. B. 476, 14 Q. B. D. 141, 51 L. T. 329, 32 W. R. 944; 49 J. P. 4.—C.A. BRETT, M.R. and BOWEN, L.J.; **COLERIDGE, C.J.** *dissenting*, *reversing* 53 L. J. Q. B. 758, 11 Q. B. D. 712.—FOLLOCK, R. and LOPES, J.

King v. Hoare, *disapproved*.
Irish Land Commission v. Jankin (1888) 24 L. R. Ir. 40—Q.B.D.

Brunsdon v. Humphrey, *explained*.
MacDougall v. Knight (1890) 59 L. J. Q. B. 517, 25 Q. B. D. 1; 63 L. T. 45; 58 W. R. 553; 54 J. P. 788.—C.A. ESHER, M.R., FRY and LOPES, L.J.

Kendall v. Hamilton (*supra*), *considered*.
Hodgson, In re, Beckett v. Ramsdale (1885) 81 Ch. D. 177; 55 L. J. Ch. 241, 34 V. L. R. 127; 54 L. T. 222.—C.A., *affirming* **DAVON, V.-C.**
SIR J. HANBURY.—But then it was said that as a question of law the *contra* which has been pursued by the plaintiffs precludes them from now having recourse to the estate of the father, and that argument is based upon the decision in *Kendall v. Hamilton*. Now, in that case, it was

undoubtedly decided, confirming the decision in *King v. Hoare*, a case which has always attracted a good deal of attention, that where some members of a firm or some joint contractors are sued and judgment is obtained against them, the matter then passes into a *res judicata* and is to be treated thenceforth as a debt against those persons only against whom that judgment has been recovered, and recourse cannot be had to a person who was not joined in that action. That, of course, must be taken as now clearly established; but in that case it was from the beginning pointed out that there is an exception to that rule, one which had long prevailed in equity, to the effect that when one member of a firm has died, though at law the debt would from that time forth be only the debt of the survivors, in equity recourse might always be had to the estate of the deceased partner. That is very clearly laid down by Cotton, L.J., in the judgment which he delivered on behalf of himself, the present M. J., and Thesiger, L.J., in *Kendall v. Hamilton*, where he says, "It is now well established that a Court of equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor." He goes on to say, "It is difficult to understand how the Court of Chancery came to interfere with the legal liability of partners, and although it has done so, it has, in giving the partnership creditor relief, dealt with him in an anomalous way, that is to say, except in cases where there has been no joint estate, the Court has only admitted the partnership creditor to rank against the estate of the deceased, after all his private or separate debts have been paid." That passage has a very important bearing on a matter to which I shall subsequently refer. He says, in conclusion "It is unnecessary to go through the numerous cases which were cited during the argument, but it will be right to refer to *Liverpool Borough Bank v. Walker* (1859) 4 De G. & J. 24, and *Jacob v. Harwood* (1751) 2 Ves sen 265, as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in equity against the estate of a deceased partner. But in each of those cases the judgment was not recovered until after the death of the partner against whose estate the creditor was seeking relief, and in each case, in which relief has been given, the court against the estate of a deceased partner, cannot be established. From and after his death, he ceases to be subject to a separate or several liability. Now this view of the law is adopted by almost every member of the House of Lords who took part in the discussion of the doctrine. It is stated by Lord Cairnes, by Lord Harbrough, by Lord Selborne and by Lord O'Hagan, and I believe I said this clearly in saying that we have only to consider the case of the deceased partner in the case of the judgment by the Court of Chancery, and it would be impossible for us to insist such a course of opinion of such high authority as we have. We come, therefore, with all our hesitation to the conclusion that this is the correct view of the law.—p 187.

BOWEN and FRY, L.J.J., who concurred, also considered the case at length.

Kendall v. Hamilton (*supra*), distinguished *Bailey v. Consolidated Bank* (1886) 84 Ch. D. 586, 55 L. T. 655; 85 W. R. 136.

STIRLING, J., held that the right of a surety against his principal are not exactly the same as those of the creditor, and that accordingly the rule laid down in *Kendall v. Hamilton*, that a creditor who has recovered judgment against one partner cannot sue another partner, did not take away the rights of a surety for one partner as against another partner.

And see C. (1888) 57 L. J. Ch. 468; 88 Ch. D. 288, 59 L. T. 419, 36 W. R. 745.—C.A.

Kendall v. Hamilton, applied.

Drake v. Mitchell (*supra*, col. 1010), distinguished.

Campbell v. Chapman (1887) 19 Q. B. D. 229, 56 L. J. Q. B. 659; 57 L. T. 625, 85 W. R. 338; 51 J. P. 456.

FIELD, J.—There [*Drake v. Mitchell*] it was held that where one of three covenants gave a bill for part of a debt secured by the covenant, and judgment was recovered against him on the bill, that judgment was no bar to an action of covenant against the three. On looking into that case it is clear that the decision proceeded on the technical rule that the giving of a bill of exchange could not suspend the remedy on the covenant, which was a security of a higher nature.—p 232.

MANISTY, J.—As to *Drake v. Mitchell*, I agree that it is distinguishable from the present case on the ground suggested by Field, J., namely, that the covenant was a security of a higher nature than a bill of exchange, but I think there is another and perhaps a more substantial ground, which is, that the bill in that case was a collateral security, and was not given for the same liability or debt as was secured by the covenant.—p 234. *And see post*.

Kendall v. Hamilton, applied.

Hoare v. Niblett (1891) 60 L. J. Q. B. 565, [1891] 1 Q. B. 781, 64 L. T. 659, 89 W. R. 491, 55 J. P. 664.—A. L. SMITH and GRANTHAM, JJ.

King v. Hoare (*supra*, col. 1000) and *Kendall v. Hamilton*, not applied. *Back v. Pierce* (1889) 58 L. J. Q. B. 516, 23 Q. B. D. 316; 61 L. T. 448, 88 W. R. 29, 54 J. P. 198.—O. A. ESHER, M.R., LINDLEY and BOWEN, L.J.J. *Weall v. Jones* (1905) 88 T. T. 515, 1 L. R. 355.—C. A. ESHER, M.R., LINDLEY and BOWEN, L.J.J.

King v. Hoare, *supra*.

King v. Hoare (1891) 60 L. J. Q. B. 565, [1891] 1 Q. B. 781, 64 L. T. 659, 89 W. R. 491, 55 J. P. 664.—A. L. SMITH and GRANTHAM, JJ.

Kendall v. Hamilton, *supra*, applied.

Drake v. Mitchell (*supra*, col. 1010).

Campbell v. Chapman (*supra*, col. 1010). *Woods-Pruett v. Evans* (1891) 1 Q. B. 105, 57 L. J. Q. B. 105, 57 L. T. 659, 85 W. R. 66, 51 J. P. 456. I do not think that the rule laid down in *Kendall v. Hamilton* was overruled by *Drake v. Mitchell*, and I do not think it was overruled by *Campbell v. Chapman*. *Drake v. Mitchell*, and *Campbell v. Chapman* were wrongly decided.—p 114.

LOPES and RIGBY, L.J.J., to the same effect.

V-C by whom this case was first decided, held, that this was an estoppel, upon the general ground that it was a deed intended, and that the nature of the conveyance, namely, lease and release, made no difference. The L.C. confirmed this judgment, but put it on this solely, that it was an allegation of a particular fact, by which the party making it was concluded. That case, therefore, greatly differed from the present, in which there is no certain precise averment in the deed of release of any such in T. Jarvis, the younger, but a recital only, that he was legally or equitably entitled.—p. 281

Right v. Bucknell, distinguished. Doe d. Downe (Lord) v. Thompson (1847) 9 Q. B. 1037, 11 Jur. 1007—Q.B., referred to, Montypenny v. Montypenny (1861) 31 L. J. Ch. 269, 9 H. L. Cas. 114—H. L. (C.), applied, Heath v. Creaklock (1874) 44 L. J. Ch. 157; L. R. 10 Ch. 22, 31 L. T. 650.—C.A. CAIRNS, L.C., JAMES and MELLISH, L.JJ.

Right v. Bucknell and Bensley v. Burden (*supra*), discussed.
General Finance Mortgage and Discount Co. v. Liberator Permanent Building Society (1878) 10 Ch. D. 15; 39 L. T. 400, 27 W. R. 210—JESSEL, M.R.

Right v. Bucknell and General Finance, &c. Co. v. Liberator Building Society, applied.
Onward Building Society v. Smithson (1892) [1893] 1 Ch. 1, 41 W. R. 53.—C.A. LINDLEY, BOWEN and A. L. SMITH, L.JJ.

Doe d. Lumley v. Scarborough (Earl) (1835) 4 L. J. K. B. 172; 3 A. & E. 2, 4 N. & M. 724—K.B.; *reversed*, *nom.* Scarborough (Earl) v. Doe d. Savile (1836) 6 L. J. Ex. 270, 3 A. & E. 897—EX. CH.

3 BY MATTERS IN PARS.

Pickard v. Sears (1887) 6 A. & E. 469, 2 N. & P. 488, 45 R. R. 538; *followed*, Gregg v. Wells (1889) 8 L. J. Q. B. 193, 10 A. & E. 90, 2 P. & D. 296, 50 R. R. 347—Q.B., *distinguished*, Sanders v. Hodgson (1839) 9 L. J. Q. B. 81; 10 A. & E. 472; 2 P. & D. 485, 50 R. R. 485.—Q.B.

Pickard v. Sears and Gregg v. Wells, judgments qualified.
Freeman v. Cooke (1848) 18 L. J. Ex. 114; 2 Ex. 654, 6 D. & L. 187; 12 Jur. 777—PARKER, B. (for the Court).—*Id.* *see post*, col. 1020.

Pickard v. Sears and Freeman v. Cooke, discussed and not applied.
Howard v. Hudson (1868) 22 L. J. Q. B. 341; 2 El. & Bl. 1; 17 Jur. 855, 1 W. R. 325.—Q.B., Jorden v. Money (1854) 23 L. J. Ch. 865; 5 H. L. Cas. 185 (*post*, col. 1017).

Pickard v. Sears, report corrected.
Bill v. Richards (1857) 5 Jur. (N.S.) 520; 26 L. J. Ex. 409; 2 H. & N. 311; 6 W. R. 650.
POLLOCK, C.B.—In the copy of 6 A. & E. which belongs to the Court of Ex., some one, probably one of the Barons, has corrected the report of the judgment of *Pickard v. Sears*, by putting in the margin "wilfully induces," instead of "wilfully induces," another to believe.—p. 522

Pickard v. Sears, qualified.
Simpson v. Accidental Death Insurance Co.

(1857) 26 L. J. C. P. 289, 2 C. B. (N.S.) 257
3 Jur. (N.S.) 1079

WILLIAMS, J.—The rule in *Pickard v. Sears* is commented on in *Freeman v. Cooke*, which must now be taken as laying down the governing rule.—p. 296.

Pickard v. Sears and Freeman v. Cooke (*supra*), discussed.
Oluke v. Hart (1858) 27 L. J. Ch. 415; 11 L. Cas. 633, 5 Jur. (N.S.) 447—11 L. (C.).

Pickard v. Sears, applied. And see post.
Cornish v. Abington (1859) 28 L. J. Ex. 262
4 H. & N. 549, 7 W. R. 504.—EX.

Pickard v. Sears and Freeman v. Cooke, no applied. Swan v. North British Australasian Co. (1863) 32 L. J. Ex. 273; 2 H. & C. 175; 10 Jur. (N.S.) 102—EX. CH.; applied, Bahia and San Francisco Ry. In re (1868) 37 L. J. Q. B. 176, L. R. 3 Q. B. 584, 9 B. & S. 811, 18 L. T. 467
16 W. R. 862—Q.B.

Pickard v. Sears, not applied. Colonial Bank v. Carly (1890) 60 L. J. Ch. 131; 15 App. Cas. 267
63 L. T. 27; 39 W. R. 17.—H.L. (S). MALE
BURY, L.C., LORDS WATSON, BRAMWELL, and HERSHELL, applied. Harrison, Ex parte Bentley & Co., In re (1893) 69 L. T. 204.—C.A.

Freeman v. Cooke (*supra*), *dictum approved*.
McKenzie v. British Linen Co. (1881) 6 App. Cas. 82, 44 L. T. 431, 29 W. R. 477.—H. L. (S). SELBORNE, L.C., LORDS BLACKBURN and WATSON.
LORD BLACKBURN.—The principles which have assumed to be law have been recognised in England ever since the clear judgment of Parke, B. in *Freeman v. Cooke*. The Scottish cases cited at your lordships' bar show that those principles have not been so clearly recognised in Scotland.—p. 101.

LORD WATSON.—The question whether a forged bill has or has not been adopted by the person whose signature is forged, is in reality an issue of fact and not of law. Still, adoption of a bill may be matter of legal inference from certain ascertained facts; and in the present case the inference which has been drawn by the Court below, adversely to the appellant, appears to depend upon the fact, that after he came to know in July that the second bill had been discounted with the bank, he (the appellant) kept silence, or at least did not inform the bank of the forgery of his own name until a fortnight or thereby had elapsed. The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in several carefully chosen language by Lord Wensleydale in *Freeman v. Cooke*,—p. 109. [His lordship also discussed the Scottish cases.] *And see post*.

***Freeman v. Cooke, referred to.**
Scarfe v. Jardine (*post*, col. 1021).

Freeman v. Cooke, approved.
Miles v. McIlwraith (1883) 8 App. Cas. 120
52 L. J. P. C. 17, 48 L. T. 669, 31 W. R. 561.—P.C.

LORD BLACKBURN (for self, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE).—The principle on which a person, having

clothed an agent with apparent general authority, but restricted it by secret instructions, is bound (if the other party chooses to hold him so) to one who, in ignorance of the restrictions, contracts through the agent, on the faith of the agent having the authority he seems to have, is well explained in *Freeman v. Cooke*. The principal does not actually contract, but the person, who thought he did, has the option to preclude him from denying that he contracted, if the case is brought within the very accurate statement of the law by Parke, B. (on p. 663): "If the person means his representation to be acted upon, and it is acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usages of trade or otherwise to disclose the truth, may often have the same effect"—p. 133.

M'Kenzie v. British Linen Co (*supra*, col. 1016), *distinguished*.

Ogilvie v. West Australian Mortgage and Agency Corporation (1896) 65 L. J. P. C. 46, [1896] A. C. 257; 74 L. T. 201.—p. 6.

LORD WATSON (for self, LORDS ROBBESON and DAVEY and SIR R. COCHRAN).—The ground upon which the plea of estoppel rested in these cases [*M'Kenzie v. British Linen Co.* and similar cases] was the fact that the customer, being in the exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced. Here, an agent of the bank had earlier and better information as to the forgeries than the customer himself.—p. 60.

Jorden v. Money (1854) 23 L. J. Ch. 865; 5 H. L. Cas. 185.—H. L. (S.). CRANWORTH, L.C. and LORD BROUGHAM, LORD ST. LEONARDS dissenting, *reversing* S. C. *nom* *Money v. Jorden* (1852) 21 L. J. Ch. 893; 2 De G. M. & G. 318.—KNIGHT BRUCE, L.J., CRANWORTH, L.J. dissenting, *observed on*—*And see* col. 1019.

Piggott v. Stratton (1861) 29 L. J. Ch. 1, 1 De G. & J. 33, 6 Jur. (N.S.) 129, 1 L. T. 111; 8 W. R. 18. *And see* col. 1020.

CAMPBELL, L.C.—I am bound to suppose this case to have been properly decided by the majority of the members of the House who voted upon it. But, in considering the doctrine of law which is established, I must look to the facts which those who decided it considered to be proved by the evidence. I must look at that evidence and see what different inferences are to be drawn from it, and that the law laid down is accommodated to those inferences. The majority of the lords thought that nothing more was proved than the declaration of a present intention not to enforce the bond. Therefore, it is not legitimate reasoning after comparing the evidence there with the evidence in this case, to argue that there, as much as here, a positive assertion of a fact had been made. The doctrine there laid down and acted upon was, that where a person possesses a legal right a Court of equity will not interfere to restrain him from enforcing

it, though between the time of its creation and that of his attempt to enforce it he has made representations of his intention to abandon it. This is the *ratio decidendi*, and this only is binding upon us. We are not called upon to give any opinion upon the point of law upon which the law lords were divided, as to the difference between a misrepresentation of a fact as it actually existed, and a misrepresentation of an intention to do or to abstain from doing an act which would lead to the damage of the party thereby induced to do an act on the faith of the representation. Taking the law as there laid down, that a mere expression of intention, although acted upon, is no ground for equitable interference, we are to say whether in this case, considering the evidence, we come to the conclusion that there was here a mere expression of an intention not to do an act.—p. 10. KNIGHT BRUCE and TURNER, L.J.J. concurred.

Hammerley v. De Biel (1845) 12 Cl. & F. 45.—LYNDHURST, L.C., LORDS BROUGHAM and CAMPBELL, *affirming* S. C. *nom*. *De Biel v. Thompson*, 3 Beav. 463.—H. R., *distinguished*, *Kay v. Crook* (1857) 3 Sm. & G. 407; 3 Jur. (S.S.) 104, 5 W. R. 220.—V.-C.: *applied*, *Prole v. Ready* (1860) 29 L. J. Ch. 721, 2 Giff. 1, 5 Jur. (S.S.) 1882; 1 L. T. 309, 8 W. R. 131.—STUART, V.-C. *And see* col. 1020.

Jorden v. Money and *Hammerley v. De Biel*, *considered*—*And see* *post*, col. 1019.

Loffus v. Maw (1862) 32 L. J. Ch. 49, 3 Giff. 604; 6 L. T. 344; 10 W. R. 513.

STUART, V.-C.—Although the decision in that case is no doubt binding, it cannot be considered as a reversal of the decision of the H. L. in *Hammerley v. De Biel*, and the proposition attributed to Lord Cranworth in the printed report, that a statement or representation of what a person intends or does not intend is not sufficient, seems irreconcilable with the decision of the H. L. in *Hammerley v. De Biel*, and with the law as laid down by all judges of the highest authority. It is remarkable that *Hammerley v. De Biel* was not referred to by any of the counsel or law lords in *Jorden v. Money*.—p. 51. *And see* *post*, col. 1020.

Hammerley v. De Biel, *distinguished*.

British and American Steam Navigation Co., In re, Ward's Case (1870) L. R. 10 Eq. 659, 22 L. T. 695; 18 W. R. 910.—STUART, V.-C.

Hammerley v. De Biel, *applied*.

Caton v. Caton (1876) 36 L. J. Ch. 886, 1 L. R. 2 H. L. 127.—H. L. (S.) CHELMSFORD, L.C., LORDS WESTBURY and COLONSAI, LORD CRANWORTH dissenting, *affirming* (1866) 35 L. J. Ch. 292, 12 Jur. (S.S.) 171; 14 L. T. 34; 14 W. R. 267.—CRANWORTH, L.C., *who reversed* (1865) 34 L. J. Ch. 564, 12 L. T. 532, 18 W. R. 761.—STUART, V.-C., *observed on*—*And see* *post*, col. 1020.

Gulliver, In re, Stroughill v. Gulliver (1856) 2 Jur. (N.S.) 701; 4 W. R. 634.—STUART, V.-C., *explained*.

Williams v. Williams (1868) 37 L. J. Ch. 854; 18 L. T. 785.

STUART, V.-C.—I have stated that the law on this subject is perplexed by authorities, but my mind is as clear on the weight of those authorities as possible. I think that Lord Cottenham

and the H. L. in *Hammersey v. De Biel*, through Lord Brougham and Lord Campbell, have, with the utmost care, stated the doctrine as it really ought to prevail in this Court. Lord Cottenham, in that case, when it was before him as L. C., said, "A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realising such representation." That I conceive to be an accurate statement of the equitable principle which

would lead to a situation after the contract different from what would have existed if the representations had not been made, and then persons making those representations shall, so far as the power of a Court of equity extends, be treated as if the representations were true, and shall be compelled to make them good; but those must be representations concerning existing facts.

The limits of that doctrine, and the distinction between it and a contract, were carefully examined, and well pointed out in the judgment given by Lord Cranworth in this House in *Jorden v. Money*, where, after referring to

Brougham and by Lord Campbell in *Hammersey v. De Biel*. There are, moreover, subsequent cases in this Court in which that of *Hammersey v. De Biel* has been followed. . . . To say that in *Guthrie, In re*, I departed in the least from the doctrine laid down by Lord Cottenham in *Hammersey v. De Biel* is a mistake. Indeed I referred to *Hammersey v. De Biel* . . . and I considered the evidence there adduced before me to be too loose and not specific enough as to the sum, and insufficient to prove that the representation had been made to the proper person.—p 867

Jorden v. Money (*supra*, col 1017) and *Thompson v. Simpson* (1870) 39 L. J. Ch. 857, L. R. 5 Ch. 659; 18 W. R. 1090.—HATHERLEY, LC and JAMES, LJ.; *reversing* L. R. 9 Eq. 497, 22 L. T. 898; 18 W. R. 964.—STUART, V.-C., *approved* Citizens' Bank of Louisiana v First National Bank of New Orleans (1878) 43 L. J. Ch. 269; L. R. 6 H. L. 852; 22 W. R. 191.

SELBORNE, L.C.—I apprehend that nothing can be more certain than that the doctrine of equitable estoppel by representation is a wholly different thing from contract or promise or equitable assignment, or anything of that sort. The foundation of the doctrine, which is a very important one, and certainly not one likely to be departed from, is this; that if a man dealing with another for value makes statements to him as to existing facts, which being so stated would affect the contract, and without reliance on which, or without a statement of which, the party would not have entered into the contract, and which being otherwise than as they were stated,

—H. L. (L.) SELBORNE, L.C., LORDS OHAGAN, BLACKBURN and FITZGERALD; *affirming* 8 C. 466, 7 Q. B. D. 174; 45 L. T. 334, 29 W. R. 656.—C. A. BRAMWELL, DAGGALLAY and BRETT, LJJ.; *which reversed* (1880) 49 L. J. Ex. 801, 5 Ex. D. 298, 43 L. T. 319; 29 W. R. 105.—STEPHEN, J., and which was explained in *Humphreys v. Glean* (1882) 52 L. J. Q. B. 140; 10 Q. B. D. 148, 48 L. T. 60, 47 J. P. 241.—C. A. DAGGALLAY and BRETT, LJJ.

SELBORNE, L.C.—It was admitted, in the argument at the bar, that the appellant had endeavoured to bring her case within the supposed authority of *Laffus v. Maw*, decided by Stuart, V.-C. (under circumstances not dissimilar) on the doctrine of representation; for which purpose the V.-C. relied upon some expressions used by Lord Cottenham in *Hammersey v. De Biel* (12 Cl. & F. 45, at p. 62, n.), and considered himself at liberty to disregard the reasons assigned by Lord Cranworth and Lord Brougham for the later decision of this House in *Jorden v. Money*. Stephen, J. and the C. A. (rightly in my opinion) took a different view. I have always understood it to have been decided in *Jorden v. Money*, that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts.—a distinction which is illustrated by such cases as *Prole v. Soudy* (*supra*, col 1018) and *Piggott v. Stratton* (*supra*, col 1017). *Hammersey v. De Biel* was a case of contract for valuable consideration, duly signed so as to fulfil the requirements of the Statute of Frauds, in the view both

of Lords Langdale and Cottenham in Ch., and of Lord Campbell in the H. L. Those decisions are consistent with each other. *Hammersley v. De Biel* does not justify, and *Jorden v. Money* is irreconcilable with, the reasons stated by the V.-C. for his judgment in *Loffin v. May*—p. 473.

LORD O'HAGAN.—I quite agree that the authorities on which that ruling [of the V.-C. in *Loffin v. May*] was based, do not sufficiently sustain it. This case must be dealt with not on the ground of representation, but as one of contract, having relation to some binding engagement for future conduct, and not to a responsibility created by any misleading averment of existing facts.—p. 483

Jorden v. Money (*supra*, col 1017), *applied* Chadwick v. Manning (1896) 65 L. J. P. C. 42; [1896] A. C. 231—p. c

LORD MACNAGHTEN (for self, LORDS ROBERTS, MORRIS and SIR R. COCHRAN).—The doctrine to that case, the accuracy of which was not challenged by the learned counsel for the respondents, is in the following words:—"Where a person possesses a legal right, a Court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will equity interfere, even though the parties to whom these representations were made have acted on them, and have in full belief of them entered into irrevocable engagements. To raise an equity in such a case, there must be a misrepresentation of existing facts, and not of mere intention"—p. 45.

Citizens' Bank of Louisiana v. First National Bank of New Orleans (*supra*, col. 1019), *discussed* Lovett v. Lovett (1897) 67 L. J. Ch. 20; [1898] 1 Ch. 82, 77 L. T. 650; 46 W. R. 105

ROMER, J.—The principle of equitable estoppel has been clearly stated, if I may say so, by Lord Selborne in *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, to the effect that the doctrine is not applied in favour of a volunteer. But in this deed—which is what is called an innocent assurance—I can find no estoppel either in the terms of the conveyance, nor of the recital—p. 22.

Soar v. Jardine (1882) 51 L. J. Q. B. 612; 7 App. Cas. 345, 47 L. T. 258, 30 W. R. 893—H. L. (R.) SELBORNE, L.C., LORDS BLACKBURN, WATSON and BLANWELL. *applied*, Pell v. Parkin (1882) 52 L. J. Q. B. 69, 47 L. T. 351—MAYES, J., JONES, J., ASHWIN (1883) 1 Cab. & E. 159.—CAVE, J., *referred to*, Blacks v. Girdwood (1885) 13 Rettie 243, Griffith v. Pound (1890) 69 L. J. Ch. 522, 45 Ch. D. 553.—STIRLING, J., Longman v. Hill (1891) 7 Times L. R. 639.—HMITH, J. British Homes Assurance Corporation v. Paterson (1902) 71 L. J. Ch. 872, [1902] 2 Ch. 104, 86 L. T. 826; 50 W. R. 612.—FARWELL, J.

Burrows v. Lock (1805) 10 Ves. 470, 8 R. R. 33, 866.—GRANT, M.R., *followed*.

Slim v. Croucher (1860) 29 L. J. Ch. 278; 1 De G. & F. 518, 6 Jur. (N.S.) 437; 2 L. T.

108; 8 W. R. 847.—CAMPBELL, L.C., KNIGHT BRUCE and TURNER, L.JJ.

Burrows v. Lock and Slim v. Croucher, *applied*, Ramshute v. Bolton (1889) 58 L. J. Ch. 594, L. R. 8 Eq. 294, 21 L. T. 51; 17 W. R. 986.—MALINS, V.-C., Hill v. Lane (1870) 40 L. J. Ch. 41, L. R. 11 Eq. 215, 23 L. T. 547; 19 W. R. 194.—STUART, V.-C.; *applied*, Brownlie v. Campbell (1880) 5 App. Cas. 925.—H. L. (R.), *discussed*, Low v. Bouvier (1891) 60 L. J. Ch. 694, [1891] 3 Ch. 82; 65 L. T. 533, 40 W. R. 50—C.A. *and see post*.

Slim v. Croucher, *applied* Conolly v. Gorman (1897) [1898] 1 Ir. R. 20, 68.—C.A. ASHBURNER, L.C., FITZGERALD, BARRY and WALKER, L.JJ.

Low v. Bouvier (*supra*), *applied*, Wynt, In re, White v. Ellis (1891) 67 L. T. 214.—STIRLING, J., Tillett, In re, Lee v. Wilson (1891) 61 L. J. Ch. 36, [1891] 3 Ch. 80, 65 L. T. 781, 40 W. R. 204.—CHITTY, J., *referred to*, Le Loeve v. Gould (1893) 62 L. J. Q. B. 353; [1893] 1 Q. B. 491, 4 R. 274, 68 L. T. 626, 41 W. R. 468, 57 J. P. 484—C.A., *approved*, Whitechurch (Geo.) Ltd v. Cavanagh (1901) 71 L. J. K. B. 400, [1902] A. C. 117, 85 L. T. 349; 50 W. R. 218.—H. L. (R.), Oliver v. Bank of England (1902) 71 L. J. Ch. 388, [1902] 1 Ch. 610, 86 L. T. 248; 50 W. R. 340, 7 Com. Cas. 89—C.A. v. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

Carr v. L. & N. W. Ry. (1873) 44 L. J. C. P. 109; L. R. 10 C. P. 307, 81 L. T. 785; 28 W. R. 747.—BRETT and DENMAN, JJ.; *approved*, Coventry v. G. E. Ry. (1883) 52 L. J. Q. B. 694; 11 Q. B. D. 776, 49 L. T. 641.—C.A. BRETT, M.R., LINDLEY and FRY, L.JJ., Seton v. Lafone (1887) 56 L. J. Q. B. 415; 19 Q. B. D. 68, 57 L. T. 647; 35 W. R. 749.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.; *not applied*, Foster v. Tyne Pontoon and Dry Docks Co (1898) 68 L. J. Q. B. 60.—COLLIER, J.; *applied*, Howson, Ex parte, Hy. Bentley & Co, In re (1895) 69 L. T. 204—C.A.; *adopted*, Dixon v. Kennaway & Co (1900) 69 L. J. Ch. 501; [1900] 1 Ch. 838, 82 L. T. 527, 7 Manson 446.—FARWELL, J., Whitechurch (Geo.) Ltd v. Cavanagh (1901) 71 L. J. K. B. 400; [1902] A. C. 117, 85 L. T. 349, 50 W. R. 218.—H. L. (R.)

Walters, In re, Nelson v. Walters (1889) 61 L. T. 872.—KEKEWICH, J., *reversed on a different point*, (1890) 68 L. T. 328—C.A. COTTON, BOWEN and FRY, L.JJ.

Andrews v. Elliott (1855) 25 L. J. Q. B. 1; 5 Bl. & Bl. 502; 1 Jur. (N.S.) 1046—Q.B.; *affirmed*, (1856) 25 L. J. Q. B. 836; 6 Bl. & Bl. 338, 2 Jur. (N.S.) 668; 4 W. R. 527.—EX. CH. *unmentioned on*.

Davies v. Price (1864) 34 L. J. Q. B. 8, 11 L. T. 203, 12 W. R. 1009—EX. CH. *followed*.

Roughland v. Lowndes (1864) 17 C. B. (N.S.) 514; 38 L. J. C. P. 337, 10 Jur. (N.S.) 850; 12 W. R. 1010—EX. CH.; *reversing* (1863) 33 L. J. C. P. 25; 18 C. B. (N.S.) 173, 4 Jur. (N.S.) 48; 9 L. T. 479; 12 W. R. 165.—BYLES and KEATINGE, JJ.

EVIDENCE.

1. ADMISSIONS, DECLARATIONS AND ENTRIES
2. PRESUMPTIONS
3. DOCUMENTS.
4. PAROL.
5. SECONDARY.
6. PRODUCTION AND ADMISSION.
7. WITNESSES.
8. COMMISSION TO TAKE
9. PERFECTION OF TESTIMONY
10. AFFIDAVITS
11. COSTS OF EVIDENCE.

1. ADMISSIONS, DECLARATIONS AND ENTRIES.

Biggs v. Lawrence (1789) 3 Term Rep 154, 1 R. R. 740, *considered*
Bauman v. Rademus (1798) 7 Term Rep 663, 2 Esp. 653

Smith v. Morgan (1839) 2 M. & Rob. 257, *overruled*.
Mellers v. Brown (1863) 1 H. & C. 691; 32 L. J. Ex. 188, 7 L. T. 795, 9 Jur. (N.S.) 416, 11 W. R. 420.—EX.

Lutterell v. Reynell (1670) 1 Mod. 282, *held overruled*
Rex v. Parker (1783) 3 Dougl. 242.

Walker v. Breadstock (1795) 1 Esp. 458, *overruled*.
Papendick v. Bridgwater (1855) 6 El. & Bl. 166; 24 L. J. Q. B. 289; 1 Jur. (N.S.) 667; 3 W. R. 490.

ERLE, J.—I understand that case, as my lord (Campbell) and my brother Coleridge do; and I think it better not to attempt to explain it, but to lay down that it cannot be sustained.—p. 181

Malcomson (or Malcolmson) v. O'Dea (1863) 10 H. L. Cas. 593; 9 Jur. (N.S.) 1136, 9 L. T. 98, 12 W. R. 178.—H.L. (IR), *followed*

Edgar v. English Fisheries Commissioners (1870) 23 L. T. 732, 736.—O.P.

Malcomson v. O'Dea, *applied by* LORD BLACKBURN
Goodman v. Saltash (Corporation) (1882) 52 L. J. Q. B. 193, 7 A. C. 683, 651, 48 L. T. 239, 31 W. R. 293, 47 J. P. 276.—H.L. (R). LORDS SELBORNE, L.C., CAIRNS, WATSON, BRAMWELL and FITZGERALD; LORD BLACKBURN *dissenting*

Malcomson v. O'Dea, *followed*.
Neill v. Devonshire (Duke) (1882), 8 A. C. 135, 138; 51 W. R. 622.—H.L. (IR). LORDS SELBORNE, L.C., O'HAGAN, BLACKBURN and WATSON.

Malcomson v. O'Dea, *principle applied*.
Papendick v. Bridgwater (supra), *distinguished*.
Blandy-Jenkins v. Dunraven (Earl) (1890) 68 L. J. Ch. 589, [1899] 2 Ch. 121; 81 L. T. 209.—O.A. LINDLEY, M.R., SIR F. H. JENNE, and ROMER, L.J.

LINDLEY, M.R.—Now, is this an ancient document which purports upon the face of it to show exercise of ownership? I say unquestionably yes, it is not an act of ownership, but it shows that there was an act of ownership. On

that ground, it seems to me, it is admissible. For the reasons I have given I think that *Papendick v. Bridgwater* has no application. This document is not an admission by the tenant against his landlord, it comes under another head altogether.

Bloxam v. Elsee (1825) 1 Car. & P. 558, Ry. & M. 187, 30 R. R. 275, *overruled*.
Slatterie v. Pooley (1840) 6 M. & W. 664, 1 H. & W. 16, 10 L. J. Ex. 8, 4 Jur. 1038

PARKE, B.—The authority of Lord Tenterden at Nisi Prius, in the case of *Bloxam v. Elsee*, is no doubt to the contrary, but since that case, as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing; for instance, a statement by a party, or one under whom he claims, that an estate had been conveyed to or from such person, or that such person filled the character of assignee, which could only be by deed, or the like (see *Dunkinson v. Charnock*, 1 B. & Ald. 677). Any one experienced in the conduct of causes at Nisi Prius, must know how constant the practice is. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable.—p. 668.

Slatterie v. Pooley, *followed*.
Howard v. Smith (1841) 3 Scott (N.B.) 574; 3 Man. & G. 254; 10 L. J. C. P. 245.

Slatterie v. Pooley, *adopted*
Doe d. Groves v. Groves (1847) 16 L. J. Q. B. 297; 10 Q. B. 486; 11 Jur. 558.—Q.B.

Slatterie v. Pooley, *followed*
Boulter v. Peplow (1860) 19 L. J. C. P. 190; 9 C. B. 493; 14 Jur. 248.—C.P.

Slatterie v. Pooley, *not to be extended*.
Sanders v. Karnoll (1858) 1 V. & F. 356
CHANNELL, B.—The doctrine contained in this case is one not to be extended.—p. 357.

Slatterie v. Pooley, *followed*
Martin v. Doherty (1880) 6 L. R. Ir. 194.—C.P.D.

Aveson v. Kinnaird (1805) 6 East 188, 195; 2 Smith 286; 8 R. R. 456; and **Wright v. Littler** (1761) 3 Burr 1244; 1 W. R. 346, *overruled*

Stobart v. Dryden (1836) 1 M. & W. 615, 2 Gale 146; 5 L. J. Ex. 218

PARKE, B. (for the Court)—The first case referred to is that of *Wright v. Littler*, in which it appeared that a witness for the plaintiff, on his cross-examination by defendant's counsel, stated that the subscribing witness to an instrument, the validity of which as a will formed a part of the defendant's case, acknowledged in his last illness, on producing as a true document a prior will which he had in his custody, that the instrument in question was forged by himself. No objection was taken to the evidence at the trial. On a motion for a new trial . . . he (Lord Mansfield) says "That the account given in the last moments of the subscribing witness was proper, even though it had been upon an examination of the plaintiff, and as

the account was a confession of a great enormity, and as he could be under no temptation to say it but to do justice and ease his conscience, he was of opinion that it was proper to be left to the jury, but, independently of that declaration, he thought fraud and forgery were apparent." From this report it is clear that Lord Mansfield by no means lays it down distinctly as an established rule of evidence that such a declaration, even when made *in extremis*, is admissible.

On the authority of this case, Mr Justice Heath, at Nisi Prius, admitted evidence that the attesting witness in his dying moments begged pardon of Heaven for having been concerned in forging the bond or will, and Lord Ellenborough, who states that decision, and apparently with approbation, twice, in 6 East 195, and 1 Camp. 211, says that it was admitted on the ground that, as the subscribing witness might have been cross-examined as to the fact, his declaration of the fact might have been proved, in contradiction to the presumption of a due execution of the bond from the proof of the handwriting of the subscribing witness; and he also adds, that the propriety of the reception of the evidence was not questioned. This ruling of Mr Justice Heath was also referred to by Mr Justice Bayley in *Doe v. Ridgway* (4 B. & Ald. 55). Such is the state of the authorities, and when it is considered in how qualified a manner the opinion of Lord Mansfield, the origin and foundation of the others, is expressed, and when it is recollected that both then and at the time of the *nisi prius* trial before Mr. Justice Heath an opinion prevailed (which is now properly exploded) that any declaration *in extremis* was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath, which consideration certainly had an influence on the mind of Lord Mansfield at least, it is impossible to say that there is any such weight of authority as to induce us to hold that this case is established and recognised as an exception from the great principle of our law of evidence that facts, the truth of which depends on parole evidence, are to be proved by testimony on oath.

Sussex Peckage Case (1844) 11 Cl. & F. 85.

See

Coppin, In re (1866) 36 L. J. M. C. 10, L. R. 2 Ch. 47, 53; Smith v. Blakey (1867) 36 L. J. Q. B. 156, L. R. 2 Q. B. 325, 332; Argos, Cargo, Ex (1873) L. R. 5 P. C. 134, 153; River Wear Commissioners v. Adamson (1877) 47 L. J. Q. B. 135; 2 App. Cas. 743, 778; Goodman's Trusts, In re (1881) 50 L. J. Ch. 425, 17 Ch. D. 265, 299; Lambert, In re (1886) 56 L. J. Ch. 122, Income Tax Commissioners v. Fensel (1891) 61 L. J. Q. B. 265; [1891] A. C. 531, 543; Glass v. Patterson [1902] 2 Ll. R. 660, 667 — K. B. D.

Bath (Earl) v. Batherson (1694) 5 Mod. 9, disapproved

Foster (Doe d.) v. Darby (Earl) (1834) 1 A. & E. 783; 8 N. & M. 782; 3 L. J. K. B. 191.

DENMAN, C.J. — That case is not stated clearly enough to be relied upon. — p. 788

Standen v. Standen (1791) 1 Peake 45, disapproved

Sussex Peckage Case (1844) 11 Cl. & F. 85, 8 Jun. 798. — H. L. (S.).

O. C.

LORD BROUGHAM — Lord Kenyon never could have entertained the opinion or held the doctrine imputed to him in the case of *Standen v. Standen*. — p. 112

Prosecutor-General v. Williams (1862) 31

L. J. P. 157, followed.

Petion, In re, Fenson v. Att.-Gen. (1886) 53 L. T. 707. — CHITTY, 7.

Butler v. Mountgarret (Viscount) (1850) 7

H. L. Cas. 633. See

Friedrick v. Att.-Gen. (1874) 44 L. J. Mnt. 1, L. R. 3 P. 270, 32 L. T. 39 — MAT. COURT.

Walker v. Beauchamp (Countess) (1843) 6

Cur. & P. 552, considered

Reilly v. Fitzgerald (1843) 1 Dr. 122, 6 Ir. Eq. R. 335.

Walker v. Beauchamp (Countess), held over-ruled.

Shekden v. Patrick (1860) 2 Sw. & T. 170, 30 L. J. Mat. 217; 6 Jur. (S.S.) 1103, 3 L. T. 592, 9 W. R. 285.

[Counsel objected to the admissibility of a letter, and cited the description of Alderson, B., of the commencement of a controversy (in which sense *in nota* was to be taken in such cases), as being the arising of a state of facts, on which the claim is founded, without anything more.]

THE COURT. — That opinion was repudiated by Sir E. Sugden, when Lord Chancellor of Ireland (*Reilly v. Fitzgerald*, *supra*) — p. 187.

Dunraven (Earl) v. Llewellyn (1850) 19

L. J. Q. B. 888, 15 Q. B. 791, 14 Jur. 1089. — EX CH., distinguished.

Warwick v. Queen's College, Oxford (1871) 40 L. J. Ch. 780, L. R. 6 Ch. 716, 25 L. T. 254, 19 W. R. 1008. — L. C.

Dunraven (Earl) v. Llewellyn and Warwick

v. Queen's College, Oxford, observed upon.

Evans v. Merthyr Tydfil Urban District Council (1896) 65 L. J. Ch. 175, [1899] 1 Ch. 211, 70 L. T. 578. — O. A. LINDLEY, M.R., CHITTY and WILLIAMS, L.J.

LINDLEY, M.R. — The question left to the jury as stated in the issue is whether the piece of land therein described "is common land or subject to any commonable rights either of the commoners of the parish of Cantref or of the commoners of the parish of Llanfynyach." In other words, whether the piece of land in question is part of any common over which any one in either of those parishes has any right of common. This is a question of such general interest in the locality as to let in evidence of reputation. *Dunraven (Earl) v. Llewellyn*, . . . is no authority to the contrary, for the pleadings in that case show that the issue there was simply whether a piece of land was the plaintiffs' or the defendant's. *Warwick v. Queen's College, Oxford*, shows that *Dunraven (Earl) v. Llewellyn* does not go so far as is sometimes supposed.

Reg. v. Lower Hayford, 2 Sm. L. C. p. 300, 6th ed., followed.

Gallop (Doe d.) v. Wovles (1833) 4 M. & Rob. 261, disapproved.

Taylor v. Witham (1876) 45 L. J. Ch. 798, 3 Ch. D. 605, 24 W. R. 877.

33

JESSUP, M.B.—I adopt the view of Parke, B., in *Reg. v. Lower Heyford*, that it must be *prima facie* against interest, that is, the natural meaning of the entry, standing alone, must be against the interest of the man who makes it. Of course, if you show *altruism* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. . . . But then, it was said, you must have something to show, *prima facie*, the connection of the entry with the debt. Even assuming the rule could go so far as that, I do not understand that any judge has said that you must prove the debt incontestably. I do not suppose any judge has said that, though in *Dee v. Voiles*, Littledale, J. rejected evidence which I think ought to have been received. That was the case of a bill for repairs by a carpenter, with a receipt for the amount of it and it was said there was no evidence that the repairs had been done. It was not in favour of the interest of the carpenter, because he had given a receipt for the whole bill, and I see no reason why the entry was not fairly admissible. It proved that the carpenter had been paid for what work he had done. It appears to me to be clearly an entry against interest, and I so far prefer the decision of Parke, B. to the decision of Littledale, J.—p. 799.

Taylor v. Witham, followed

The Swiftness (1900) 82 L. T. 389; 0 Asp. M. C. 65.—JUNIOR, P.

Roe d. Brune v. Rawlings (1806) 7 East 279, 3 Smith 251, 8 R. R. 632, *referred to*.

Higham v. Ridgway (1808) 10 East 109, 10 R. R. 235

Roe d. Brune v. Rawlings, distinguished.
Reg. v. Birmingham Overseers (1861) 31 L. J. M. C. 63, 1 B. & S. 763, 8 Jur. (N.S.) 37, 5 L. T. 309, 10 W. R. 41—Q.B.

Higham v. Ridgway (1808) 10 East 109, 10 R. R. 235, *dictum disapproved*.
Gleadow v. Atkin (1833) 3 Tyrw. 289; 1 C. & M. 410; 2 L. J. Ex. 153.

"lifetime." That qualification is not to be found in any of the other books or cases in which the rule is laid down. The rule has always been generally laid down, and I must state that I doubt whether that expression was ever used by me; but if it was, and if it bears the meaning ascribed to it by Mr. Crosswell, then *Darrington v. Scarle* (3 B. & P. C. 593) and other cases in the House of Lords are directly against such a qualification—p. 302.

Higham v. Ridgway, applied

Reg. v. Birmingham Overseers (1861) 31 L. J. M. C. 63, 1 B. & S. 763, 8 Jur. (N.S.) 37, 5 L. T. 309, 10 W. R. 41—Q.B.

Higham v. Ridgway and Reg. v. Birmingham Overseers, applied

Reg. v. Exeter Governors (1869) 38 L. J. M. C. 126; 1 L. R. 4 Q. B. 311, 10 B. & S. 133, 20 L. T. 693, 17 W. R. 850—Q.B.

Goss v. Watlington (1821) 3 Bl. & R. 132; 6 Moore 355, and *Whitnash v. George* (1828) 8 B. & C. 556; *nom. Whitmarsh v. George*, 7 L. J. (O.S.) K B. 57, *considered*.
Middleton v. Melton (1820) 10 R. & C. 317, 8 L. J. (O.S.) K B. 213, 5 M. & Ry. 264

Knight v. Waterford (Marquis) (1810) 4 Y. & C. 283, 10 L. J. Ex. Eq. 57; 5 C. 5 Jun. 88, *disapproved*

Reg. v. Exeter Guardians (1869) 10 B. & S. 433, 38 L. J. M. C. 126, 1 L. R. 4 Q. B. 311, 20 L. T. 693, 17 W. R. 850—Q.B.

LUSH, J.—I cannot understand the ruling of Alderson, B. in *Knight v. The Marquis of Waterford*, according to which items on one side of an account would be admitted and items on the other rejected, though I could understand both being rejected on the ground that they were not declarations against interest.—p. 436.

2. PRESUMPTIONS

Doe d. Knight v. Nepean (1833) 2 L. J. K B. 150, 5 B. & Ad. 86; 2 N. & M. 219—K.B.; 5 C. *nom. Nepean v. Doe d. Knight* (1837) 7 L. J. Ex. 355, 2 M. & W. 891—EX. CH. See

Rex v. Harborne (Inhabitants) (1855) 4 L. J. M. C. 19, 2 A. & E. 549, 4 N. & M. 341; 1 H. & W. 36.—Q.B. [see extract, *post*, col. 1197], *Benham's Trust*, in re (1867) 36 L. J. Ch. 502, 1 L. R. 4 Eq. 116, 419; *Reg. v. Lumley* (1869) 38 L. J. M. C. 126, 1 L. R. 4 Q. B. 311, 10 B. & S. 133, 20 L. T. 693, 17 W. R. 850—Q.B.

Benham's Trusts, in re (1867) 36 L. J. Ch. 502; 1 L. R. 4 Eq. 416, 16 L. T. 349, 15 W. R. 741.—V.C., *Lambe v. Orton* (1859) 29 L. J. Ch. 286; 6 Jur. (N.S.) 61; 1 L. T. 290, 8 W. R. 111—V.C., and *Dunn v. Snowden* (1862) 2 Drew. & Sm. 201; 32 L. J. Ch. 104, 7 L. T. 558, 11 W. R. 160—V.C., *overruled*.

Phend's Trusts, in re (1870) 1 L. R. 5 Ch. 139;

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30 L. J. Ch. 316; 22 L. T. 111; 18 W. R. 303.
—*L. J.*, reversing *v. o.*

GIFFARD, *l. j.*.—The case decided by Malins, V.-C., was *In re Benham's Trusts*. He adopted and acted on the decisions of Kindersley, V.-C., [in the other three cases mentioned above], but went somewhat further, laying it down that "if you cannot presume death at any particular period during the seven years, then at the end or expiration of the seven years you must presume, for the first time, that the person was dead, and you must also presume that within that time he is alive." *In re Benham's Trusts* was appealed, and Balf. L. J., in November, 1867, discharged the Vice-Chancellor's order, and directed further inquiries, simply stating that there was no evidence for the Court to act upon, and that it was a case, not of presumption, but of proof (p. 144). The leading case, however, is one at law—viz., *Doe v. Noyes* . . . The Exchequer Chamber adopted the doctrine of the Court of Queen's Bench in these terms, viz.—"We adopt the doctrine of the Court of Queen's Bench—that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof." It is obvious from these passages that there is an inconsistency between that which the Courts of Queen's Bench and Exchequer Chamber laid down, and what I have quoted from the judgment of Malins, V.-C. as going beyond what was laid down by Kindersley, V.-C. Kindersley, V.-C., however, seems to have founded his opinion on certain portions of these two judgments (p. 147). Kindersley, V.-C., appears to have acted on the passages in both those judgments which are to the effect that the onus of proving the death lay on the plaintiff, because the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown. Those passages are not essential to the conclusions arrived at, or sound in point of reasoning (p. 149) . . . The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence. The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.—p. 152.

Corbishley's Trusts, In re (1880) 49 L. J. Ch. 269; 14 Ch. D. 846; 28 W. R. 536—*v. o.*, followed.

Tils, In re, Lampet v. Kennedy (1890) 74 L. T. 153—CHITTY, J.

Walker, In re (1871) 41 L. J. Ch. 219; L. R. 7 Ch. 120; 25 L. T. 775; 20 W. R. 171.—*L. J.*, applied.

Benjamin, In re, Neville v. Benjamin (1902) 71 L. J. Ch. 319; [1902] 1 Ch. 723; 86 L. T. 587.—JOYCE, J.

Wing v. Angrave (1860) 8 H. L. Cas. 183; 30 L. J. Ch. 65.—H. L. (E.); *s. o. u.*
Underwood v. Wing (1856) 4 De G. M. & G. 633; 3 Eq. R. 794; 24 L. J. Ch. 293, 1 Jur. (N.S.) 159, 2 W. R. 641.—*L. o.* and *l. j.*, followed.

Green's Settlement, In re (1865) 35 L. J. Ch. 252; L. R. 1 Eq. 288; 12 Jur. (N.S.) 70, 18 L. T. 541. 14 W. R. 192.—*v. o.*

Anderson v. Weston (1840) 6 Bing. (N.C.) 296; 8 Scott 583; 9 L. J. C. P. 194, and **Potes v. Glossop** (1818) 2 Ex. 191, commented on.

Batler v. Mountgairret (Viscount) (1859) 7 H. L. Cas. 633.

LORD WENSLEYDALE.—One observation I wish to make upon another part of the case to which my noble and learned friend has adverted—that is, to the admission of the letter from Moffatt. . . . It is perfectly true that under a decision pronounced by Bosanquet, J. in the Common Pleas (*Anderson v. Weston*), to which I adverted in the course of the argument, the practice has been to treat the date in a letter as its true date. This matter was under consideration in the Court of Exchequer at the time when my noble and learned friend opposite was a member of that Court in the case of *Potes v. Glossop*, where it was laid down by the judges that we were compelled, by the many cases which had been decided, to hold the date to be *prima facie* evidence as to the time of writing the letter, but we intimated our opinion very strongly—at least, I did, and I believe my noble and learned friend contented with me—that it would be proper to take the opinion of a superior Court by a bill of exceptions, if that point should ever become material. I observe that that case has been followed in one of two cases that are referred to in the note of that case of *Potes v. Glossop*—p. 646.

Armory v. Delamirie (1722) 1 Strange 504, observed upon.

White v. Mullett (1851) 20 L. J. Ex. 291; 6 Ex. 718.—EX. *Bridges v. Hawkesworth* (1851) 21 L. J. Q. B. 75, 15 Jur. 1079.—Q. B., and *Buckley v. Gross* (1863) 32 L. J. Q. B. 129, 9 Jur. (N.S.) 986, 7 L. T. 748; 11 W. R. 465.—Q. B.

Armory v. Delamirie, distinguished.

Whitworth v. Lloyd (1864) 10 H. L. Cas. 589; 33 L. J. Ch. 688; 10 Jur. (N.S.) 961, 10 L. T. 767.—H. L. (E.).

WESTBURY, L. C.—I confess I am unable to conceive the analogy between a client closing the mouth of his solicitor upon a question as to professional communications, and the conduct of the jeweller in *Armory v. Delamirie*, who, upon a mounted jewel which had been found being brought to him, took out the stones and returned the empty socket to the finder, and not producing the jewel at the trial of the action brought to recover its value, was made to pay in damages the value of a jewel of the purest water, which would fit the socket, upon the rule *omnis presumitur contra spoliatorem*. But a person who refuses to allow his solicitor to violate the confidence of the professional relation cannot be regarded in that odious light. The law has so great a regard to the preservation of the secrecy of this relation, that even the party himself cannot be compelled to disclose his own statements made to his solicitor with reference to professional business.—p. 591.

Armory v. Delamirie, applied.

Hammersmith and City Ry. v. Brand (1869) 39 L. J. Q. B. 265, L. R. 4 H. L. 171, 224; 21 L. T. 238, 18 W. R. 12.—H. L. (E.).

Armory v. Delamirie, referred to.

Thunton Election Case (1869) 21 L. T. 169.

Croton v May (1878) 9 Ch. D. 388; 39 L. T. 461, 27 W. R. 327.—*C.A. JAMES, BRETT and COTTON, L.J., and Hocking, in re, Michell v Lee* (1898) 67 L. J. Ch. 663; [1898] 2 Ch. 567, 79 L. T. 164, 47 W. R. 111.—*C.A. LINDLEY, M.R., CHITTY and COLLINS, L.J., distinguished.*

White, in re. White v. Edmond (1901) 70 L. J. Ch. 300, [1901] 1 Ch. 570; 81 L. T. 199; 49 W. R. 429.

BUCKLEY, J.—It appears to me that I can apply the principle of the cases relating to sisters also to widows who have had children. It is said that there are two cases to the contrary *Croton v May* is the first of these, it seems to me to be distinguishable. There the age was fifty-four years and six months, the lady had had no children, but the married life had practically been only about three years, for although she had been actually married for seventeen years, husband and wife had been separated for the first fourteen years. There the absence of capacity to bear children had not been sufficiently proved. The other case is *In re Hocking*. The principle there laid down is that the Court will not make the presumption for the purpose of depriving a living person of a possible interest. **LINDLEY, M.R.** says: "If property is given to A in the event of B having no children, and A claim that property before the death of B. My answer is, no, neither at law nor in equity, unless B's possible child is the only person who can deprive A of the property. When that is the case, the Court of Chancery has ordered funds under its control to be paid to A when satisfied that B, owing to her age, can have no child." The case before me is exactly within that exception. In my opinion *In re Hocking* does not apply in this case, and I hold that the plaintiffs are entitled to have the funds paid to them.

Taylor v. Barclay (1828) 2 Sm. 213, 7 L. J. (O.S.) Ch. 65; 29 R. R. 82; and **Thompson v. Powles** (1828) 2 Sm. 194, *applied.*

Foster v. Globe Venture Syndicate (1900) 69 L. J. Ch. 375, [1900] 1 Ch. 811; 82 L. T. 253.—**PANWELL, J.**

3. DOCUMENTS.

Public and Official

Wilberforce v. Hearfield (1877) 46 L. J. Ch. 584; 5 Ch. D. 709; 26 W. R. 861.—**JESSEL, M.R. distinguished.**

Smith v. Lister (1894) 64 L. J. Q. B. 164; 18 R. 226, 72 L. T. 20.

CHARLES, J.—The reception of this map in evidence was strenuously objected to, and *Wilberforce v. Hearfield* was cited. In that case the late Master of the Rolls held that a title map was not evidence of boundaries between two adjoining owners. I considered, however, that the case did not apply to the admissibility of such a map upon an issue raising a question of public or general right, and I accordingly received it in evidence.

Doe d. Patteshall v. Turford (1832) 3 B. & Ad. 890; 1 L. J. K. B. 262, *followed.*

Sturla v. Freccia (1880) 50 L. J. Ch. 86, 5 App. Cas. 623, 43 L. T. 209, 29 W. R. 217, 44 J. P. 812.—**H.L. (2).**

Sturla v. Freccia, applied.

Phillips v. Hudson (1867) 36 L. J. Ch. 301, L. R. 2 Ch. 213; 16 L. T. 221, 15 W. R. 370.—*L.C. distinguished.*

Evans v. Merthyr Tydfil Urban District Council (1898) 68 L. J. Ch. 175, [1899] 1 Ch. 241, 79 L. T. 578.—*C.A. LINDLEY, M.R., CHITTY and WILLIAMS, L.J.*

CHITTY, L.J.—The case is distinguishable from *Phillips v. Hudson*, where Lord Chalmersford, L.C., seemed to consider, although he did not actually decide the point, that a survey coming from the Augmentation Office was inadmissible in evidence on the ground that, although made on behalf of the Crown, it was just the same as if it had been made on behalf of a private owner. The survey there was not made, as here, under the requisitions of a public statute.

Armstrong v. Hewett (1817) 1 Price 216, 18 R. R. 707.—*EX. CH., followed.*

Bulder v. Bridges (1880) 54 L. T. 529; 34 W. R. 514.—**KAY, J.**

Hall's Estate, in re (1852) 22 L. J. Ch. 177; 9 Haec (App.) xvi, 17 Jur. 29, 2 De G. M. & G. 748, 1 W. R. 2, *report corrected.*

Porter's Trusts, in re (1856) 25 L. J. Ch. 688, 2 Jur. (N.S.) 249; 4 W. R. 443.

WOOD, v. C.—The report of 2 De G. M. & G. is inaccurate, and an extract from a parish register, signed by the curate of the parish, is admissible in evidence under the 14th section of 14 & 15 Vict. c. 99. The reports in the Jurist and the Law Journal are correct.

Malone v. L'Estrange (or O'Connor) (1839) 2 Ir. Eq. R. 16.—*L.C. referred to.*

Ennis v. Carroll (1868) 17 W. R. 314 (1r).—*M.R.*

Harding v. Williams (1880) 49 L. J. Ch. 661, 14 Ch. D. 197, 42 L. T. 507, 28 W. R. 615.—**FRY, J., doubted.**

Arnott v. Hayes (1887) 56 L. J. Ch. 814, 847, 88 Ch. D. 781, 57 L. T. 299, 801; 36 W. R. 246, 247.—*C.A. COTTON, BOWEN and FRY, L.J., See per FRY, L.J. during the argument.*

Arnott v. Hayes, referred to.

Parnell v. Wood (1892) [1892] P. 137, 66 L. T. 870, 40 W. R. 864.—*C.A. LINDLEY, LOPES and KAY, L.J.*

Parnell v. Wood, distinguished.

Perry v. Phosphor Bronze Co (1894) 14 R. 851; 71 L. T. 854.—*C.A. LINDLEY and SMITH, L.J., LINDLEY, L.J.—Parnell v. Wood has nothing to do with this case. These the pass-books contained the matter which it was sought to get at, but certain portions of the pass-books were ordered to be sealed up till the trial. I think there is ample jurisdiction under sect. 7 [of the Bankers' Books Evidence Act, 1879] to make this order, though it is an unusual one, and ought not to be made unless special circumstances justify it.*

Howard v. Beall (1880) 58 L. J. Q. B. 884; 23 Q. B. D. 1; 60 L. T. 637; 37 W. R. 655.—**MATHEW and GRANTHAM, JJ., considered.**

South Staffordshire Tramways Co. v. Ebbsmith (1895) 65 L. J. Q. B. 96; [1895] 2 Q. B. 669;

78 L. T. 454; 44 W. R. 97—C.A. *ESHER, M.R.* and *KAY, L.J.*

ESHER, M.R. (during the argument)—All that *Howard v. Brail* decides, as I understand it, is that if the Court comes to the conclusion that a banking account, though kept in the name of another person, is in fact the account of a party to the action, the Court may order inspection of it before trial (under the Bankers' Books Evidence Act, 1879, s. 7). That seems to be right.—p. 97. See also judgments.

Southampton Dock Co. v. Richards (1840)

1 Man. & G. 448; 1 Scott (N.R.) 219; 2 Railw. Cas. 215—C.P., *followed*.
Miles v. Bough (1842) 3 Railw. Cas. 668, 8 G. & D. 119; 3 Q. B. 845; 12 L. J. Q. B. 74.—Q.B.

Southampton Dock Co. v. Richards, principle applied.

Porter v. Emmens (1876) 45 L. J. C. P. 305; 1 C. P. D. 217, *affirmed*, 46 L. J. C. P. 179; 1 C. P. D. 664.—C.A.

Miles v. Bough, followed.

Inglis v. G. N. Ry. (1852) 16 Jur. 895—H. L. (80).

Judicial Documents.

Pim v. Curell (1840) 6 M. & W. 234, *discussed*

Neill v. Devonshire (Duke) (1882) 8 App. Cas. 185, 31 W. R. 622—H. L. (18).

SERBORN, L.C.—I think it is clear from the judgment of the Court in *Pim v. Curell* that if a final decree . . . had been made between the parties to the suit in the Duchy Court . . . the evidence would have been held admissible—p. 146.

Neill v. Devonshire (Duke), held applicable.

Blount v. Layard (1888) [1891] 2 Ch. 681, n.—C.A. *ESHER, M.R., LINDLEY and ROWEN, L.JJ.*

Briskell v. Hulso (1837) 2 N. & P. 426;

7 A. & E. 154; 7 L. J. Q. B. 18.—Q.B.; and *Gardner v. Moul* (1839) 2 F. & D. 403; 10 A. & E. 464; 8 L. J. Q. B. 270, 3 Jur. 1190.—Q.B., *considered*.

Richards v. Morgan (1868) 33 L. J. Q. B. 114, 4 B. & S. 641; 10 Jur. (N.S.) 559, 9 L. T. 662, 12 W. R. 162.—Q.D.

Richards v. Morgan, observed upon.

Evans v. Merthyr Tydfil Urban District Council (1898) 68 L. J. Ch. 175, [1899] 1 Ch. 241; 79 L. T. 578—C.A. *LINDLEY, M.R., CHITTY and WILLIAMS, L.JJ.*; and *Hutchinson v. Glover* (1875) 15 L. J. Q. B. 120, 1 Q. B. D. 188.

Humphreys v. Pensam (1836) 1 My & Cr. 580.—L.C., *dictum applied*.

Printing Telegraph and Construction Co. of the Agency Havas v. Drucker (1894) 64 L. J. Q. B. 58, [1894] 2 Q. B. 801; 9 R. 677; 71 L. T. 172, 42 W. R. 674.—C.A. *ESHER, M.R., KAY and SMITH, L.JJ.*

Lake v. Pelsley (1865) L. R. 1 Eq. 173; 11 Jur. (N.S.) 1012—M.R.

Allen v. Bonnett (1868) L. R. 6 Eq. 522, 16 W. R. 1075.—M.R.

[An order to read at the hearing certain depositions made in the Bankruptcy Court was at first

granted by Lord Romilly, M.R., on the authority of *Lake v. Pelsley*, but was afterwards stopped by him, on his attention being called to *Stephenson v. Brinary* (L. R. 2 Eq. 303).]

Other Documents

Alner v. George (1808) 1 Camp. 392, *questioned*.

Rowe v. Foster (1858) 2 H. & N. 779, 27 L. J. Ex. 262, 4 Jur. (N.S.) 95; 6 W. R. 207.—*EX CH.* POTLOCK, C.B.—What fell from Lord Ellenborough in the case of *Alner v. George*, viz., "that a receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, is binding on him," means, where the receipt in full is given *as and for a real receipt and discharge*—p. 784.

MARTIN, B.—That case is directly overruled by *Graves v. Key* (3 Barn. & Adol. 813)—p. 786. CHANELL, B.—I have some difficulty in reconciling the conclusion at which I have arrived with the language imputed to Lord Ellenborough in *Alner v. George*. That decision may perhaps be supported on the ground suggested by the Lord Chief Baron, or it may be that it is overruled by *Graves v. Key*—p. 792.

Stewart v. G. W. Ry. (1865) 2 De G. J. & S.

319; 11 Jur. (N.S.) 627, 13 L. T. 79, 13 W. R. 907.—L.C., *distinguished*.

Lee v. Lancashire and Yorkshire Ry. (1871) L. R. 6 Ch. 527; 23 L. T. 77; 19 W. R. 729.—L.JJ.

JAMES, L.J.—This case appears to me entirely different from *Stewart v. Great Western Railway Co.*, where, while a poor man was lying suffering from an accident persons went to him on behalf of the railway company, and induced him to accept a small and almost nominal sum in full of all demands, making false representations to him as to the medical opinions which had been given about his state. That was a case where a directly fraudulent and false statement was made to the man to induce him to enter into the arrangement, and, under those circumstances, it appears to me to be of course that this Court should not relinquish its jurisdiction to deal with a case of fraud, but should say that the company was not to be entitled to use at all, for any purpose or under any circumstances, the document which had been obtained in that way (p. 530). . . . The bill nowhere charges that the doctors ever made a false representation, or were guilty of any concealment, and the doctors themselves all swore that they throughout gave the plaintiff their advice and opinion to the best of their judgment—p. 532.

Jacobs (Doe J.) v. Phillips (1845) 8 Q. B.

158, 15 L. J. Q. B. 47, 10 Jur. 34, *followed*.
Johnson v. Tyrrell (1860) 2 L. T. 429.—Q.B.

4. PAROL.

Smith v. Thompson (1849) 8 C. B. 44, 18

L. J. C. P. 313, *applied*.
Bank of New Zealand v. Simpson (1900) 69 L. J. P. C. 22, [1900] A. C. 182; 82 L. T. 102; 48 W. R. 591.—P.C. LORDS DAVEY and ROBERTSON and SIR R. COUCH.

Bourne v. Gatcliffe (1841) 3 Man & G 643 —
1X CH. 1, *affirmed with variation* S. C.
non **Gatcliffe v. Bourne** (1838) 3 Bing
(N.C.) 311, 5 Scott 667, 7 L. J. C. P.
172.—C.P., *repleaded*
Buges v. Wickham (1863) 3 B & S 669, 33
L. J. Q. B. 17, 8 L. T. 47, 11 W. R. 992
BLACKBURN, J.—I think that parol evidence
can no more be admitted to contradict or qualify
an implied warranty than it could have been if
the warranty had been expressed **Gatcliffe v.**
Bourne, in error, has sometimes been supposed to
be an authority to the contrary, but it is mis-
understood. There it was necessary to prove the
course and usage of delivery in the port of
London, and therefore it was necessary that
evidence to disprove the custom should also be
admitted. It was upon this ground, and this
only, that evidence of what the parties did was
admitted—it was not let in for the purpose of
altering or explaining the contract. . . And it
seems plain on principle that every mischief
arising from admitting parol evidence, to vary
a written contract, arises equally whether it is
admitted to vary an express or an implied part of
that contract.—p. 697

Pym v. Campbell (1856) 25 L. J. Q. B. 277;
6 E. & B. 370; 2 Jur. (N.S.) 641, 4 W. R.
528, and **Davis v. Jones** (1856) 25 L. J.
C. P. 91; 17 C. B. 625, 4 W. R. 248,
applied.
Wallis v. Littell (1861) 31 L. J. C. P. 100, 11
C. L. (N.S.) 369, 8 Jur. (N.S.) 745, 5 L. T. 489;
10 W. R. 192.—C.P.; and **Clever v. Kirkman**
(1875) 38 L. T. 673.—C.P.D.

Pym v. Campbell; Gudgeon v. Besset (1856)
26 L. J. Q. B. 361, 6 E. & B. 986; 8
Jur. (N.S.) 212, and **Furness v. Mook**
(1857) 27 L. J. Ex. 34, *followed*
Pattie v. Hornbrook (1896) 66 L. J. Ch. 144;
[1897] 1 Ch. 25, 75 L. T. 475; 45 W. R. 123.—
STIRLING, J.

Jeffery v. Walton (1810) 1 Stark 267,
adverted upon
Malpas v. L. & S. W. Ry. (1866) 1 H. & R. 227,
35 L. J. C. P. 166; 14 R. 1 C. P. 336, 12 Jur.
(N.S.) 271; 13 L. T. 710; 14 W. R. 391
WILLIS, J.—With respect to the case of **Jeffery**
v. Walton I wish to say that, notwithstanding the
high reputation of the reporter, I think he must
have misrepresented the reason why the plaintiff
was precluded from giving any evidence as to
the time of hiring and rate of payment. The
writing in that case did not purport to be an
agreement, but was only a memorandum in
pencil, and the judge who decided the case of
Watson v. Hargreaves (5 East 10), could hardly have
meant to describe it as a binding agreement.—
p. 339.

Waterpark (Lord) v. Fennell (1859) 7 H. L.
Cas. 650, 5 Jur. (N.S.) 1135; 7 W. R. 634,
H.L. (1859), *replead*.
Hastings Corporation v. Ivill (1874) L. R. 19
Eq. 558, 582; 22 W. R. 224.—V.C.

Waterpark (Lord) v. Fennell, cited
Devonshire v. Pattinson (1887) 57 L. J. Q. B.
189; 20 Q. B. D. 263, 273; 58 L. T. 392, 52

J. P. 276.—C.A. **ESHER, M.R., BOWEN and**
FRY, L.JJ.

Senior v. Armitage (1810) Holt N. P. 197,
commented on.
Hutton v. Warren (1896) 1 M. & W. 466, 2
Gale, 71 1 Tyr. & G. 646; 5 L. J. Ex. 234
PARK, B. (for the Court)—This question sub-
sequently came under the consideration of the
Court of King's Bench in the case of **Senior v.**
Armitage. In that case which was an action by
a tenant against his landlord for a compensation
for seed and labour, under the denomination of
tenant-right, Mr. Justice Bayley, on its appear-
ing that there was a written agreement between
the parties, nonsuited the plaintiff. The Court
afterwards set aside that nonsuit, and held, as
appears by a manuscript note of that learned
Judge, that though there was a written contract
between landlord and tenant, the custom of the
country would still be binding, if not inconsis-
tent with the terms of such written contract,
and that, not only all common law obligations,
but those imposed by custom, were in full force
where the contract did not vary them. Mr. Holt
appears to have stated the case too strongly when
he said that the Court held the custom to be
operative, "unless the agreement in express terms
excluded it," and probably he was not quite
accurate in attributing a similar opinion to the
Lord Chief Baron Thompson, who presided on
the second trial. It would appear that the Court
held that the custom operated, unless it could be
collected from the instrument, either expressly
or impliedly, that the parties did not mean to be
governed by it.—p. 476.

Trueman v. Loder (1840) 11 A. & B. 589; 3
P. & D. 567; 9 L. J. Q. B. 165, *considered*
Hamfrey v. Dale (1857) 7 E. & B. 268;
affirmed, (1858) E. B. & E. 1004; 27 L. J. Q. B.
390; 5 Jur. (N.S.) 191; 6 W. R. 854.—**EX. CH.**
CAMPRELL, C.J. (for the Court).—It is the
business of Courts reasonably so to shape their
rules of evidence as to make them suitable to the
habits of mankind, and such as are not likely to
exclude the actual facts of the dealings between
parties when they are to determine on the con-
troversies which grow out of them. It cannot
be doubted in the present case that in fact this
contract was made with the usage understood to
be a term in it; to exclude the usage is to exclude
a material term of the contract, and must lead
to an unjust decision. Of course, this could be
no reason for a decision contrary to authority,
but we think any one who reads the judgment
of the Court in **Trueman v. Loder** with attention
will perceive how much it was influenced by a
feeling of the supposed inconvenience of receiving
any parol evidence in the case of a written con-
tract. And, as it was not necessary to the decision
of the case then before the Court, we are not
bound by it now; and we did not hold ourselves
bound by it in the case of **Brown v. Byrne** (3
E. & B. 708), when it was brought to our notice.
—p. 278

Hamfrey v. Dale, followed.
Fleet v. Merton (1871) 41 L. J. Q. B. 49;
L. R. 7 Q. B. 126; 26 L. T. 181; 20 W. R. 97.—
Q.B.
[*Held*, on the authority of **Hamfrey v. Dale**,
that evidence of the custom in the same trade
was admissible, as not inconsistent with the
written contract.]

Humphrey v Dale and Fleet v. Murton,
followed.

Hutchinson v. Tatham (1873) 42 L. J. C. P. 260; 13 R. C. P. 182, 24 L. T. 103, 22 W. R. 18.

[*Held*, on the authority of the above cases, that in an action by shipowners against the defendants upon the charter-party, evidence was admissible of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable.]

Humphrey v Dale and Fleet v. Murton,
discovered.

Southwell v. Bowditch (1876) 43 L. J. C. P. 630; 45 L. T. 196, 24 W. R. 838.—O. A., *reversing* C. P.

JESSEL, M.R., in discussing the cases, held that the decisions turned entirely on the admissibility of the evidence of trade usage, and that, if such evidence had not been there admissible, they would have been decided the other way. "If therefore appears to me," his lordship said, "both on principle and authority, taking the only authorities which were relied upon by the Court below in support of the contrary proposition that in all cases like this the broker is not personally liable" Kelly, O.B. and Mellish, L.J. both agreed that in these cases the reason for the decisions was the evidence as to trade usage.

Hutchinson v. Tatham, considered.

Humphrey v. Dale and Fleet v. Murton,
followed.

Pike v. Ongley (1887) 56 L. J. G. B. 873; 18 Q. B. D. 708; 35 W. R. 634.—O. A. *ESHER, M.R. and PEY, L.J., reversing* DAY and WILLS, JJ.

ESHER, M.R.—In this case the defendants are clearly not liable upon the contract itself, they were selling as agents for an owner, and in the absence of trade usage no liability would attach to them. The evidence of the witnesses who were called to prove the custom came to this, that if the name of the owner was not given in, or at the time of the making of, the contract, the buyer had the right to treat the broker as principal. I can well conceive that in this trade (the hop trade), and in many others, such a custom is for the broker's benefit, and I am clearly of opinion that the evidence was properly admitted by the learned judge at the trial. If any remarks of mine in the judgment in *Hutchinson v. Tatham* are in conflict with our present decision they must be considered as withdrawn.

Webb v. Plummer (1819) 2 B. & Ald. 746; 21 R. L. 479.

Hutton v. Warren (1836) 1 M. & W. 466; 2 Gaic 71; 1 Tyr. & G. 646; 5 L. J. Ex. 284.

Syvers v. Jones (1848) 2 Ex. 111.

considered and applied.
Spartali v. Bencke (1850) 10 C. B. 212; 19 L. J. C. P. 293.—O. P.

Spartali v. Bencke, overruled in part.

Field v. Lelan (1861) 30 L. J. Ex. 168; 6 H. & N. 617, 7 Jur. (8 s.) 618, 4 L. T. 121; 9 W. R. 387.—EX. CH.

WIGHTMAN, J.—The judgment of the Court of Common Pleas in *Spartali v. Bencke*, in which the circumstances were hardly distinguishable

from the present is no doubt directly against the admissibility of evidence of usage in this case, but that decision proceeds upon what appears to me to be the mistaken ground that the effect of the introduction of a custom as to the time of delivery of the thing sold would be to alter the time, or to vary the time fixed for payment by the written contract; whereas the time for payment would not be altered, and the custom could only affect the time for delivery, with respect to which the written contract is silent.—p. 170.

Falmouth (Earl) v. Roberts (1841) 9 M. & W. 469, 1 D. P. C. 638, 11 L. J. Ex. 180,
discovered, and observations approved.

Pattinson v. Luckley (1875) 33 L. T. 360
BRAMWELL, J.—I think the case of *The Earl of Falmouth v. Roberts*, and the observations of Parke, B. thereon, of great value as showing what ought to be the right conclusion here, namely, that even if the instrument has ceased to have any intrinsic operation, we may yet look at it to see the terms of the bargain under certain circumstances.

5. SECONDARY.

Rex v. Denio (1827) 7 B. & C. 620, 1 M. & R. 204.—K.B., *commented upon.*

Reg. v. Kenilworth (1845) 14 L. J. M. C. 100; 7 Q. B. 642; 2 New Sess. Cas. 46, 7 Jur. 898—Q. B.; and *Reg. v. Saffron Hill (Liberty)* (1852) 22 L. J. M. C. 22; 1 El. & Bl. 93.—Q. B.

6. PRODUCTION AND ADMISSION

Jones v. Fort (1828) M. & M. 196, *overruled*
Boyle v. Wiseman (1855) 11 Ex. 560, 3 O. L. R. 1071, 24 L. J. Ex. 284; 1 Jur. (8 s.) 894, 3 W. R. 577.

ALDERSON, B.—It is better to state that the case of *Jones v. Fort* must now be considered as overruled, than to endeavour to distinguish it from the present case.—p. 368.

Boyle v. Wiseman, distinguished.

Stowe v. Querner (1870) 39 L. J. Ex. 60; 1 R. 5 Ex. 155; 23 L. T. 29; 18 W. R. 466.—EX.

Roe v. Harvey (1769) 4 Burr 2184, *quoted.*

Bate v. Kinsey (1834) 4 Tyr. 662; 1 C. M. & R. 38; 3 L. J. Ex. 804.

ALDERSON, B.—In *Roe v. Harvey*, there were several dismissions by Mrs. Haldane and Thomas Urry. The evidence proffered was a conveyance by the former to the latter, then it was reasonable that parol evidence should be admitted of that conveyance. The title was proved to be in Urry. Yet the Court upheld a nonsuit, which in fact affirmed that there was title in neither. It is a strange decision.

Matheson v. Ross (1849) 2 H. L. Cas. 286; 13 Jur. 307; 6 Bell, 374.—H. L. (sc.), *considered.*

Evans v. Prothero (1850) 2 Mac. & G. 319, 822, 20 L. J. Ch. 448; 15 Jur. 113.—L.C. *But see infra*, S. C. 1 De G. M. & G. 572; 21 L. J. Ch. 772.—L.C. *contra*.

Matheson v. Ross, followed.

Rutty v. Benthall (1867) 36 L. J. C. P. 194; 1 R. 2 C. P. 488, 16 L. T. 287, 15 W. R. 744

Matheson v. Ross and Coppock v. Bower (1838) 4 M. & W. 301; 8 L. J. Ex. D. See Stamp Act, 1891 (51 & 52 Vict. c. 39), s. 14 (1).

Green v. Davies (1825) 1 B. & C. 235, 3 L. J. (O.S.) K. B. 185, *followed*.

Evans v. Prothero (1852) 1 D. M. & G. 572; 21 L. J. Ch. 772—L.C.; 8 C. 2 Mac & G. 319, 29 L. J. Ch. 448, 15 Jur. 113.—L.C., *distinguished*.

Alding v. Boon (1891) 60 L. J. Ch. 306; [1891] 1 Ch. 568, 64 L. T. 193; 39 W. R. 298.—KKEWICH, J.

Alves v. Hodgson (1797) 7 Term Rep. 241; 2 Esp. 528, 4 R. R. 133, *commented on*.

Bristow v. Sequeville (1850) 5 Ex. 275, 19 L. J. Ex. 289, 3 Car. & K. 64, 14 Jur. 674.—EX.

Orford v. Cole (1818) 2 Stark. 351. See now Stamp Act, 1891 (51 & 52 Vict. c. 39), sch. 1.

Re x v. Middlesex (1787) 2 Term Rep. 41, *unreported*.

Bowles v. Langworthy (1793) 5 Term Rep. 364, *followed*.

Gordon v. Secretan (1807) 8 East 548.

LORD ELLENBOROUGH, C.J., said that the case of *Re x v. Middlesex*, which was much questioned at the time, had been since overruled. And that it was not enough to give notice to the opposite party in a cause to produce an instrument in his hands, in order to dispense with any further proof of it by the party giving the notice; but that the production of it at the trial, in pursuance of such notice, did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases.

Reay's Trusts, In re (1855) 3 Eq. R. 312, 1 Jur. (N.S.) 222, 3 W. R. 312.—V.-C., *not followed*.

Muir's Estate, In re (1873) 42 L. J. Ch. 882, 28 L. T. 769, 21 W. R. 749.—V.-C.

Phelps v. Parker (1808) 1 Camp. 412, *not followed*.

Lemon v. Dean (1810) 2 Camp. 636, n and **Fitzgerald v. Elson** (1811) 2 Camp. 635, *followed*.

Talbot v. Holman (1816) 7 Taunt. 251, 2 Marsh. 527.—C.P.

Nelson v. Whittall (1817) 1 B. & Ald. 19, 21, *not followed*.
Page v. Mann (1827) M. & M. 79

Page v. Mann, *followed*.
Kay v. Brookman (1828) 3 Car. & P. 555.—BEST, C.J.

7 WITNESSES.

Attendance.

Tippins v. Coates (1847) 6 Hare 16; 17 L. J. Ch. 17; 11 Jur. 1075.—V.-C.; *order discharged*, (1848) 17 L. J. Ch. 337; 12 Jur. 339.—L.C.

Griffith v. Ricketts (1849) 7 Hare 299; 19 L. J. Ch. 399, 14 Jur. 325.—V.-C., *disapproved*.

Hope v. Liddell (1855) 7 De G. M. & G. 331.—L.J.

TURNER, L.J.—With reference to *Griffith v. Ricketts*, I certainly cannot agree to what is reported to have been said by the Vice-Chancellor, that the lien of a solicitor is, in substance, the same as a mortgage, nor do I believe that the Vice-Chancellor said this. His observations, I have no doubt, had reference to the title of *Rosina Frost*, who, it appears, claims under a mortgage. To suppose that he could intend to place a solicitor's lien upon the same footing as a mortgage title, would be to impute a position quite at variance with his general accuracy.—p. 339

Griffith v. Ricketts. See

Lee v. Angus (1866) 35 L. J. Ch. 373, L. R. 2 Eq. 64, Ohsold v. Cork (1872) 27 L. T. 144; **Sanders' Trusts, In re** (1878) 47 L. J. Ch. 670

Marston v. Downes (1831) 6 Car. & P. 331, 4 N. & M. 861, 1 A. & E. 31; 3 L. J. K. B. 158, *explained*.

Hubbard v. Knight (1848) 2 Ex. 11; 17 L. J. Ex. 119; 12 Jur. 162.

PARKER, B.—There a witness, an attorney, refused to produce a title deed because it was his client's, but he told the contents of the deed willingly. My brother Ludlow objected to the evidence, not on the ground that the attorney was privileged, but that no secondary evidence could be given of the deed which was itself in existence. My brother Patteson ruled that secondary evidence might be given, as the party was not obliged to give up his deeds, and that, if the attorney did not insist upon his privilege, but chose willingly to disclose the contents of them, the evidence might be received. Thus explained, the case is correct.—p. 12.

ALDERSON, B.—The second point in the case of *Marston v. Downes* requires explanation. It would seem, from the report of that case, that an attorney can be compelled by the Court to divulge the contents of his client's deeds. The Court will hear him, and receive his evidence, if he does so willingly, but the Court cannot insist upon it.—p. 12

Cook v. Hearn (1832) 1 M. & Rob. 201, *questioned*.

Dwyer v. Collins (1852) 7 Ex. 689, 21 L. J. Ex. 225, 16 Jur. 569

PARKER, B. (for the Court).—That the privilege of an attorney does not extend to protect him from answering whether the document is then in Court was decided by Best, C.J., at *mai prius*, in *Beran v. Waters* (1 Moo. & M. 235).

On the other hand, some authorities were cited against the admissibility of this question. The first is *Cook v. Hearn*, in which it is said that Patteson, J. refused to permit the question to be put with respect to a rule of Court because "no notice to produce had been given," and he also decided, that a notice to produce *then* was too late, and the report goes on to state that the course adopted was approved by Taunton, J. and myself, in the following term. It is very doubtful from the report whether the question was disallowed by Patteson, J., and so far as I am concerned, I think there must be a mistake, either of my own or of the reporters, as it is at variance with the opinion I have always had on that point; and on referring to my manuscript note of the motion for a new trial in *Michaelmas*

Term, 1832, I find no trace of such a circumstance. The rule was moved for on the ground that it appeared on the cross-examination of the plaintiff's witness that there was a written agreement or lease, which was not produced, and the rule *was* granted, suggesting a *vet* process. This case is by no means a sufficient authority, and no other was cited which is in point, nor are we aware of any. This objection cannot therefore prevail.—p. 646

Schimmel v Louisa (1812) 1 Taunt 695, *corrected*

Tremain v Barrett (1815) 6 Taunt. 88; 1 Marsh. 463, 668, 16 R. R. 564

GIBBS, J. observed, that the practice of the Court of King's Bench as to the costs of the witnesses' return, was clearly ascertained to be such as was contended for by the plaintiffs. The reporter, in the decision in *Schimmel v Louisa*, had omitted there to state one part of the practice in such a case in the Court of King's Bench, namely, that in that Court the costs of his return were given. Their practice was certified to be that there the costs of bringing a witness over were not to be allowed, the costs of his detention were to be allowed, and the costs of his return were to be allowed, but the plaintiffs were met by the decision in this Court, that the costs of sending back the witnesses are not to be given.—p. 91

Mackley v. Chillingworth (1877) 46 L. J. C P 484. 2 C P D. 273, 36 L T. 514; 26 W. R. 650—C.P.D., *distinguished*.

Turnbull v. Janson (1878) 47 L J C P. 384; 3 C P D. 264, 26 W. R. 816.

Turnbull v. Janson (1878) 47 L J C P. 384; 3 C. P. D. 264, 26 W. R. 816, *followed*.

East Stonehouse Local Board v Victoria Brewery Co. (1895) 64 L J Ch 793, [1895] 2 Ch. 514, 13 R. 657; 73 L. T. 54, 43 W. R. 585—NORTH, J.

Malcolm v. Ray (or Day) (1819) 3 Moon 222, 579—C.P., *held overruled*.

Dixon v Lee (1831) 1 C. M. & R. 645, 3 D. P. C. 259, 5 Tyr. 180.

PARKER, B.—Since the case of *Barrow v. Humphreys* (3 Barn. & Ald. 598), that case cannot be quoted as an authority.—p. 646

Anon. (1793) 2 Selk. 544, *disapproved*.

Montague v. Harrison (1867) 5 C B. (N.S.) 292, 27 L. J. C P. 24, 4 Jur. (N.S.) 29, 6 W. R. 43.—COCKBURN, C.J.

Examination

Emmet v Butler (1817) 7 Taunt 599.

Raven v Dunning (1799) 3 Esp. 25; and

Currie v Child (1812) 3 Camp 238,

disapproved.

Bate v. Russell (1829) M & M 382.—PARKER, J.

Rex v Olviger (1788) 2 Term Rep 263,

commented on.

Rex v All Saints', Worcester (Inhabitants) (1817) 6 M. & S 194—K.B.

Rex v Olviger, *distinguished*.

Rex v. Bathwick (1831) 2 B. & Ad. 639—K.B.

Monroe v Twisleton (1802) Peake, Ad C

219—K. n. *adopted*

Beveridge v. Minter (1831) 1 Cai & P. 361

overruled.

O'Connor, Majoribanks (1812) 1 Man & G. 435. 7 Scott (N.R.) 394. 12 L J C P 161; 7 Jur 344—C P

Anon. (1782) cited in **Campbell v Tremlow**

(1814) 1 Price 81, 84, *explained*

Bathews v. Galindo (1828) 4 Bing. 610

1 M & P 565; 3 Car & P 298, 6 L J. (os) C P. 138

Walton v Shelley (1786) 1 Term Rep. 296,

disapproved.

Jordaine v Lashbrooke (1798) 7 Term Rep 601

Upton v Curtis (1823) 1 Bing 210, 1 L J.

(os) C. P. 68, *questioned*

King v. Baker (1834) 2 A. & B 333

Rex v Blackman (1794) 1 Esp. 95, *overruled*

Rex v. Cole (1794) 1 Esp 167—K B

Cheyne v Koops (1802) 4 Esp. 112

considered.

Wilson v. Hirst (1835) 1 B. & Ad 760, 1

N. & M. 746.

Cheyne v Koops, *considered*.

Beckett v Wood (1840) 6 Bing (N.C) 380;

10 L J C P 79, n

Omicund v Barker (1744) 1 Ark 21.

Wilkes 538, *followed*

Att.-Gen. v. Hadlaugh (1885) 54 L. J. Q B

205. 14 Q. B. D 667; 52 L. T. 589, 33 W. R.

678; 49 J. P. 500—C.A. BRETT, M.R., LINDLEY,

L.J.; COTTON, L.J. *doubting*.

Reg. v. Dent (1843) 1 Cai & K 97,

overruled

Sussex Peerage Case (1844) 11 Cl. & F 85.

8 Jur 793—H.L. (E.).

LORD LYNCHURST, L.C.—I ought to say at

once that it is the universal opinion, both of the

judges and the Lords, that the case (*Rex v*

Dent), as represented to have been decided by

Wightman, J. is not law.—p. 134.

Bristow v Sequeville (1850) 5 Ex 275; 19

L J. Ex 289; 3 Car. & K. 61 14 Jur

874, *approved*

Rowley v. L & N W Ry. (1873) 12 L J Ex.

153. L. R. 8 Ex. 221; 29 L. T. 180; 21 W. R.

869.—EX. CH

Bristow v Sequeville, *followed*

Bonelli, In Goods of (1875) 45 L. J. P 12, 1

P. D 69, 21 W. R. 255, 34 L. T. 32.—

HANNEN, P.

Garrels v. Alexander (1801) 4 Esp. 37,

guaranteed.

Kington v. Kingston (1803) 8 Ves 438

ELDON, L.C.—I doubt the authority of the

case of *Garrels v. Alexander*, where, if a man

will not take upon him to say he believes, it is

to be the writing of the person, but says he thinks

it like, Lord Kenyon is made to say that is

evidence. I doubt that. Formerly that could

not have been deemed evidence. The evidence

of handwriting being of this nature, it is

evidence in itself, the credit of which must be

affected by and depend much upon the circumstances, as they come out in the course of the case.—p. 475

Burr v. Harper (1816) Holt N P 420, *questioned*

Mudd (*Doct.*) r. Seckemore (1836) 5 A & E. 703, 2 N. & P. 16; W. W. & D 406 7 L J. Q. B. 33

PATTERSON, J.—In the case of *Burr v. Harper*, Dallas, L C J. allowed what I consider to have been comparison of handwriting, and I do not think that decision right, it was never brought under review, because the verdict was against the party in whose favour it was made.—p. 737.

Rex v. Smith, 1 Phillips Evidence, Ch. 6, 142, *denied*

Reg. v. Avery (1838) 8 Car. & P. 596.

Cromack v. Heathcote (1820) 2 B. & B. 4.

Rex v. Smith, and Doe d. Shellard v. Harris (1835) 5 Car. & P. 592, *overruled*.

Reg. v. Cox and Raiton (1881) 54 L J. M. C. 41; 14 Q. B. D. 153; 52 L. T. 25, 33 W. R. 396—C. C. R.

Fountain v. Young (1807) 1 Taunt. 60, *disapproved*.

Calley v. Richards (1854) 19 Beav. 401; 2 W. R. 614

NOVILLY, M. R.—The cases of *Wilson v. Bassall* (4 T. R. 753) and *Fountain v. Young* at nisi prius, are no doubt at variance with this doctrine, and the latter is a very strong case, but if the report of it be correct, the rule there laid down, that a person who is not a solicitor, but whom a party supposing him to be such makes confidential communications respecting his cause, is bound to give evidence of them if called as a witness. This is not now the rule of this Court.—p. 404

Catheart, In re, Campbell, Ex parte (1870) L. R. 5 Ch. 703; 23 L. T. 289, 18 W. R. 1056.—L. J., *followed*.

Bursill v. Tanner (1885) 55 L. J. Q. B. 68; 14 Q. B. D. 1, 53 L. T. 445; 34 W. R. 35.—C. A. ESHER, M. R., COTTON and LINDLEY, L. J.

Catheart, In re, Campbell, Ex parte, followed.

Arnott, In re, Official Receiver, Ex parte (1883) 60 L. T. 109; 37 W. R. 223; 5 Morrell 286.—CAVE, J.

Catheart, In re, Campbell, Ex parte, followed Hood-Barri v. Heriot (1896) 65 L. J. Q. B. 622; [1896] 2 Q. B. 338; 75 L. T. 15; 45 W. R. 1.—C. A. SMITH and RIGBY, L. J.

Fisher v. Ronalds (1852) 12 C. B. 762, 22 L. J. C. P. 62; 17 Jur. 393; 1 W. R. 54, *overruled upon*.

Sidebottom v. Adkins (1857) 27 L. J. Ch. 152; 5 W. R. 748, 3 Jur. (N. S.) 631.

[STUART, V. C. expressed the opinion that the statements attributed to the judges in *Fisher v. Ronalds* to the effect that it is enough for the person interrogated to state upon his oath that he considers, or has been advised, or that it is his opinion, that his answering the question would tend to criminate him, and that the witness is the sole judge upon the subject, are not countenanced by other authorities.]

Fisher v. Ronalds, dicta questioned

Reg. v. Rendling (1879) 7 How St. Tr. 279, 296, *not followed*.

Sidebottom v. Adkins, approved.

Reg. v. Boyes (1861) 2 F. & F. 157; 30 L. J. Q. B. 301, 1 B. & S. 311, 7 Jur. (N. S.) 1158; 5 L. T. 117, 9 W. R. 690, 9 Cox C. C. 32—Q. B.

Reg. v. Boyes, approved and followed.

Reynolds, In re, Reynolds, Ex parte (1882) 51 L. J. Ch. 756 20 Ch. D. 294, 46 L. T. 508, 30 W. R. 651, 46 J. P. 533.—C. A. JESSIEL, M. R., COTTON and LINDLEY, L. J.

Seaman v. Netherclift (1876) 46 L. J. C. P. 128; 2 C. P. D. 55; 35 L. T. 784; 25 W. R. 159.—C. A., *rule applied*.

Goffin v. Donnelly (1861) 50 L. J. Q. B. 303, 6 Q. R. D. 307, 44 L. T. 141; 20 W. R. 440; 45 J. P. 439—FIELD and MANISTY, JJ.

Ewing v. Osbaldiston (1834) 6 Sim 608—V. C., *disapproved*

Two Sicilies (King) v. Willcox (1851) 1 Sim. (N. S.) 301, 20 L. J. Ch. 417; 15 Jur. 214.

GRANWORTH, V. C.—A majority of judges decided in *Garbett's Case* (2 Car. & Kirw. N. P. 474), that if a witness is asked as to matters which may subject him to penalties, he may stop at any time, although what he has disclosed may be ample evidence to convict him. I cannot reconcile that with the decision in *Ewing v. Osbaldiston*—p. 320.

Dixon v. Vale (1824) 1 Car. & P. 278; and **East v. Chapman** (1827) 2 Car. & P. 570, 573, M. & M. 47, *overruled*.

Reg. v. Garbett (1847) 1 Den. C. C. 236; 2 Car. & K. 474, 2 Cox C. C. 448.—C. C. R.

Att-Gen v. Briant (1846) 15 M. & W. 169; 15 L. J. Ex. 285, *followed*.

Maris v. Beyfus (1890) 69 L. J. Q. B. 479; 25 Q. B. D. 494; 38 W. R. 705.—C. A. ESHER, M. R., LINDLEY and BOWEN, L. J.; *affirming* 54 J. P. 775.—COOLIDGE, C. J. and MATHEW, J.

Clarke v. Saffery (1824) Ry. & M. 126, 27

R. R. 736, *overruled in part*

Bastin v. Carew (1824) Ry. & M. 127, *commented on*.

Price v. Manning (1889) 58 L. J. Ch. 649; 42 Ch. D. 372; 61 L. T. 537, 37 W. R. 785.—C. A. COTTON, FRY and LOPES, L. J.

COTTON, L. J.—The plaintiff says that having called the defendant he is entitled as of right to cross-examine him, and in support of this contention *Clarke v. Saffery* is relied on. But in my opinion that is a matter in the discretion of the judge.—p. 650

Lord v. Colvin (1855) 24 L. J. Ch. 517; 3 Drew 222, 3 Eq. R. 514, 1 Jur. (N. S.) 293; 3 W. R. 342, *repleaded*.

Fielden v. Slater (1869) 38 L. J. Ch. 379; L. R. 7 Eq. 523, 20 L. T. 112; 17 W. R. 485.—V. C.

8. COMMISSION TO TAKE.

Berdan v. Greenwood (1850) 20 Ch. D. 761, n.; 46 L. T. 521, n.—C. A. BAGGALLAY and COTTON, L. J., *distinguished*.

Langer v. Tate (1883) 24 Ch. D. 522, 58 L. J. Ch. 861; 49 L. T. 753; 32 W. R. 189.—C. A. COTTON and BOWEN, L. J.

COTTON, L. J.—The case is quite different from the case which was relied upon in the Court below, of *Berdan v. Greenwood*. There the Court

was satisfied that the reason given for the plaintiff's not coming to England was a pretence, and was only brought forward to enable him to avoid being cross-examined in Court. The Court said they would not assist him in that scheme, and that if his evidence were material to his case, he must come and give it in person. That authority, we think, does not apply to the present case.—p. 528.

Lawson v. Vacuum Brake Co (1884) 54 L. J. Ch. 16; 27 Ch. D. 137, 51 L. T. 275, 33 W. R. 186.—C.A. BAGGALLAY, COTTON and LINDLEY, L.J.J.; and **Kemp v. Tennant** (1886) 2 Times L. R. 304.—DENMAN and MATTHEW, JJ. *explained*.
Coch v. Alcock (1888) 21 Q. B. D. 1.—FIELD and WILLS, JJ., *affirmed*, 57 L. J. Q. B. 489; 21 Q. B. D. 178, 36 W. R. 747.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J.J.
ESHER, M.R.—In consequence of the case cited [*Kemp v. Tennant*] we have communicated with Matthew, J., and he tells us that he never meant to say or to cite Mr. Justice Wills as having said that the grant of a commission was *ex debito justitiæ* in the sense in which the expression was used by the plaintiff's counsel in argument. It is clear that according to the established practice it is a matter of judicial discretion, and the commission ought only to be granted on reasonable grounds being shown for its issue.

Ross v. Woodford (1893) 63 L. J. Ch. 191; [1894] 1 Ch. 38; 8 B. 20, 70 L. T. 22; 42 W. R. 188.—CHITTY, J., *approved*.
New v. Burns (1894) 64 L. J. Q. B. 104, 14 B. 839; 71 L. T. 681; 43 W. R. 182.—C.A. LINDLEY and SMITH, L.J.J.

Kensington v. White (1816) 3 Price 164.—EX., *commented on*.
Shonckell v. Macaulay (1824) 2 Sim. & S. 79; 8 L. J. (S.) Ch. 40. *And see* Macaulay v. Shonckell, 1 Bl. (N.S.) 96.
LEACH, J. v.-o.—The report of the case of *Kensington v. White* is too loose to afford any principle.—p. 87.

Thomas v. Von Stutterheim (1856) 5 W. R. 6.—Q.B. *distinguished*.
Morgan v. Alexander (1875) L. R. 10 C. P. 184; 44 L. J. C. P. 167; 32 L. T. 34; 23 W. R. 921.—C.P.

COLERIDGE, C.J.—The case of *Thomas v. Stutterheim* was cited, which is referred to by Mr. Day in his book on the Common Law Procedure Act (3rd ed., p. 245). The headnote of that case does not correctly report the decision. The Court there doubted whether they had power to make an order absolute in the first instance for the examination of a witness on the point of death, the application not being incidental to any motion or summons. Mr. Day seems correctly to give the result of the case when he says, "It would seem that the section was intended only to provide evidence upon otherwise pending motions or summonses." This case is not, therefore, at all inconsistent with the construction we are now putting on the statute, and it appears to me that the construction is in accordance both with the natural meaning of the terms used and the reason of the thing—p. 185.

Bellamy v. Jones (1802) 8 Ves. 31; 6 R. R. 205, *commented on*.

Bulder v. Bridges (1884) 26 Ch. D. 1, 53 L. J. Ch. 179, 50 L. T. 287, 32 W. R. 115.—C.A. SELBORNE, L.C. and COTTON, L.J.
SELBORNE, L.C.—Now I assume that there is no objection in a case in which the Court thinks it right to an order being made *ex parte* for the examination of witnesses *de bene esse*. There may be many cases in which the ends of justice may require it, but every such order must be taken subject to being discharged if any person seeking to discharge it can show that it was not proper because not necessary for the purposes of justice, and I cannot think that the earlier authorities, such as that before Lord Eldon of *Bellamy v. Jones*, and others which have been mentioned, really meant more than this, that *prima facie*, and for the purpose of the question, whether the order was regularly made *ex parte* or not, if it was brought within a certain category of cases it would be right and not irregular to obtain it *ex parte*. I do not understand Lord Eldon as having meant to lay down even as to those cases in which there would be sufficient *prima facie* ground for obtaining an *ex parte* order to examine witnesses *de bene esse*, that no reasons or grounds could be shown why, upon a motion to discharge such an order consistent with its formal regularity, it should be discharged.—p. 9.

Hamilton (Duke) v. Meynal (1751) 2 Dick. 788, 2 Ves. sen 497.—HARDWICKE, L.C., *followed*.

Moggridge v. Hall (1879) 13 Ch. D. 380, 28 W. R. 487.—V.-O. *See further* (1881) 19 Ch. D. 221; 30 W. R. 557.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J.J.

Wright v. Wilkin (1858) 4 Jur. (N.S.) 804; 6 W. R. 648.—V.-O. *observed upon*.

Ohlsen v. Terreo (1874) L. R. 10 Ch. 127; 44 L. J. Ch. 165; 51 L. T. 811; 23 W. R. 185.—L.C. and L.J.J.

CAIRNS, L.C.—The case of *Wright v. Wilkin* appears to have come before the Court upon a very unusual and, I should think, irregular application. I take it that the course that would be pursued would be this.—If a witness, or his counsel, thought that he was being unfairly dealt with upon an examination, he might refuse to answer a particular question, and upon that refusal the matter might be brought before the Court, who would decide whether the examiner was pursuing a proper course or not, in allowing the witness to be treated as a hostile witness. It is, however, unnecessary now to decide that question. I only refer to it lest I should be thought to have assented to the view that the examiner is powerless in a case of that kind.—p. 129.

Wheeler v. Atkins (1805) 5 Esp. 246; and **Espinasse's Reports**, *disapproved*.

Small v. Nairne (1849) 13 Q. B. 840.

DENMAN, C.J.—I am tempted to remark, for the benefit of the profession, that Espinasse's reports, in days newer than our time, when their want of accuracy was better than it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited, as if counsel thought them

of equal authority with Lord Coke's reports.—
p. 844.

Delarogue v SS. Oxenholme (1883) W. N. 227, *approved*.

Ridley v Sutton (1863) 1 H. & C. 741, 32 L. J. Ex. 122, 9 Ju. (N. S.) 858, 7 L. T. 693, 11 W. R. 314, *disapproved*.

Beaufort (Duke) v Ashburnham (Earl) (1863) 13 C. D. (N. S.) 308, 42 L. J. C. P. 97, 9 Ju. (N. S.) 892, 7 L. T. 710, 11 W. R. 267, *considered*.

Bartlett v Higgins (1901) 70 L. J. K. B. 621, [1901] 2 K. B. 240; 84 L. T. 509, 49 W. R. 449.—*C.A. COLLINS and STIRLING, L.JJ.*

COLLINS, L.J.—That case [*Ridley v Sutton*] was decided in 1863 and it is very important to see what it did decide. As the law then stood, applications of this kind were regulated by sect 9 of 1 W. 4, c. 22, which provided that the costs of any examination ordered under sect 1 should be costs in the cause unless otherwise directed, either by the judge who made the order for examination, or by the judge before whom the cause might be tried, or by the Court. Now the Court of Exchequer, in dealing with an application under that section arrived at the conclusion, as it seems to me, that the section itself did not apply at all to a case where, in point of fact, the examination so taken was not used at the trial, and therefore they said that the rule of the section—that the costs of the examination were to be costs in the cause—did not apply in such a case, because the examination was not read in evidence. . . . Rightly or wrongly that is the basis of the decision, and I think it was a decision upon the circumstances of that particular case, that the question was not one of discretion at all. The Act did not under the circumstances, allow the discretion or let in the rule that the costs should be costs in the cause. Therefore, in effect, it was a decision refusing to exercise discretion. That was the view taken by the Court of Exchequer, but almost simultaneously there was a case of *Duke of Beaufort v Earl of Ashburnham*, in the Court of C. P., where that Court took quite a different view of sect. 9, and considered that they undoubtedly had a discretion. . . . Leaving then those authorities as they stand, I come to the rule under the Judicature Act in order to see which of those two authorities should be adopted. Now there are the words of the rule before us—Ord. LXV. i. 27 (29) [the L. J. read the rule].

Now, what is the meaning of that? Surely it makes the standard for consideration, not the event which actually happened, but whether, when the order for examination was applied for, proper prudence was exercised, or whether there was "over-caution, negligence, or mistake." In fact it makes the standard or governing point for consideration the state of things before the legal adviser at the time he makes up his mind. Now the question is, which of these two standards the taxing master should have selected in order to decide whether the costs of this examination were "necessary or proper for the attainment of justice"—the time when, and the circumstances under which the legal adviser had to act, or the circumstances that took place at the trial itself. In my opinion he should have chosen the first alternative. The matter does not rest merely on the rule, because we have a decision of Field, J., since the Judicature Act,

1873, and it appears to me that he has lent the weight of his authority to the construction I am now suggesting. That is in *Delarogue v. SS. Oxenholme*. That case is very much in point—practically on all four with the present case. . . . The master disallowed the costs of the examination on the ground that it had become unnecessary to use it at the trial. In giving judgment Field, J., said this: "It was said in argument that this was done by reason of a rule that the costs of a proceeding should not be allowed unless it was actually used for some purpose." That looks as if *Ridley v Sutton* had been brought to the learned judge's attention in the argument. Then he proceeds "I should require to be better satisfied of the propriety of such a rule than I am at present before I acceded to it." That is really an expression of dissent from the decision of the Court of Exchequer in *Ridley v Sutton*. I think, for the reasons I have given, that the requirements of the rule have been abundantly satisfied, and that we are not fettered by the decision in *Ridley v Sutton*.

9 PERPETUATION OF TESTIMONY.

Morris v. Morris (1847) 2 Ph. 205; 16 L. J. Ch. 286, 11 Ju. 98.—*o.c.*, *followed*.
Dreyfus v Peruvian Guano Co (1880) 58 L. J. Ch. 471, 41 Ch. D. 151, 60 L. T. 216, 37 W. R. 394.—*KAY, J.*

Spencer (Earl) v Peek, 37 L. J. Ch. 227; L. R. 3 Eq. 416, 15 W. R. 478.—*M.R.*, *reversed*, (1870) 39 L. J. Ch. 538, L. R. 5 Ch. 548; 22 L. T. 469, 18 W. R. 558.—*L.J.*

Spencer (Earl) v. Peek, and Angell v. Angell (1822) 1 L. J. (O. S.) Ch. 6; 1 Sim. & N. 88, 34 R. R. 149, *disallowed*.

Brooking v. Maudslay (1888) 57 L. J. Ch. 1001; 38 Ch. D. 636; 58 L. T. 862; 36 W. R. 664, 6 Asp. M. C. 296.—*STIRLING, J.*

Att.-Gen. v Ray (1848) 2 Hare 518.—*v.c.* and *Biddulph v Camoye (Lord)* (1864) 19 Beav. 467.—*M.R.*, *followed*.

Vane v. Vane (1876) 34 L. T. 477, 24 W. R. 452.—*v.c.* See *infra*.

Vane v. Vane (1876) 34 L. T. 477; 24 W. R. 452.—*v.c.*; *reversed*, 45 L. J. Ch. 589, 24 W. R. 565.—*G.A.*

Dew v. Clarke (1822) 1 Sim. & S. 108, 1 L. J. (O. S.) Ch. 37.—*v.c.*, *followed*.
Lanley v Lanley (1849) 12 Ir. Eq. R. 608.—*M.R.*

10 AFFIDAVITS.

Orde, in re (1883) 52 L. J. Ch. 832; 24 Ch. D. 271; 49 L. T. 480, 31 W. R. 801.—*RAGGALLAY, GOTTON and BOWEN, L.JJ.*

explained.
Dodsworth, in re. Spencer v. Dodsworth (1891) 60 L. J. Ch. 798; [1891] 1 Ch. 657, 64 L. T. 282; 39 W. R. 362.

CRITTY, J.—The case of *Orde, in re*, as I read it, merely decided that a deponent to the fitness of a proposed trustee should be described by some term less vague than "gentleman." It was only for the purpose of weighing the deponent's evidence that the description was held insufficient.

Barnes v Parker (1866) 15 L. T. 218.—EX., *questioed*
Fleet v Pettins (1868) 19 L. T. 147; 9 B. & S. 573, 37 L. J. Q. B. 233, L. R. 3 Q. B. 536
BLACKBURN, J.—I should pause before I considered myself bound by that decision.—p. 148.

Rex v James (1692) 1 Show. 397, Cath 220—K.B., *disapproved*
Crook v Dowling (1782) 3 Doug 75—MANFIELD, C.J.

Knight, In re, Knight v Gardner 24 Ch. D. 606, 19 L. T. 34, 31 W. R. 911.—BACON, V.-C. *reversed*. (1883) 53 L. J. Ch. 183, 25 Ch. D. 297; 49 L. T. 545, 32 W. R. 469.—C.A. COTTON, LINDLEY and FRY, L.JJ.

Knight, In re, Knight v Gardner (*supra* in C.A.), *applied*
Backhouse v Alcock (1885) 51 L. J. Ch. 812, 28 Ch. D. 609; 52 L. T. 312, 33 W. R. 107.—CHITTY, J.

Backhouse v Alcock, followed
Baker, In re, Connell v Baker (1885) 54 L. J. Ch. 844, 29 Ch. D. 711, 52 L. T. 421.—CHITTY, J.

Kay v Smith (1855) 20 Beav 566; 24 L. J. Ch. 788, 3 W. R. 622—M.R. *overruled*
Mauby v Bewicke (1856) 5 De G. M. & G. 470; 26 L. J. Ch. 20; 2 Jur. (N.S.) 672, 4 W. R. 757.—L.JJ.

Clarke v Law (1855) 2 K. & J. 28, 2 Jur. (N.S.) 223, 4 W. R. 35—V.-C. *approved*
Quintz Hill Consolidated Gold Mining Co., In re, Young, Ex parte (1882) 51 L. J. Ch. 940; 21 Ch. D. 642; 31 W. R. 173.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

11. COSTS OF EVIDENCE.

Crookes v Gore (1856) 1 H. & N. 14; 25 L. J. Ex. 267; 2 Jur. (N.S.) 127.—EX., *followed*.
Weils v. Mitcham Gas Light Co (1878) 48 L. J. Ex. 76, 4 Ex. D. 1, 39 L. T. 667, 27 W. R. 112.—EX.

Watson v. G. W. Ry. (1880) 50 L. J. Q. B. 302; 6 Q. B. D. 163, 29 W. R. 427.—O.P.D., *distinguished*
De la Warr (Earl) v Miles (1881) 19 Ch. D. 80; 45 L. T. 424; 30 W. R. 35.—C.A. JESSEL, M.R., LUSH and LINDLEY, L.JJ.

De la Warr (Earl) v Miles, applied
The "Tarret Court" (1901) 84 L. T. 331—JENKINS, P.

EXECUTION.

ISSUE

Chick v Smith (1840) 8 D. P. C. 337; 4 Jun. 86, *overruled*.
Wright v. Mills (1869) 28 L. J. Ex. 223, 6 Jur. (N.S.) 771; 4 H. & N. 488, 7 W. R. 498.—EX.

Mortimer v Piggott (1834) 4 A. & E. 363, n., 2 D. P. C. 615, *questioed*
Blancheway v. Durr (1814) 1 Q. B. 707; 3 G. & D. 618, 12 L. J. Q. B. 291, 7 Jun 575
DENMAN, C.J. (for the Court).—(After having shortly stated the pleadings, and in particular the objection raised by the replication that the *en. sa.* was absolutely void, having issued on a judgment more than a year old without a *sc. fa.*, his lordship said.) The plaintiff argues that it is absolutely void for this fault, relying on the language of this Court in *Mortimer v Piggott*, in which it is so decided. That case, however, did not require the doctrine now called in question, and is actually reported in *Adolphus & Ellis* without its being laid down. We are now required to consider it, and are satisfied that it is in that respect erroneous.—p. 710.

Cheston v. Gibbs (1848) 12 M. & W. 111, 1 D. & L. 120, 13 L. J. Ex. 53; and **Goldschmidt v. Hamlet** (1813) 12 L. J. C. P. 304, 1 D. & L. 501; 6 Scott (N.S.) 962, 6 M. & G. 187, *followed*.
Graham v. Witherby (1845) 11 L. J. Q. B. 290; 7 Q. B. 491.

Cheston v Gibbs and Graham v Witherby, explained and not followed.
Congreve v. Everts (1854) 23 L. J. Ex. 273, 10 Ex. 298; 2 Q. L. R. 1254, 18 Jur. 637.
PARKER, J. (for the Court).—This Court decided [*Chaston v Gibbs*] that the 10th section of the Bankruptcy Act affected the operation of the writ, and did not merely direct the application of the money levied under it, and that the sheriff was a wrongdoer in acting contrary to the statutory direction coupled with the direction of the writ. We never held the writ to be void as the Court of Queen's Bench seems to have supposed, in *Graham v Witherby*, . . . and from that they deduced the consequence that it was void altogether, and so the defendant's writ in that case was therefore the first valid writ. We never meant to say more than that the sheriff in disobeying the writ, and the clauses in the Act of Parliament directing its operation, was dealing wrongfully with the goods which, but for the writ, would be the property of the assignees, and therefore responsible in an action of trover. We cannot, therefore, consider that either of these cases bind us as authorities—p. 278.

Goldschmidt v Hamlet; Cheston v Gibbs, and Graham v Witherby, inapplicable.
Pearce, In re, Crosthwaite, Ex parte (1885) 54 L. J. Q. B. 316; 14 Q. B. D. 960, 52 L. T. 518, 33 W. R. 614; 2 Morrell 105—CAVE, J.

CAVE, J.—These cases, however, are not applicable to the case now under discussion, first, because in these cases there was a subsequent sale by the sheriff which was invalidated by the express words of the section, "no creditor shall avail himself" of such execution; and secondly, because, if the first execution was void, the subsequent one, having been executed by seizure before the *fiat*, was within the execution contained in the 10th section. In this case, on the contrary, there are no words in sect. 46, sub-sect. 2, which invalidate the sale by the sheriff, and indeed under that clause the sale must necessarily take place before it can be known whether the execution creditor will or will not ultimately be entitled to the proceeds; and secondly, the

words of the statute do seem to imply that the benefit of the execution is to be transferred from the execution creditor to the trustee for the benefit of the creditors generally.

PIERI FACIAS.

Williams v. Smith, 26 L. J. Ex. 371, 2 H. & N. 443.—*EX. affirmed* (1850) 28 L. J. Ex. 286; 4 H. & N. 559; 5 Jur. (85) 1107, 7 W. R. 503.—*EX. CH., reversed in*
Cochran's Estate, in re, *De Wolf v. Landsell* (1868) 37 L. J. Ch. 293, L. R. 5 Eq. 209; 17 L. T. 487, 16 W. R. 324.—*ROMILLY, M.R.*

Jarman v. Hooper (1843) 6 M. & G. 827, 1 D. & L. 769, 13 L. J. C. P. 63; 8 Jur. 127, 7 Scott (N.R.) 663.—*C.F., distinguished.*

Smith v. Keal (1882) 9 Q. B. D. 340; 47 L. T. 142, 31 W. R. 76.—*C.A. JESSEL, M.R. and LINDLEY, L.J.; affirming* 51 L. J. Q. B. 487, 46 J. P. 615.—*POLLOCK, B. and MANISTY, J., STEPHEN, J. dissenting.*

Jarman v. Hooper, explained and followed.
Childers v. Wooler (1860) 2 El. & El. 287, 20 L. J. Q. B. 129; 6 Jur. (N.S.) 444, 2 L. T. 49, 8 W. R. 321.—*Q.B., considered*
Morris v. Salberg (1880) 58 L. J. Q. B. 275, 22 Q. B. D. 611, 61 L. T. 283, 37 W. R. 469; 53 J. P. 772.—*C.A. ESHER, M.R., FRY and LOPES, L.J.*

ESHER, M.R.—The learned judge who tried the case, being of opinion that nothing indorsed on the back of the writ, whether written by the execution creditor himself or his solicitor, can be a direction to the sheriff, gave judgment for the defendant. . . . Is that view sound? It is contended on behalf of the plaintiff that it is not sound; and in support of that contention *Jarman v. Hooper* has been cited. But it is said by the defendant's counsel that this point was not under consideration in *Jarman v. Hooper*, and that that case is therefore no authority upon the point. It is quite true that all that that case decided as to the liability of the execution creditor was that words written on the back of the writ by the solicitor would bind the client, because the writing was within the scope of the solicitor's authority, but when the case is carefully looked at, it must be seen how closely it resembles that now before us. . . . The only point taken on behalf of the execution creditor was that the indorsement was written by the solicitor and was not authorised by the client, but for all that the Court must have seen the indorsement; it was staring them in the face, and it is plain from the question of Maule, J. during the argument that the question whether the indorsement was a direction or not was present to their minds; and when the Court came to the conclusion that the execution creditor was liable because the solicitor was authorised to make the indorsement, it seems to me that the case is a clear decision that the indorsement was a direction. But then it is said that *Jarman v. Hooper* is inconsistent with *Childers v. Wooler*. Now, in *Childers v. Wooler* the Court of Q. B. could have declined to regard the decision in *Jarman v. Hooper* as good law, or binding upon them, but it is to be observed that they did not assume to overrule it.

Cockburn, C.J., delivering the judgment of the majority of the Court in *Childers v. Wooler*, distinguishes *Jarman v. Hooper* upon two grounds: first, that the indorsement in the latter case was much more specific than that in the case then before the Court, and, secondly, that in *Jarman v. Hooper*, the defendant, by attending the interpleader summons and insisting that the goods were rightly seized by that act, ratified the seizure, which was for his benefit. I confess I am unable to follow either of these distinctions. I cannot see that the indorsement was more specific in the one case than the other; and as to the ratification, it is plain that, if there was ratification, the matter ratified must have been capable of ratification, in which case the ratification adds nothing and makes no distinction, or if the matter were not capable of being ratified, there could be no ratification, and the distinction falls to the ground. . . . It seems to me that one must take the same view of *Jarman v. Hooper* which has already been taken by this Court in *Smith v. Keal* [9 Q. B. D. 349]. . . . Therefore if one of these two cases, *Jarman v. Hooper* and *Childers v. Wooler*, is to be overruled, it is not *Jarman v. Hooper*, and if it is not to be overruled, it appears to me to be in point—pp. 276, 277, 278.

Semayne's Case (1604) 5 Co. Rep. 91. *discussed.*
Penton v. Bruwne (1663) 1 Keb. 698, 1 Sid. 186.

Semayne's Case, *discussed.*
Lee v. Gausel (1774) Cowp. 1—*MANSFIELD, C.J.*

Penton v. Browne, *commented on.*
Brown v. Glenn (1851) 16 Q. B. 254, 20 L. J. Q. B. 205; 15 Jur. 189.—*Q.B.*

Brown v. Glenn, *commented on.*
Ryan v. Shilcock (1851) 21 L. J. Ex. 55, 7 Ex. 72; 15 Jur. 1200.—*EX.*

Semayne's Case, **Penton v. Browne**, and **Ryan v. Shilcock**, *considered.*
American Concentrated Must Corporation v. Hendry (1893) 62 L. J. Q. B. 388; 5 R. 335 n.; 68 L. T. 742; 57 J. P. 768.—*BOWEN, L.J., affirmed in C.A. ESHER, M.R., LOPES and SMITH, L.J.*

BOWEN, L.J.—"The law," says the Court in *Semayne's Case*, "abhors the destruction or breaking of any house." The landlord (like the sheriff in a civil suit) could only, therefore, enter by an open door or an open window—*per ostia et fenestras*. In *Penton v. Browne* it was indeed held that a sheriff for the purposes of execution might break a barn which was in a field, as distinct from a barn which was parcel of a house, but the Court agreed that if the barn had been adjoining a parcel of the house, it could not lawfully have been broken. The law so laid down in *Penton v. Browne* as to a sheriff's right with regard to a detached outside barn in a field, appears to me to be a departure from older law. This view, whether right or wrong, was at all events considered in *Brown v. Glenn* not to be applicable to a landlord's distress. I should (with submission) have myself supposed that the sheriff in a civil suit had no more right to break a detached inclosure than a landlord's bailiff had. In *Brown v. Glenn* a locked stable door was

broken open. The stable was not within the curtilage of the dwelling-house, but nevertheless the Court held that the fact of the stable door being locked of itself rendered the distress unlawful. In so doing they affirmed and followed a far older decision of Hardwicke, L. J., in the *Summer Assizes at Exeter*, in the year 1735, who held that a padlock put upon a barn's door could not be opened by force to take the corn by way of distress. (Vid. Abi. "Distress," E. 2, 6; cited also in *Poult v. Longwell*, 2 Wm. S. 284, c., note 2, (4th ed.).) It is a misconception to suppose that an outhouse within the curtilage enjoys less immunity than a disconnected outhouse. *Penton v. Browne* shows exactly the reverse, and in *Ilgan v. Shilcock* it seems conceded that the landlord may not break open the outer door of any building whatever. The language of Lord Coke is general to the effect that the landlord may not open gates, nor break down inclosures.—p. 390.

Penton v. Browne, followed.
Hobson v. Thellusson (1867) 86 L. J. Q. B. 302, 1 R. 2 Q. B. 642; 8 B. & S. 476; 16 L. T. 837; 15 W. R. 1037—Q. B., *discussed*.

Hodder v. Williams (1895) 65 L. J. Q. B. 70; [1895] 2 Q. B. 668, 14 R. 747; 73 L. T. 394, 11 W. R. 98—O. A., *affirming WILLIAMS, J.*

KAY, J., after discussing *Penton v. Browne* and *Brown v. Glenn* and *Seawall's Case*, continued: The case then came before the Court of Q. B. in *Hobson v. Thellusson*, which was an action against a sheriff for having failed to seize goods under a writ of execution. As reported in the L. J. Reports, Lord Blackburn in that case said: "I do not think that the sheriff's officer was bound to go off at once and take a crowbar to break open the doors, although no doubt that might have been done, as the goods were in a warehouse, and not in a dwelling-house. It does not appear that there was any reason for his being bound to use the utmost possible diligence, he went soon after he received the writ, and on his arrival found that the doors were locked. He was not bound to use more than reasonable diligence. He certainly might have broken the doors open, and have seized the goods." Mr Macaskie pointed out that these words are modified in the report of the case which appears in the Law Reports, and he suggested that Lord Blackburn, when he revised his judgment, intentionally altered this passage. But both reports, when they are read carefully, seem to me to come to the same thing. . . I therefore think that the doctrine laid down in *Penton v. Browne* was approved of in *Hobson v. Thellusson*. It was said, however, that it was disapproved of in *American Concentrated Milk Corporation v. Hendry*. There Bowen, J., after referring to the earlier history of the doctrine of the inviolability of the outer door of a house and its precincts, said: "In *Penton v. Browne* it was indeed held that a sheriff for purposes of execution might break a barn which was in a field, as distinct from a barn which was parcel of a house, but the Court agreed that if the barn had been adjoining to a parcel of the house, it could not lawfully have been broken. The law so laid down in *Penton v. Browne* as to a sheriff's rights with regard to a detached outhouse in a field appears to me to be a departure from older law." But he does not say that in his opinion the

decision in *Penton v. Browne* was not law, neither does he suggest that it ought to be overruled.—p. 72.

ESHER, M. R. and LOPES, L. J. to the same effect.

Winter v. Miles (1800) 10 East 578, 1 Camp. 475, n., 10 R. R. 391; and *Strathmore v. Laing* (1826) 2 Wilson & Shaw, 8c. Ap. 1, *discussed*.
Att.-Gen. v. Dakin (1870) 39 L. J. Ex. 113, L. R. 4 H. L. 338; 23 L. T. 1, 18 W. R. 1111—LORDS CHANESFORD and COLLOSSAY, LORD RATHERLEY, L. C. *disenting*.

Miller v. Parnell (1815) 6 Taunt. 370, 2 Marsh. 78, *followed*.
Andrews v. Sanderson (1837) 1 H. & N. 725, 26 L. J. Ex. 208, 3 Jur. (N.S.) 118—*HK.*

Alleyne v. Darcy (1853) 5 L. Ch. R. 35.—L. C. *followed*.
Stokes v. Cowan (1861) 29 Beauv. 647, 7 Jur. (N.S.) 901, 1 L. T. 693, 9 W. R. 801—M. R., *not followed*.
Sargent's Policy (1870) 7 L. R. L. 66—M. R.

Rasley v. Ryle (1844) 12 L. J. Ex. 322, 11 M. & W. 16, *discussed*.
West v. Hedges (1751) Baines. 211, *explained*.

Smallman v. Pollard (1844) 13 L. J. C. P. 116, 7 Scott. (N. S.) 911; 1 D. & L. 901, 6 Man. & G. 1001; 8 Jur. 246.

Rasley v. Ryle and *Smallman v. Pollard*, *commented on*.

Wharton v. Naylor (1848) 17 L. J. Q. B. 278; 12 Q. B. 673, 6 D. & L. 136; 12 Jur. 894.

Wharton v. Naylor, *considered*.
Davis, in re Pollen's Trustees, Ex parte (1886) 34 W. R. 442, 55 L. J. Q. B. 217, 54 L. T. 304, 3 Moorel. 27.

CAVE, J.—In *Wharton v. Naylor* the goods distrained upon were crops which had been sold under the *fi fa*, and were not at the time of the distress in such a state as to be capable of removal. The marginal note, which lays it down that goods are equally a *custodia legis* for the purpose of freedom from distress, whether they are in the hands of the sheriff or of the vendor, must be read with reference to this fact.—p. 441.

ELEGIT.

Hatton v. Haywood (1874) 43 L. J. Ch. 372, L. R. 9 Ch. 229; 30 L. T. 279, 22 W. R. 356.—L. C. and L. J., *applied*.

South, in re (1874) 43 L. J. Ch. 411, L. R. 9 Ch. 369; 30 L. T. 347; 22 W. R. 460.—L. J., *reversing*, 22 W. R. 388—*V. C.*

South, in re (1874) 43 L. J. Ch. 111; L. R. 9 Ch. 369, 30 L. T. 347, 22 W. R. 460.—L. J., *applied*.

Johns v. Pink (1899) 69 L. J. Ch. 98, [1900] 1 Ch. 296, 81 L. T. 712, 48 W. R. 217—STIRLING, J.

South, in re, *followed*.
Cooper, in re (1880) 60 L. T. 95, 37 W. R. 390.—CHITTY, J. *discussed*.
Harrison and Bottomley, in re (1899) 68 L. J. Ch. 208, [1899] 1 Ch. 465, 80 L. T. 29, 47 W. R.

307—C.A. LINDLEY, M.R., HIGBY and WILLIAMS, L.J.

LINDLEY, M.R.—The defendants are persons entitled to legal remandments in real estate devised to them by this testator and the appellant has obtained a judgment against them, and cannot get his money. The question is whether he can, whilst their interests are reversionary, obtain a sale of their reversionary estates. Having regard to those cases [*In re Hamilton* (1887) 55 L.J. Ch. 282; 31 Ch. D. 291—C.A.] and *In re South* and the reasons we have given, it appears to me that we are now asked to do what we have no jurisdiction to do. There is nothing really in the cases cited by Mr. Stevenson which in any way affects that view and though perhaps there are two cases to which he has referred which might at first sight appear to be favourable, the point was not raised. As to those cases, *In re Jones* and *In re Cooper* I doubt whether they were decisions upon reversionary interests at all: they are so reported that I cannot tell, and therefore I cannot act upon them.

SEQUESTRATION.

Hyde v. Greenhill (1746) 1 Dick 106, followed

Pratt v. Inman (1889) 59 L.J. Ch. 274, 13 Ch. D. 175, 61 L.T. 760, 38 W.R. 200—CHITTY, J.

Snow v. Bolton (1881) 50 L.J. Ch. 748, 17 Ch. D. 433, 44 L.T. 571, 29 W.R. 383.—FRY, J., held inapplicable

Selous v. Croydon Rural Sanitary Authority (1885) 53 L.T. 209

CHITTY, J. held that in the circumstances the plaintiff was right in moving the Court in the first instance for leave to issue sequestration instead of proceeding by summons in chambers, as in *Snow v. Bolton* inasmuch as, the case being one which must have been eventually argued in Court, he had thereby saved the costs of the proceedings in chambers

Lumley, In re, Cathcart, Ex parte (1894) 63 L.J. Ch. 437, [1894] 2 Ch. 271, 70 L.T. 780, 42 W.R. 401—C.A. LINDLEY, LOPES and KAY, L.J., followed.

Deakin, In re, Cathcart, Ex parte (1900) 69 L.J. Q.B. 797, [1900] 2 Q.B. 478, 83 L.T. 89—C.A. SMITH, WILLIAMS and ROMER, L.J.

CHARGING STOCKS, ETC.

Jones v. Williams (1841) 8 M. & W. 349, 10 L.J. Ex. 258; 9 D. P. C. 702, 5 Jur. 895—EX., and Chadwick v. Holt (1856) 8 De G. M. & G. 581, 26 L.J. Ch. 76, 2 Jur. (N.S.) 918; 27 L.T. (O.S.) 286, 4 W.R. 791.—L.J., followed.

Burns v. Irving (1876) 46 L.J. Ch. 423, 3 Ch. D. 291; 34 L.T. 752, 25 W.R. 66.—HALL, V.-C., not followed

Widgery v. Tepper (1877) 18 L.J. Ch. 367, 6 Ch. D. 864, 37 L.T. 297, 25 W.R. 872—C.A.

Baker v. Tynte (1866) 2 El. & El. 897, 29 L.J. Q.B. 233, 6 Jur. (N.S.) 1192—Q.B., referred to

Cragg v. Taylor (1807) 36 L.J. Ex. 63, L.R. 2 Ex. 131; 15 L.T. 584.—EX.

Cragg v. Taylor (1807) 36 L.J. Ex. 63, L.R. 2 Ex. 131, 15 L.T. 584—EX., distinguished.

Dixon v. Wrench (1869) L.R. 4 Ex. 154, 38 L.J. Ex. 113, 20 L.T. 192; 17 W.R. 591—EX. KELLY, C.B.—I must, however, notice the case of *Cragg v. Taylor*, because at first sight it might seem opposed to our present decision, there being in that case also a power in the trustees to sell the stock and apply the proceeds. But if that case is examined, it will be found to differ essentially from this, for there the deed which was relied on as taking the stock out of the provisions of the Act did not actually transfer the shares, which were already mortgaged, but only rendered it incumbent on the defendant to procure their delivery over to the trustees, that they might execute the trusts of the deed.

Cragg v. Taylor, approved

Dixon v. Wrench, distinguished

South Western Loan Co. v. Robertson (1881) 51 L.J. Q.B. 79; 8 Q.B.D. 17; 16 L.T. 427, 30 W.R. 102.—GROVE and LOPES, JJ.

Warburton v. Hill (1854) 23 L.J. Ch. 653, Kay, 470, 2 Eq. R. 441, 2 W.R. 365.—WOOD, V.-C., expressions doubted

Scott v. Hastings (Lord) (1858) 4 K. & J. 633, 5 Jur. (N.S.) 450, 6 W.R. 862, referred to.

Haly v. Barry (1868) 37 L.J. Ch. 723, L.R. 3 Ch. 452, 18 L.T. 490, 16 W.R. 654.—L.J., affirming MALINS, V.-C.

WOOD, L.J.—*Warburton v. Hill* might, if the authorities referred to in *Scott v. Lord Hastings* had been before me, have been rested on a higher ground than the one I took, namely, on the ground that a charging order against the debtor could not affect property which he had previously assigned. In the course of my judgment I said: "The date to be looked to is not that of obtaining the order *non*, but, subject to operation of the 15th section as to intermediate charges, the real charge is acquired when the charging order is made absolute." I there used expressions which were not necessary to the decision, and which I am inclined to think erroneous.

Scott v. Hastings (Lord), adopted.

Leavesley, In re (1891) 60 L.J. Ch. 385, [1891] 2 Ch. 1, 64 L.T. 268, 39 W.R. 276.—C.A.

Scott v. Hastings (Lord), compare

Horne v. Pountney (1889) 58 L.J. Q.B. 413, 23 Q.B.D. 261, 61 L.T. 510, 38 W.R. 240, 54 J.P. 37.—FIELD and CAVE, JJ.

Jeffries v. Reynolds, Reynolds, Ex parte (1882) 52 L.J. Q.B. 65, 48 L.T. 358.—FIELD and STEPHEN, JJ., approved

Drew v. Lewis (or Willis), Martin, Ex parte (1891) 60 L.J. Q.B. 264, [1891] 1 Q.B. 450, 64 L.T. 760; 39 W.R. 310; 55 J.P. 373—C.A. ESKER, M.R. and FRY, L.J.

Drew v. Willis, distinguished

Bram v. Horne (1894) 10 IL 171—MATHEW and CAVE, JJ.

MATHEW, J.—The Court of Appeal in *Drew v. Willis* held that it had no power to set aside a charging order which had been properly made, but in that case there was no appeal against the granting of the charging order. In this case the

defendant is appealing against the order making the charging order absolute, and he may be seriously prejudiced if we refuse this application—pp. 171, 172.

Haly v. Barry (*supra*) and **Finney v. Hinde** (1879) 48 L. J. Q. B. 275; 4 Q. B. D. 102; 10 L. T. 193, 27 W. R. 413—COCKBURN, C. J. and POLLOCK, B., *discussed*.

Stewart v. Rhodes (1900) 69 L. J. Ch. 174, [1900] 1 Ch. 866; 82 L. T. 387; 48 W. R. 354.—C.A. LINDLEY, M.R., RIGBY and VAUGHAN WILLIAMS, L.J.J.

LINDLEY, M.R.—Therefore it is necessary for the application of this Act [the Judgments Act, 1838, s. 14] and for obtaining a charging order that you must have a person against whom a judgment has been entered, and the procedure shows that the person against whom judgment is to be entered is the judgment debtor, who must be in a position to show cause why the charging order should not be made. In other words, he must be alive; and it was settled as long ago as **Finney v. Hinde** that if you had a charging order *sub* against a dead man, it was useless, and that you could not convert that into an order absolute. That is all **Finney v. Hinde** really decided . . . The only case that throws any doubt upon what I am saying, and which is to a certain extent inconsistent with it, is **Haly v. Barry**. In that case someone had a charging order against the testator. The practice under the Common Law Procedure Act was followed there, and the executor was made a party, and Wood, L.J. and Selwyn, L.J. thought that was equivalent to a judgment against the executor. Whether that was equivalent to it under the old practice or not it is unnecessary to consider; but, be that as it may, the decision was that they would make the order absolute for what it was worth. The L.J. held that if a man had an advantage, the benefit was not to be taken away from him. There was no ground for the injunction in that case, except that put forward by the appellant in that case—that the Court would stop a race between creditors. At the same time I recognise that there are observations in the judgment of Wood, L.J. which make me doubt whether I am quite right in saying that you cannot obtain a charging order against the executor even now, if there is any method of getting judgment against him. I doubt whether there is any method under the present practice, and I am not quite sure whether there was any such method even when the practice of entering a suggestion was in vogue. The result is that this order *sub* is altogether wrong. There is no precedent for it, and it is an experiment that I certainly hope will not be repeated.—pp. 181, 182.

EQUITABLE EXECUTION.

Mildred v. Austin (1869) L. R. 8 Eq. 220, 20 L. T. 939, 17 W. R. 688.—M.R., *disapproved*.

Cork (Earl) v. Russell (1871) L. R. 13 Eq. 210; 41 L. J. Ch. 226; 26 L. T. 280.

MALINS, V.-C.—My opinion, therefore, is that a judgment creditor who has not issued execution has no interest in the land; and the object in a foreclosure suit being to bring before the Court those only who have an interest, it is evidently

parties. The M.R. (in **Mildred v. Austin**) took a different view of the case, and I cannot say that I concur in his decision. At any rate, I am bound by the Act 27 & 28 Vict. c. 112.—p. 216.

Bishops Waltham Ry., In re (1896) 11 W. R. 1008—M.R., *explained*.
Redfield v. Wickham Corporation (1888) 57 L. J. P. C. 91, 13 App. Cas. 107, 474; 58 L. T. 456.—P.C.

Bishops Waltham Ry., In re, applied.

Stagg v. Midway Navigation Co. (1902) 50 W. R. 446.—SWINFEN EADY, J.

Fuggle v. Bland (1883) 11 Q. B. D. 711—POLLOCK, B. and LOPES, J., and **Macnicoll v. Farnell** (1887) 35 W. R. 778—COLLIERIDGE, C. J. and SMITH, J., *followed*.
Tyrell v. Painton (1894) 64 L. J. P. 33; [1895] 1 Q. B. 202; 11 R. 589; 71 L. T. 687, 43 W. R. 163.—C.A. HALSBURY, L. C., LINDLEY and SMITH, L.J.J.; *reversing* RUSSELL, C. J.

Whittaker v. Whittaker (1881) 51 L. J. P. 80, 7 P. D. 15, 47 L. T. 131, 30 W. R. 431.—HANNEN, P., *disapproved*.

Manchester and Liverpool District Banking Co. v. Parkinson (1888) 58 L. J. Q. B. 262; 22 Q. B. D. 173; 87 W. R. 264.—C.A. ESHER, M.R., FRY and LOPES, L.J.J.

ESHES, M.R.—With regard to **Whittaker v. Whittaker** I desire to say that, unless there were some special circumstances there which are not disclosed in the report, I am unable to agree with that case.—p. 263.

Whittaker v. Whittaker, *disapproved*.

Holmes v. Millage (1895) 62 L. J. Q. B. 380; [1895] 1 Q. B. 551; 4 R. 332; 68 L. T. 205, 11 W. R. 354, 57 J. P. 551.—C.A. LINDLEY and BOWEN, L.J.J.

LINDLEY, L.J. (for the Court)—In **Whittaker v. Whittaker**, an order *sub* was made for the appointment of a receiver to get in a debt which might be attached under the garnishee order, but this case was disapproved in **Manchester and Liverpool District Banking Co. v. Parkinson**, and cannot be relied on.

Kewney v. Attrill (1886) 56 L. J. Ch. 448; 84 Ch. D. 343, 55 L. T. 805; 33 W. R. 191.—KAY, J., *followed*.

Brand v. Sandground (1901) 85 L. T. 517—FARWELL, J.

Westhead v. Riley (1883) 53 L. J. Ch. 1153; 25 Ch. D. 413; 49 L. T. 776, 32 W. R. 273.—CHITTY, J., *followed*.

Flegg v. Prentis (1892) 61 L. J. Ch. 705, [1892] 2 Ch. 428; 67 L. T. 107.—STIRLING, J.

Flegg v. Prentis, *followed*.

De Peyrecave v. Nicholson (1894) 10 R. 539; 71 L. T. 255; 42 W. R. 702.—MATHEW and DAY, J.J.

DISCOVERY IN AID.

Irwell v. Eden (1887) 56 L. J. Q. B. 446, 18 Q. B. D. 588; 56 L. T. 620, 35 W. R. 511.—C.A. ESHER, M.R. and BOWEN, L.J.J., *followed*.

Bursill v. Tanner (1885) 55 L. J. Q. B. 53; 16 Q. B. D. 1, 53 L. T. 445, 34 W. R. 35.—C.A. ESHER, M.R., COTTON and LINDLEY, L.J.J., *distinguished*.

[1896] 2 Q. B. 338; 75 L. T. 15; 45 W. R. 1.—
C.A. A. L. SMITH and HIGBY, L.JJ.

A. L. SMITH, L.J.—It has been held in *Irwell v. Esher* that upon an examination under Ord. XLIII. 1. 32, only the judgment debtor can be examined. So far, therefore, it would seem that the order of Pollock, B., was right. It is contended, however, that in *Burall v. Tanner* the Court has decided otherwise. In that case the

Charter v. Charter, applied.

Brake, in goods of (1881) 50 L. J. P. 48; 6 P. D. 217; 45 L. T. 191; 29 W. R. 744.—
HANNEN, P.

Brake, in goods of, followed.

Charter v. Charter, principle applied.

Chappell, in goods of (1894) 63 L. J. P. 93; [1894] P. 95; 4 R. 574; 70 L. T. 245.—
JENNIE, P.

Brake, in goods of, followed.

4) 68 L. J. P. 65, —
JENNIE, P.

AND DUTIES.

ON.

K. R. 14 Ves. 434; 9 R. R. 14.—
Gen. v. Fletcher —
LANGDALE, M.R.,

id v. Forshaw (1891)

Ch. 261; 65 L. T.

INDLEY, BOWEN and

KAY, L.JJ., *reversing*, 59 L. J. Ch. 343; 43 Ch. D. 648; 62 L. T. 63; 38 W. R. 412.—
KEKEWICH, J.

Getting in and realising Estates.

Lawson v. Copeland (1877) 2 Bro. C. C. 156

—THURLOW, L.C.; Powell v. Evans (1801)

5 Ves. 839.—ARDEN, M.R.; and Tebb v.

Carpenter (1814) 1 Madd. 280.—PLUMER,

V.-C., distinguished.

Buxton v. Buxton (1835) 1 My. & Cr. 80 —
PEPYS, M.R.

Grayburn v. Clarkson (1868) 37 L. J. Ch.

550; L. R. 8 Ch. 808; 18 L. T. 494; 16

W. R. 716.—WOOD and SELWYN, L.JJ.,

followed.

Buxton v. Buxton, distinguished.

Sculthorpe v. Tipper (1871) 41 L. J. Ch. 266.

L. R. 13 Eq. 282; 26 L. T. 119; 20 W. R. 276

—MALINS, V.-C. And see post.

Buxton v. Buxton, approved and followed.

Marsden v. Kent (1877) 46 L. J. Ch. 497; 5

Ch. D. 598; 37 L. T. 49; 25 W. R. 522.—C.A.

JAMES and MELLISH, L.JJ. and BAGGALLAY, J.A.

Sculthorpe v. Tipper (*supra*), distinguished.

Norrington, in re Brindley v. Partridge (1879)

13 Ch. D. 634; 28 W. R. 711; 44 J. P. 474.—C.A.

JAMES, BAGGALLAY and THESIGER, L.JJ.

BAGGALLAY, L.J.—I may add that in *Sculthorpe v. Tipper* the testator directed that his

property should be sold immediately after his

decease, or so soon thereafter as the trustees

might see fit, showing that he contemplated their

being sold within the ordinary period.—p. 665

• Buxton v. Buxton (*supra*), principle applied.

Carry (or Caney) v. Bond (1848) 12 L. J. Ch.

484; 6 Nev. 488.—M.R., doubted.

Owens, in re Jones v. Owens (1882) 47 L. T.

61.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

[Caney v. Bond having been cited in argument,

JESSEL, M.R., said "I do not think that

case is good law. Lord Langdale relied on the

fact that a request had been made by a party

interested.—p. 62.]

EXECUTOR AND ADMINISTRATOR.

1. TITLE OF EXECUTOR OR ADMINISTRATOR
2. RIGHTS, POWERS AND DUTIES
3. LIABILITIES
4. DEBTOR APPOINTED EXECUTOR
5. EXECUTOR DE SON TOIT
6. MARRIED WOMAN EXECUTRIX.
7. ADMINISTRATION
8. DISTRIBUTION
9. REPENDING LEGACIES FOR CREDITORS
10. PROCEEDINGS

1. TITLE OF EXECUTOR OR ADMINISTRATOR

Greaves v. Weigham, 1 Roll. Abr. 919,
quod non.

Allen v. Dundas (1789) 3 Term Rep. 125.

BULLER, J.—Another thing to be observed in the case in Comyns is, that it was decided on the authority of a case in Roll. Abr. 919, which it is there said was never denied. From that circumstance, I am inclined to think it passed without much consideration. For the doctrine in Roll. Abr. is contradicted in 2 Lev. 90, and 1 Lev. 158 and 236. . . . It seems, therefore, strange that the Chief Justice should have said in that case that the case in Roll. Abr. had never been doubted; because these cases determined the reverse of the doctrine there contained.—p. 131.

GROSE, J. to the same effect

Charter v. Charter (1874) 43 L. J. P. 73;
L. R. 7 H. L. 364.—H.L. (E) CATRAN, L.C.

and LORD SELWYN; LORDS CHELMSFORD and HATHERLEY dissenting, commented on.
De Rosaz, in goods of (1877) 46 L. J. P. 6; 2 P. D. 66; 36 L. T. 263; 25 W. R. 352.—HANNEN, P.
And see post

Selling or Mortgaging Estate.

Beningfield v Baxter (1886) 56 L. J. P. C. 13, 12 App. Cas. 167, 56 L. T. 127.—
F. O. HERSHILL, L.C., LORDS SELBORN, B.
BLACKBURN, HOBHOUSE and COTTON, L.J.,
approved.

Huddingh v De Villiers (1887) 56 L. J. P. C. 107, 12 App. Cas. 624, 57 L. T. 885.—P.O.
LORDS FITZGERALD and HOBHOUSE, SIR B.
FRACOCK and SIR R. COUCH.

Curtis v Fairbrook (1819) 19 L. J. Ch. 65, 8
Hare 25, 13 Jur. 1044, *corrected on the point of*
the implied power of sale, 8 Hare 278—
WIGRAM, V.-C.

Russell v Plance (1864) 28 L. J. Ch. 441,
18 Rev. 21; 18 Jur. 254, 2 Eq. R. 1149,
2 W. R. 249.—ROMILLY, M.R., *approved*.
Vane (Earl) v Rigden (1870) 39 L. J. Ch. 797,
L. R. 5 Ch. 663, 18 W. R. 1092.—HATHERLEY,
L.C. and JAMES, L.J., *reversing* 39 L. J. Ch. 148;
18 W. R. 808.—MALINS, V.-C.

Sanders v Richards (1846) 2 Coll. C. C. 568.
—KNIGHT BRUCE, V.-C., *disapproved*.
Cruciochank v Duffin (1872) 41 L. J. Ch. 317,
L. R. 13 Eq. 555, 26 L. T. 121, 20 W. R. 354.
MALINS, V.-C.—It is very true that it was
formerly held in this case, that where a power of
sale was given by an executor upon a mort-
gage, the title under that power of sale could not
be forced upon a purchaser. That case I had as-
serted by Lord St. Leonards (Sugden V. P., p.
890, n. c. 14) as an authority. But I think
(and indeed the learned counsel for the defendant
has not disputed it) that the doctrine laid down
in that case can be no longer maintained as the
rule of the Court, for in *Russell v Plance* (*supra*),
the M.R. decided directly the contrary, namely,
that a good title could be made under a power of
sale created by an executor. That case of
Russell v Plance having been cited before the
L.C. and the L.J.J. in *Vane (Earl) v Rigden*
(*supra*), was commented upon by the L.C., who
expressed his approbation of it, and I therefore
think it may be considered as an authority upon
the point. There is another case before myself
of *Chawner's Will, In re* (1869) 38 L. J. Ch.
726; L. R. 8 Eq. 569, 23 L. T. 262, which is to
the same effect—p. 820.

Hill v Simpson (1802) 7 Ves. 152; 6 R. R.
108, *principle applied*.
Connolly v Munster Bank (1887) 19 L. R. 11
119.—CHAMPERTON, V.-C.

Finch v Hattersley (1775) 3 Russ. 345, n.,
followed, *Henvell (or) Henville) v Whitaker*
(1827) 3 Russ. 348, 5 L. J. (o.s.) Ch. 158; 27
R. R. 88—M.R.; *doubted*, *Cook v Dawson* (1861)
3 De G. F. & J. 127.—TURNER, L.J. (*post*,
col. 1065).

Henvell v Whitaker, commented on
Symons v James (1848) 2 Y. & C. C. O. 301.—
KNIGHT BRUCE, V. C.

Symons v James, commented on.
Harris v Watkins (1854) Kay 438.—WOOD,
V.-C.

Wasse v Heslington (1834) 3 L. J. Ch. 221,
3 Myl. & K. 495.—LEACH, M.R.; *Warren*

v. Davies (1833) 2 L. J. Ch. 203; 2
Myl. & K. 49.—M.R., *explained*.
Hartland v Murrell (1850) 27 Beav. 204.—
ROMILLY, M.R., and **Harris v Watkins**,
discussed.
Bailey, In re, Bailey v Bailey (1879) 48
L. J. Ch. 628, 12 Ch. D. 268, 11 L. T. 157,
27 W. R. 909.—FRY, J.

Bailey, In re, Bailey v Bailey, approved.
Hartland v Murrell and Wasse v Hesling-
ton, discussed.
Tanqueray-Williams and Landau, In re (1882)
51 L. J. Ch. 431, 20 Ch. D. 465; 30 W. R. 801.
—C.A. (*post*, col. 1065).

Bailey, In re, referred to.
De Bugh Lawson, In re (*post*, col. 1066).

Crane v Drake (1708) 2 Vern. 616; and
Pagett v Hopkins (or Hoskins) (1715)
Pres. Ed. 451, Glib. Rep. 111,
discussed.
Nugent v Gifford (1738) 1 Atk. 163.—HARD-
WICKE, L. C.

Nugent v Gifford, followed, Mead v Orery
(*Lord*) (1745) 3 Atk. 235.—HARDWICKE, L.C.,
commented on. **Bonney v Ridgoad** (1784) 1 Cox
145.—KENYON, M.R. (*see* 11 R. R. 23; 14 R. R.
247, n.; and *see post*, col. 1064). **Scott v Trier**
(1788) 2 Bro. C. C. 431; 2 Dick. 712.—THURLOW,
L.C. *And see post*, col. 1064.

Elliot v Merriman (1740) 2 Atk. 41; 3
Barnard 78 (*and see post*, col. 1061); **Whale**
v Booth (1785) 4 Term Rep. 623, n. 2
R. R. 483, n.; **Bonney v Ridgoad**;
Nugent v Gifford; **Mead v Orery** (*Lord*);
Farr v Newman (1792) 4 Term Rep. 621;
2 R. R. 479, and **Taylor v Hawkins**
(1808) 8 Ves. 209, 7 R. R. 27, *discussed*.
M'Leod v Drummond (1810) 17 Ves. 152;
11 R. R. 41.—ELDON, L.C. *And see post*, col. 1063.

M'Leod v Drummond, approved
Keane v Roberts (1819) 4 Madd. 332; 20
R. R. 306.—V.-C. *And see col.* 1063.

M'Leod v Drummond, distinguished
Cooper, In re, Cooper v Vosey (1882) 51
L. J. Ch. 862, 20 Ch. D. 611, 47 L. T. 89, 30
W. R. 648.—C.A. **JESSEL, M.R., COTTON and**
LINDLEY, L.J.

Farr v Newman, Whale v Booth, and
Aylesbury v Harvey (1674) 3 Lev. 204.
discussed.
Ray v Ray (1815) G. Cooper 264, 14 R. R. 235
—LUMER, V.-C.

Ray v Ray, distinguished.
Morgan, In re, Pilgrem v Pilgrem (1831)
18 Ch. D. 88; 29 W. R. 733.
FRY, J.—*Ray v Ray* has been very properly
relied upon. In that case the Court dissolved an
interlocutory injunction, which had been granted
on the application of a creditor of a testator,
to restrain a creditor of the executor from selling
the testator's leaseholds under an execution for
his own debt. The point was not finally deter-
mined, but the Court thought the circumstances
were such as to raise an inference of a gift by
the testator's creditor to the executor. When
another case arises in that form I shall follow
Ray v Ray, but the present case is very
different.—p. 101.

[The C. A. (50 L. J. Ch. 884, 18 Ch. D. 93; 15 L. T. 183; 30 W. R. 223—JESSEL, M.R., JAMES and LUSH, L.J.) upheld Fry, J.'s decision, but did not refer to *Ray v. Ray*]

Nugent v Gifford (*supra*), *discussed*.
Morgan, In re, Pillgrem v. Pillgrem,
applied
Queles Estate, In re (1886) 17 L. R. Ir 861.
—C.A. NAISH, L.C., FITZGERDON and BARRY, L.JJ.

Morgan, In re, Pillgrem v. Pillgrem, *discussed*,
Connolly v. Munster Bank (1887) 19 L. R. Ir. 1190.—CHATTERTON, V.C.; Ffrench's Estate, In re (1887) 21 L. R. Ir. 283.—C.A. PORTER, M.R., FITZGERDON and BARRY, L.JJ., *applied*,
Jennings v. Mather (1900) 70 L. J. Q. B. 53; [1901] 1 Q. B. 108, 85 L. T. 506 (*see post*, col. 1106)

Keane v Roberts (*supra*), *applied*.
Nugent v. Gifford and Mead v. Orerry (Lord) (*supra*), *questioned*.
Wilson v. Moore (1883) 1 Myl. & K. 337, 36 R. R. 272

BROGHAM, L.C.—The cases which have always been considered as going farthest in protecting the party dealing with an executor are *Nugent v. Gifford* and *Mead v. Orerry* (Lord). It is, however, impossible to read the argument of Lord Hardwicke in each of these decisions without being satisfied that he considered the knowledge of the executor's misappropriation as not distinctly brought home to the party. That there was notice of the representative character is clear, and that there was notice of the executor dealing with testamentary assets we may also admit; nevertheless, the whole argument appears to assume that the party dealing with the executor might suppose the executor had a right so to dispose of the property. "A purchaser from an executor," he says, "has no power of knowing the debts of the testator." Again, "If you can follow the property into the hands of the assignee, this would be saying that no man could have an assignment from executors without coming into the Court of Chancery to have an account how he has distributed the assets of his testator." But there can be no doubt that subsequent decisions are difficult if not impossible to be reconciled with these two cases. What Lord Hardwicke lays down in *Nugent v. Gifford* would probably not have been so stated if *Pare v. Newman* (*supra*) had then been decided. Lord Kenyon had at the Rolls, in *Janney v. Ridgard* (*supra*), expressed himself as strongly of opinion that *Mead v. Orerry* (Lord) went too far, and he held that, though a person purchasing from an executor is not bound to see to the application of the money, yet that the purchaser taking with the knowledge that the money was to be misapplied, had no protection. Lord Thurlow in *Scott v. Tyler* (*supra*), says, that *Nugent v. Gifford* cannot be reconciled with *Crane v. Drake* (*supra*). And Lord Thurlow is known to have formed an opinion clearly against the bankers in *Scott v. Tyler*, though the matter was compromised. It is quite clear from what Lord Eldon says in the elaborate judgment in *W. Lord v. Drummond* (*supra*), where he minutely examined all the cases, that he considered *Janney v. Ridgard* to have shaken *Nugent v. Gifford* and *Mead v. Orerry*, in so far as these cases may be

supposed to establish any general principle—p. 355. *And see post*.

Nugent v. Gifford and Mead v. Orerry (Lord), *discussed*.
Graham v. Drummond (1806) 65 L. J. Ch. 472; [1896] 1 Ch. 968.—ROMER, J. (*see post*, col. 1068).

Keane v Roberts and Wilson v. Moore (*supra*), *referred to*.
Shields v. Bank of Ireland (1900) [1901] 1 Ir. R. 222.—PORTER, M.R.

Elliot v. Merriman and Bonney v. Ridgard (*supra*, col. 1062), *followed*.
Shaw v. Borier (1836) 5 L. J. Ch. 864, 1 Keen 559.—LANGDALE, M.R. *And see post*.

Bonney v. Ridgard, *distinguished*, *Ridgway v. Newstead* (1861) 30 L. J. Ch. 889; 3 De G. F. & J. 474.—L.C. (*post*, col. 1109), *discussed*.
Soar v. Ashwell (1893) 2 Q. B. 390, 4 R. 602, 69 L. T. 685, 42 W. R. 165.—C.A. FISHER, M.R., BOWERS and KAY, L.JJ.

Elliot v. Merriman, *explained*.
Colyer v. Finch (1856) 26 L. J. Ch. 65; 5 H. L. Cas. 905.—H. L. (2); *affirming* 19 Deav. 600.—M.R. *And see post*, col. 1065.

Shaw v. Borier and Mills v. Banks (1724) 3 P. Wms. 1, *approved*.
Ball v. Harris (1840) 8 L. J. Ch. 114; 1 Myl. & Cr. 264. 3 Jur. 140.—COTTENHAM, L.C.; *affirming* 8 Sim. 485.—SHADWELL, V.C. *And see post*.

Johnson v. Kennett (1833) 6 Sim. 384.—SHADWELL, V.C. *reversed*, (1835) 3 Myl. & K. 624, 41 R. R. 145.—LYNDHURST, L.C., *explained*.

Page v. Adam (1841) 10 L. J. Ch. 407, 4 Beav. 269.—LANGDALE, M.R., *approved*.
Forbes v. Peacock (1846) 15 L. J. Ch. 371, 1 Ph. 717.—LYNDHURST, L.C., *reversing* (1845) 13 L. J. Ch. 46; 12 Sim. 528.—SHADWELL, V.C.

Forbes v. Peacock, *discussed*.
Doc d. Jones v. Hughes (1851) 20 L. J. Ex. 148; 6 Ex. 223.—EX. *And see post*.

Mills v. Banks and Ball v. Harris (*supra*), *discussed*.

Johnson v. Kennett and Forbes v. Peacock, *distinguished*.
Stroughill v. Anstey (1852) 22 L. J. Ch. 130, 1 De G. M. & G. 635; 16 Jur. 671.—ST. LEONARDS, L.C. *And see post*, col. 1066.

Doc d. Jones v. Hughes (*supra*), *observed on*.
Robinson v. Lowater, 37 Beav. 592.—ROMILLY, M.B.; *affirmed*, (1854) 23 L. J. Ch. 641; 5 De G. M. & G. 272; 19 Jur. 863, 2 W. R. 394.—KNIGHT BRUCE and TURNER, L.JJ.

Doe v. Hughes, *discussed*.
Cook v. Dawson (1861) 3 De G. F. & J. 127 (*post*, col. 1065), Tanqueray-Willaine and Landau, In re (*post*, col. 1065).

Robinson v. Lowater, *explained*. *And see post*.
Storry v. Walsh (1854) 27 L. J. Ch. 588; 18 Beav. 569, 13 Jur. 503.—ROMILLY, M.R.

Forbes v Peacock (*supra*) and **Stroughill v Anstey** (*supra*), followed
Sabin v Heape (1859) 20 L. J. Ch. 79; 27 *W. R.* 558, 5 Jur. (N.S.) 1146, 1 L. T. 51; 8 *W. R.* 120.—(NOMILLY, M.R. *And see post*, col. 1065.)

Forbes v Peacock, *discussed*
Stroughill v Anstey, *explained*.
Tanqueray-Williaume and Landau, In re (*post*, col. 1065).

Robinson v Lowater and **Sabin v Heape** (*supra*), followed
Hodkinson v Quinn (1860) 30 L. J. Ch. 118, 1 J. & H. 803; 7 Jur. (N.S.) 64; 3 L. T. 804, 9 *W. R.* 197.—WOOD, V.-C.

Forbes v Peacock, *explained and followed*
Carlton v Truscott (1876) L. R. 20 Eq. 318; 44 L. J. Ch. 186, 32 L. T. 50; 23 *W. R.* 802.
JESSEL, M.R. [after discussing *Forbes v Peacock*, continued:—] Therefore, the decision amounted to no more than this—that wherever there was a power to sell for the payments of debts and legacies there was an implied power to give receipts. At the present time that implied power is no longer wanted. Beyond that, as it appears to me, *Forbes v Peacock* has no application to the case before me.—p. 350.

Robinson v Lowater, *questioned*.
Cook v Dawson (1861) 30 L. J. Ch. 850; 3 De G. F. & J. 137, 4 L. T. 226, 9 *W. R.* 431.—L.J., *affirming* 29 *Beav.* 123; 7 Jur. (N.S.) 130.—NOMILLY, M.R.

TURNER, J.J.—I cannot say, on looking into the authorities on the subject, that the title can be held to be good. It may be so if *Robinson v Lowater* is to be followed to its full extent; but I observe that doubts have been expressed in the profession whether that case should or should not be followed to its full extent, and I must respectfully say that I think the purchaser has done very wisely in escaping from his purchase.—p. 360.

[In the reports in De G. F. & J. and the Law Times the case referred to by Turner, J.J. is *Finch v. Plattesley* (*see col.* 1061).]

Watkins v Check (1825) 2 Sim. & S. 199, 25 R. R. 181.—V.-C., *approved*.

Robinson v Lowater, *commented on*.
Cosser v Cartwright (1875) 45 L. J. Ch. 605, L. R. 7 H. L. 731.—H. L. (C.). **CAIRNS, L.C.**, **LORDS HATHERLEY, O'HAGAN and SELBORN**; *affirming* (1873) L. R. 8 Ch. 971, 29 L. T. 596; 21 *W. R.* 938.—JAMES and MELLISH, J.J. *And see post*, cols. 1066, 1067.

Sabin v Heape (*supra*, col. 1064), *partially discussed from*.

Tanqueray-Williaume and Landau, In re (1882) 20 Ch. D. 465, 51 L. J. Ch. 434; 30 *W. R.* 801, *reversing* (1881) 45 L. T. 281.—KAY, J.

JESSEL, M.R.—The only remaining point is what period of time is sufficient to raise a presumption that the debts have been paid. Now upon that point, and upon that point only, I differ from *Sabin v Heape*. I think it is clear that ten years and a-half are not sufficient, but, as has been said, the line must be drawn somewhere. The question is where? In *Sabin v Heape*, the late M.R. held that the lapse of twenty-seven years did not raise the presumption. I think that period too long. In *Forbes v Peacock*

(*supra*, col. 1064) the period was twenty-five years, which the V.-C. appears to have considered too long—p. 450. His lordship also referred to *Boiley v Bailey* (*supra*, col. 1062) and *Stroughill v Anstey* (*supra*, col. 1061).

BRETT, L.J.—Now, it seems to me that a reasonable and fair general rule of construction may be deduced from the decided cases, and that this rule is well stated in *Hartland v Marrell* (*supra*, col. 1062). There the M.R. says, "I am of opinion that when a testator bequeaths all his real estate to his executors and directs them to pay all his debts, that constitutes a charge on the real estate, although they take no beneficial interest in it." Upon hearing those two cases read [*Wase v. Medington* (*supra*, col. 1062), and *Hartland v. Marrell*], it seemed to me that you might extract from them a very good rule, viz., that where a gift is in the form mentioned in *Hartland v. Marrell*, the debts are charged upon the real estate, unless upon other parts of the will a contrary intention clearly appears. The rule, as stated in *Hartland v. Marrell*, with that proviso on condition attached to it, seems to me to be consistent with the authorities, and to be well stated in the passage from *Boiley v. Bailey*, which was read by the M.R.—p. 452. **HOLKER, J.** concurred.

[The C. A. laid it down that twenty years was a reasonable period.]

Tanqueray-Williaume and Landau, In re, *discussed*.

Molynux and White, In re (1881) 15 L. R. Ir. 333.—**C. A.** **SULLIVAN, L.C.**, **MAY, C.J.**, **FITZGERALD** and **BARRY, L.J.**; *affirming* 13 L. Ir. 382.—**CHATTERTON, V.-C.**

Tanqueray-Williaume and Landau, In re, and **Molynux and White, In re**, *followed*.
Ryan and Cavanagh, In re (1885) 17 L. R. Ir. 42.—**CHATTERTON, V.-C.**

Tanqueray-Williaume and Landau, In re, *not applied*, **Whistler and Richardson, In re** (1887) 56 L. J. Ch. 827; 35 Ch. D. 561, 37 L. T. 77; 35 *W. R.* 652; 51 J. L. 890.—**KAY, J.**, *applied*.
De Burgh Lawson, In re, **De Burgh Lawson v. De Burgh Lawson** (1889) 58 L. J. Ch. 561, 41 Ch. D. 568, 37 *W. R.* 797.—**STIRLING, J.**

Whistler and Richardson In re (*supra*), *followed*.

Cosser v Cartwright (*supra*, col. 1065), *applied*.

Venn and Ferra's Contract, In re (1894) 63 L. J. Ch. 803; [1894] 2 Ch. 101; 8 R. 220; 7 L. T. 312; 42 *W. R.* 440.

STIRLING, J.—The question whether the rule thus laid down [that where executors in whom real estate is vested for a legal estate in fee simple subject to a charge of debts are selling, a purchaser is not bound or entitled to inquire whether debts remain unpaid unless twenty years have elapsed from the testator's death] ought to be applied to the case of executors selling leaseholds arose in *Whistler, In re*. . . although the facts in that case are different from those which occur in the present, and although there the contract was entered into within twenty years of the testator's death, it appears to me to be an express decision that the rule in question is not applicable to the case of an executor selling leaseholds. It is said however that this decision

conflicts with . . . *Molynson and White, In re (supra)*, a case which was not cited in *Whistler, In re*. In my opinion those decisions were not based upon the rule in question. The L.C. of Ireland, in giving the judgment of the C.A., says "There is potent evidence that the debts have, as a matter of fact, been paid. . . . The V.C. came to the conclusion that there was clear evidence before him that the debts were paid, and that the vendors were violating the trusts reposed in them. . . . We do not decide as to the limit of twenty years" (by which I understand the period fixed as the limit in *Tanqueray-Walker and Landan, In re (supra)* to be referred to), "but we think that the order of the V.C. was right, and that the vendors, not being able to say that there were debts still due, had no right to sell." That case seems to have been decided upon evidence that the debts had been paid, and that the executors who were selling were acting as trustees and not as executors. . . . [His lordship then discussed *Corser v. Cartwright*, and continued.] It appears to me that I have the high authority of Lord Cairns and Lord Cranworth [in *Corser v. Cartwright*] for saying that where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary; and, further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity.—p. 306—309

Whistler and Richardson, In re (supra)
and **Venn and Furze's Contract, In re, distinguished.**

Verrell's Contract, In re (1902) 72 L. J. Ch. 44, [1903] 1 Ch. 65; 87 L. T. 521; 51 W. R. 73.—**KELKESWICH, J.** See judgment.

Corser v. Cartwright, applied
West of England and South Wales District Bank v. Murch (1889) 52 L. J. Ch. 784; 23 Ch. D. 138; 48 L. T. 417; 31 W. R. 467.—**FRY, J.**

Crawshaw, In re, Dennis v. Crawshaw (1888) 60 L. T. 357.—**NORTH, J.** followed
West of England, &c. Bank, v. Murch, distinguished.

Morrison, In re, Morrison v. Morrison (1901) 70 L. J. Ch. 399, [1901] 1 Ch. 701; 84 L. T. 385; 49 W. R. 441, 8 Mans. 210

BUCKLEY, J.—**Fry, J.** decided the case [*West of England, &c. Bank v. Murch*] entirely upon s. 30 of Lord Cranworth's Act, as being a compromise with the creditors of the firm.—p. 401

Crawshaw, In re, and Morrison, In re, distinguished.

New's Settlement, In re, Langham v. Langham; Leavers, In re, Leavers v. Hall, Morley, In re Fraser v. Leavers (1901) 70 L. J. Ch. 710, [1901] 2 Ch. 534; 85 L. T. 174, 50 W. R. 17.—**C.A.** reversing **COZENS-HARDY, J.**, who considered himself bound by those decisions.

ROMER, L.J. (for self, **RIGBY** and **COLLINS, L.J.**)

—As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms. *Crawshaw, In re* . . . and *Morrison, In re* . . . are instances where the

Court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorise. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it is not infrequently happens that some peculiar circumstance arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be very essential for the benefit of the estate, and in the interest of all the *cestui que trust*, that certain acts should be done by the trustees, which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen, and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *in jure* or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to.—p. 718.

Onates d. Markham v. Cooke (1765) 3 Burr 1634, and **Anthony v. Rees** (1841) 1 L. J. Ex. 44, 2 Cr. & J. 75, 2 Tyr. 100, 87 R. R. 626.—**EX, followed**
Davies to Jones, In re (1885) 52 L. J. Ch. 720; 24 Ch. D. 199, 49 L. T. 624.—**PEARSON, J.**

Noble v. Brett (1856) 27 L. J. Ch. 516, 24 Beav. 499.—**ROMILLY, M.R.** and **Hooper v. Smart** (1875) 45 L. J. Ch. 99, 1 Ch. D. 90.—**HALL, V.C., distinguished**
Graham v. Drummond (1896) 65 L. J. Ch. 472; [1896] 1 Ch. 968; 74 L. T. 417, 44 W. R. 596.—**ROMILLY, J.** See judgment.

Clay and Tetley, In re (1890) 16 Ch. D. 3, 43 L. T. 402, 29 W. R. 5.—**C.A.** **JESSER, M.R., JAMES and COTTON, L.J.** See now *Trustee Act, 1893* (56 & 57 Vict. c. 53, s. 21).

Indemnity.

Dodson v. Sammel (1860) 29 L. J. Ch. 335, 6 Jur. (N.S.) 147, 1 L. T. 429, 8 W. R. 252.—**KINDERSELEY, V.C., overruled.**
Smith v. Smith (1860) 1 Dr. & Sm. 384; 7 Jur. (N.S.) 652, 4 L. T. 11, 9 W. R. 406

[In *Dodson v. Sammel*, **KINDERSELEY, V.C.** decided that the statute 22 & 23 Vict. c. 35, s. 27, was not retrospective, but in *Smith v. Smith*, **KINDERSELEY, V.C.** said that, upon communication with the other judges, he had found that he was in error, in that case, in holding that the Act was not retrospective, the intention being that it should be retrospective, and that case, therefore, was no longer an authority.]

Wood (or Woods) v. Waightman (1872) L. R. 18 Eq. 434, 26 L. T. 385; 20 W. R. 459.—**ROMILLY, M.R., explained**

Bracken, In re, Doughty v. Townson (1890) 59 L. J. Ch. 18; 43 Ch. D. 1; 61 L. T. 631, 38 W. R. 48.—**C.A.**, affirming **NORTH, J.**

COTTON, L.J.—In *Wood v. Waightman*, Lord Romilly did not say that it was necessary to insert the advertisement in the *Times*; but in that case there had been no advertisement in any

London paper, and he said that an advertisement ought to have been inserted in the *Gazette*, and that it was usual to insert one in the *Times*. But that case does not lay down that that was the rule.—p. 20

BOWEN, L.J. to the same effect. FRY, L.J. concurred.

Clegg v Rowland (1866) 36 L. J. Ch. 137, 1 L. R. 3 Eq. 368; 15 L. T. 385, 13 W. R. 251.—MALINS, V.-C., commented on and approved. Hunter v. Young (1879) 48 L. J. Ex. 689, 4 Ex. D. 256; 41 L. T. 112, 27 W. R. 637.—C.A. BRAMWELL, BAGGALLAY and THESIGER, L.J.; followed, Fawcett, in re, Frowen v. Frowen (1889) 60 L. T. 359.—NORTH, J., dictum dissentient from. Dowdon, in re, Andrew v. Cooper (1890) 59 L. J. Ch. 815, 45 Ch. D. 444, 39 W. R. 219.—FRY, J.

Retainer.

Cockcroft v. Black (1725) 2 P. Wms. 299

—KING, L.C., approved

Franks v. Cooper (1799) 4 Ves. 763.—L.C., disapproved

Dunning, in re, Hatherley v. Dunning (1885) 51 L. T. Ch. 900, 53 L. T. 413, 33 W. R. 760.—C.A. COTTON, LINDLEY and FRY, L.JJ.

Dunning, in re, Hatherley v. Dunning, applied

Loome v. Stothard (1823) 1 L. J. (os) Ch. 220; 1 Sum. & S. 458, 24 R. R. 209

—LEACH, V.-C., examined and explained

Hayward, in re, Tweede v. Hayward (1900) 70 L. J. Ch. 155, [1901] 1 Ch. 221; 84 L. T. 256; 49 W. R. 296.

BYRNE, J.—In reference to the reports of that case [*Loome v. Stothard*], which is stated with more detail in the *Law Journal* than in *Simons & Stuart*, I find that there were two points argued. The first point was a very important one, the judgment deciding that a devisee had a right to retain a debt due to himself or to his trustees out of the produce of the estate devised to him, the other point being as to the costs of the administration—namely, whether they should come out of the estate in priority to the debt or not. . . The case has not got into any of the text-books to which I have before referred as being an authority for the proposition for which it is cited, nor is there any case in which it has been followed as deciding such a question. I have not, therefore, the same difficulty as if I had to deal with an old-established authority on a particular point. In any event I should have thought myself bound by the decision of the C. A. in *Dunning, In re*, but, as I have said, I do not think that *Loome v. Stothard* is an authority for the proposition for which it is now invoked—namely, that a tenant for life *est dedit que tenet* is entitled to retain where there are trustees competent to sue for the corpus of the fund.—p. 157

Spoer v. James (1835) 2 Myl. & K. 487.—

LYNDHURST, L.-C., applied.

Thompson v. Cooper (1841) 13 L. J. Ch. 416, 1 Coll. C. C. 81, 8 Jur. 181.—KNIGHT BRUCE, V.-C.

Perrot v. Austin (1891) 1 Cro. Eliz. 232, questioned

Plumer v. Marchant (1763) 3 Burr. 1890.—MANSFIELD, C.J. And see post, col. 1071.

Perrot v. Austin, commented on

Cooper v. Chesswall (1866) 36 L. J. Ch. 114; 1 L. R. 2 Ch. 112, 15 L. T. 427, 15 W. R. 212.—OHELMESFORD, L.C., reversing 35 L. J. Ch. 498; 1 L. R. 2 Eq. 106; 14 L. T. 262, 14 W. R. 568.—KINDERSLEY, V.-C.

Hall v. Macdonald (1844) 11 Sim. 1.—

SHADWELL, V.-C., and Lovegrove v. Cooper

(1854) 2 Sim. & G. 271.—STUART, V.-C.

commented on

Bain v. Sadler (1871) 40 L. J. Ch. 791, 1 L. R. 12 Eq. 570, 23 L. T. 202, 19 W. R. 1077.—STUART, V.-C.

WICKENS, V.-C.—There is a difficulty created by *Hall v. Macdonald*, but I am bound to say that for a great many years I have thought that case was not law. I remember making a note against it when it was first reported. I have no doubt whatever that Shadwell, V.-C.'s decision was right, but I cannot help thinking that Mr. Simons has misconceived the precise point of the case. In fact, he did not report the case for that point. It is mentioned incidentally, and one can easily conceive certain states of circumstances in which the decision would have been perfectly right without that expression having been necessary, or having been used. It seems to me that this case is, in fact, settled by principle, and that principle is so well established that I may venture to depart even from so great an authority as Shadwell, V.-C. There is no doubt as to the right of retainer against legal assets. There is also, I think, such a preponderance of authority in favour of holding assets like these to be equitable assets, that, notwithstanding the decision in *Lovegrove v. Cooper*, I may so hold.—p. 791

Ferguson v. Gibson (1872) 41 L. J. Ch. 640, 1 L. R. 14 Eq. 379.—V.-C. And see cols. 1071, 1075, approved.

Hall v. Macdonald, questioned

Ilidge, in re, Davison v. Ilidge (1884) 27 Ch. D. 478, 55 L. J. Ch. 991; 51 L. T. 529, 83 W. R. 18.—C.A.

COTTON, L.J.—I at first felt some difficulty about . . . *Ferguson v. Gibson*, but in my opinion that decision was quite right. There an estate was devised to a mother for life, and to the daughter after her death. The V.-C. determined that the widow, who was a surety for the testator by specialty in which the heirs were bound (and if she had paid off the debt would have had a right to the benefit of the specialty), not having paid it off, could only be treated as a simple contract creditor, and had no right of retainer; but that her daughter, who was entitled as devisee in remainder (not as devisee in trust for sale or subject to a charge of debts, but a devisee for her own benefit) and was a creditor by specialty in which the heirs were bound, was entitled to retain. That, in my opinion, was quite right, upon the ground I have expressed, that in the case of a specialty creditor where the heirs are bound, the common law right of action against the heir, by which priority may be gained, is not taken away, whereas a simple contract creditor can only obtain a judgment as against the real estate for the benefit of himself and all the other creditors.—p. 482. BAGGALLAY, L.J. concurred.

LINDLEY, L.J.—I will only add that *Hall v. Macdonald* is not to be relied upon as being any

guide. I do not say that the decision was wrong, for I do not know the facts of the case. There is no reference to this Act of Parliament [3 & 4 Will. 4, c. 104] in the report, and we are not told whether the devise was in trust for sale, or what the circumstances were. The decision may have been right, but the absence of facts makes it useless as an authority.—p. 484

Player v. Foxhall (1826) 1 Russ. 538; 25 R. R. 143.—GILFORD, M.R., *distinguished*.

Burn v. Burn (1707) 3 Ves. 573.—ELDON, L.C., *limited*.

Ferguson v. Gibson (1872) 41 L. J. Ch. 640. L. R. 14 Eq. 379.

WICKENS, V.-C.—*Burn v. Burn* was a case to be followed, but not to be extended.—p. 618. *And see* col. 1070

Ferguson v. Gibson, *applied*

Owen, In re (1889) 23 L. R. Ir. 323.—PORTER, M.R., Giles, In re (*post*, col. 1074).

Player v. Foxhall, *distinguished*

Campbell, Ex parte, Campbell v. Campbell (1880) 16 Ch. D. 198, 13 L. T. 727; 29 W. R. 233.—BACON, V.-C. *And see post*, col. 1074.

Chapman v. Turner (1788) 9 Mod. 268;

Vin. Abn. Executors (D. 2) pl. 2, Fox v. Garrett (1860) 29 L. J. Ch. 423, 28 Beav. 16, 6 Jun. (N.S.) 208; 1 L. T. 474.

ROMILLY, M.R.; and Plummer v. Marchant (*supra*, col. 1069), *followed*.

Sander v. Heathfield (1871) 41 L. J. Ch. 118; L. R. 19 Eq. 21; 31 L. T. 400, 23 W. R. 331.—MALINS, V.-C. *And see post*, col. 1072.

Fox v. Garrett, *applied*.

Owen, In re (1889) 23 L. R. Ir. 323.—PORTER, M.R.

Sander v. Heathfield (*supra*), *explained*.

Stewart, In re, Crowder v. Stewart (1880) 16 Ch. D. 368; 50 L. J. Ch. 136; 29 W. R. 331.

MALINS, V.-C.—I decided that he (the executor) is bound to exercise the right of retainer if the *cestui que trust* require him to do so.—p. 371. *And see post*, col. 1072.

Sander v. Heathfield, *followed*.

Faithfull, In re; Sutton, In re, Hardwick v. Sutton (1887) 57 L. T. 14.—CHITTY, J.

Gann v. Taylor (1842) 11 L. J. C. P. 68; 3 Man & G. 886; 3 Scott (N.S.) 700.—C.P., *followed*.

Jennings v. Rigby (1868) 33 L. J. Ch. 149; 33 Beav. 198; 9 L. T. 308; 12 W. R. 32.—ROMILLY, M.R.

Jennings v. Rigby, *followed*.

Williams' Estate, In re, Williams v. Williams (1872) 42 L. J. Ch. 158; L. R. 15 Eq. 270, 28 L. T. 17, 21 W. R. 160.—WICKENS, V.-C. *And see post*, col. 1073

Williams' Estate, In re, Williams v. Williams, *approved*, Stubbs' Estate, In re, Hanson v. Stubbs (1878) 47 L. J. Ch. 671, 8 Ch. D. 154; 26 W. R. 736.—JESSEL, M.R., Smith v. Morgan (1880) 49 L.N.J. C. P. 410; 5 C. P. D. 337.—LINDLEY, J. *And see infra*, and col. 1118.

Hopton v. Dryden (1701) Prec. Ch. 179; 2

Eq. Cas. Abr. 450, *distinguished*.

Wilson v. Coxwell (1883) 23 Ch. D. 764, 52 L. J. Ch. 975.

PEARSON, J.—I think that the present case is distinguishable from *Hopton v. Dryden*, and that there is a right of retainer, the deceased executor having claimed it during his lifetime.—p. 976.

And see post, col. 1079

Wilson v. Coxwell, *overruled*

Loane v. Casey (1775) 2 W. Bl. 965, *followed* Compton, In re, Norton v. Compton (1885) 30 Ch. D. 16, 54 L. J. Ch. 904; 53 L. T. 110.—C.A.

COTTON, LINDLEY and FRY, L.JS. *See judgments* [*Headnote*].—An executor's right of retainer is limited to so much of the assets of his testator as comes into the possession or under the control of the executor or is paid into Court during his lifetime. If an executor asserts in his lifetime a right of retainer but dies without having exercised it, his representatives may exercise that right for the benefit of his estate only as to anything which the actual control of their testator, or which was paid into Court during his lifetime. Unless *Wilson v. Coxwell* is restricted in this way, it must be treated as overruled.]

Compton, In re, Norton v. Compton, *not applied*, Rhoades, In re, Rhoades, Ex parte (1899) 68 L. J. Q. B. 804, [1899] 2 Q. B. 347.—C.A. (*see post*, col. 1075), *approved and applied*, Taaffe v. Taaffe [1902] 1 Ir. R. 148.—CHATTERTON, V.-C.

Wickens v. Townshend (1830) 1 Russ. & M. 861; 32 R. R. 221.—LYNDHURST, L.C., *applied*.

Birt, In re, Burt v. Burt (1883) 52 L. J. Ch. 397; 22 Ch. D. 604; 48 L. T. 67; 31 W. R. 334.—FRY, J.

Richmond v. White (1879) 48 L. J. Ch. 798; 12 Ch. D. 361; 41 L. T. 570, 27 W. R. 378.—C.A. JAMES, BRETT and COTTON, L.JS.; *reversing* (1878) 10 Ch. D. 727.—HALL, V.-C. (*and see post*, col. 1074), and Birt, In re, Burt v. Burt, *followed with reluctance*.

Wilson v. Coxwell (*supra*), *approved*.

Williams' Estate, In re (*supra*), *distinguished* Stewart, In re, Crowder v. Stewart (*supra*, col. 1071), *distinguished*

Jones, In re, Calver v. Laxton (1885) 31 Ch. D. 440, 55 L. J. Ch. 350, 53 L. T. 855, 34 W. R. 249.

KAY, J.—At first sight the decision in *Williams, In re*, seems to be analogous to the present case, but upon examination there is a considerable distinction. The judgment creditor was no longer a simple contract creditor, but had obtained a higher right than simple contract creditors in the distribution of assets, and the effect of placing specialty creditors for the purpose of distribution on the same level was not necessarily to put them after the judgment creditor. But here the executrix who desires to retain is only a simple contract creditor, and the law that she cannot retain against specialty creditors remains, unless the statute must be read that for this purpose, among others, the specialty creditors are of equal degree with the simple contract creditors. . . . I cannot help the conclusion that the Act (32 &

38 Vict. c. 46) having augmented the fund for payment of simple contract creditors, has to this extent enlarged the right of retainer. In this respect I agree with Pearson, J.'s decision in *Wilson v. Cornwall*,—pp. 446, 447.

Jones, In re Calver v. Laxton, explained
Richmond v. White, not applied
Batten v. Dartmouth Harbour Commissioners (1890) 69 L. J. Ch. 700; 18 Ch. D. 612; 62 L. T. 861; 38 W. R. 605.—KEKEWICH, J.

Wilson v. Cowxell; Jones, In re, and Briggs, In re, Ex p. Briggs, W. N. (1894), p. 162.
—CHITTY, J., *approved*

Williams' Estate, In re, distinguished
Bentnick, In re, Bentnick v. Bentnick (1897) 66 L. J. Ch. 359; [1897] 1 Ch. 673; 76 L. T. 284; 45 W. R. 397.

STIRLING, J.—In *Williams, In re*, the question arose how the position of such a judgment creditor [a simple contract creditor who had obtained judgment] was affected by the Act of 1869 [Indo Palmer's Act], and it was held by Wickens, V.-C., that he was entitled to be paid in priority to both specialty and simple contract creditors. . . . That case, so far as I know, stands alone in the Reports. The other class of cases relates to the right of retainer on the part of a legal personal representative in respect of a debt due to him from the deceased; a right which can only be exercised in preference to creditors of equal degree. With reference to this right it has been decided in . . . *Wilson v. Cowxell*, *Jones, In re*, and *Briggs, In re*, that the assets must, in the first place, be divided rateably between specialty and simple contract creditors, and that effect is to be given to the right of retainer in respect of the simple contract debt due to the legal personal representative only out of the portion coming to the simple contract creditors. The grounds for the decision are thus stated by Kay, J. in *Jones, In re*. . . . I understand *Williams, In re*, to be there distinguished, because after the death of the testator the creditor had recovered judgment, and had thus attained a higher rank than he had at the time of the death. It is also distinctly laid down that the object of the Act of 1869 is "only to take away the priority of a specialty creditor over simple contract creditors, not to give any of them priority over him." I am not sure that Wickens, V.-C. took the same view.—p. 360

Orsmond, In re, Drury v. Orsmond (1887) 58 L. T. 24.—KEKEWICH, J., *not followed*.

Jones, In re, followed.
Hankey, In re, Smith v. Hankey (1899) 68 L. J. Ch. 242; [1899] 1 Ch. 541, 80 L. T. 47, 47 W. R. 444.

NORTH, J.—There is no case in which any distinction has been drawn between the right of retainer and the right of preference. In *Tillot v. Fryer* (1878) 9 Ch. D. 568, 27 W. R. 148—M.R., it was pointed out that both these rights depend on the same principle. In *Williams' Estate, In re* (*supra*), the point did not really arise, but in *Jones, In re*, *Calver v. Laxton*, *Briggs, In re* (*supra*), and *Wilson v. Cornwall* (*supra*) (though not fully argued) the point was decided as to retainer; and in *Bentnick, In re* (*supra*), the same principle was applied to the priority of a simple contract Crown debtor. I cannot decide in favour of the defendant's contention without

going directly in the teeth of these decisions. It is said that I ought to follow *Orsmond, In re*. I have, however, to choose, between that case and another of uniformly consistent authorities to the contrary dealing with the right of retainer. The case, as reported, is short, and not quite intelligible. The learned judge is reported to have said, "Cases have been cited to show that there has been some alteration in an executor's right of retainer." Now the report does not mention the names of the cases cited in support of that proposition, and none of them have been cited to me.—p. 244.

Richmond v. White (*supra*, col. 1072), *explained and followed*.
Langley, In re, Johnson v. Langley (1899) 68 L. J. Ch. 361.

KEKEWICH, J.—I understand the principle of *Richmond v. White* to be that where money is paid into Court for convenience of administration the executor's right of retainer is not interfered with; but where that result follows not from convenience of administration, but because the executor is not a proper person to receive it, and the Court has appointed its own officer in his place, then his right is ousted, but so long as he is in possession of his legal rights as administrator, though under the control of the Court, he is not to lose his right of retainer. It is also said that he must be taken to have waived his right, and that argument is put on the ground that the parties were not aware of his rights. The answer to that is the answer given in *Richmond v. White*, namely, that it is not necessary to expressly reserve the right or to express that the order is made without prejudice to the right.—p. 362.

Jones, In re (*supra*), *approved and applied*.
Taaffe v. Taaffe [1902] 1 Ir. R. 148.—CHATELTON, V.-C.

Lee v. Nuttall (1879) 12 Ch. D. 61.—C.A. JAMES, BAGGALLAY and THESIGER, L.J.J., *approved*, *Jones, In re*, *Calver v. Laxton* (*supra*, col. 1072), *applied*, *Hopkins, In re*, *Williams v. Hopkins* (1881) 18 Ch. D. 370, 45 L. T. 117, 40 W. R. 767—FRY, J., *affirmed*—C.A., *explained*, *May, In re*, *Crawford v. May* (1890) 60 L. J. Ch. 84; 45 Ch. D. 499; 63 L. T. 375; 38 W. R. 765.—NORTH, J., *referred to*, *Leng, In re*, *Tarn v. Emmerson* (1895) 64 L. J. Ch. 468; [1895] 1 Ch. 652, 12 R. 202; 72 L. T. 107; 43 W. R. 406.—C.A. (*see post*, col. 1118); *Davies v. Parry* (1899) 68 L. J. Ch. 346; [1899] 1 Ch. 602; 47 W. R. 429. *See post*, col. 1077.

Hubback, In re, International Marine Hydrographic Co. v. Hawes (1884) 51 L. T. 189.—BAGGALLAY, V.-C., *reversed*, (1885) 54 L. J. Ch. 923; 29 Ch. D. 934, 52 L. T. 908; 33 W. R. 606—C.A. COTTON, BOWEN and FRY, L.J.J.

Campbell, Ex parte, Campbell v. Campbell (*supra*, col. 1071); *Nisbet v. Smith* (1789) 2 Bro. C. C. 578—L.C., and *Harrison, In re*, *Latimer v. Harrison* (1866) 65 L. J. Ch. 687, 32 Ch. D. 203; 55 L. T. 100; 31 W. R. 736—*explained and distinguished*, *Giles, In re*, *Jones v. Pennedraeth* (1896) 63 L. J. Ch. 419, [1896] 1 Ch. 956, 74 L. T. 21; 44 W. R. 283.

KEKEWICH, J.—In that case [*Campbell, Ex parte*] the question was as to a right of retainer apart from a right of proof, but the right which

the V.C. says may be lost, forfeited, or released may be either a right of retainer or a right of proof, and he says the judge who decided *Player v. Porchall* (col 1071) thought that in that case the claim of the heir to retain was made too late. I should decide the present case in the same way as *Player v. Porchall* if I were satisfied that the right had been lost, forfeited, or released, but I see nothing of the kind. . . . Then it is said that he [the applicant] has no right until he has established his debt, and for that the respondents rely on *Harrison, In re*. I confess I thought that the law was clearly settled—certainly it is engrafted in my legal mind by *Niel v. Smith* and by *Erignau v. Gibson* (col 1070). If Pearson, J. decided against or declined to follow these authorities, I should feel a difficulty, but it seems to me that he did nothing of the kind. In the first place, neither case was cited to him. The arguments did not go to this particular point. The judgment was a considered one, but Pearson, J. did not touch this particular point. What he doubts his mind to is that there was nothing due to the executrix before he was called on to pay. There is no debt in that sense, it is an equitable debt. . . . therefore the learned judge was correct in saying there was nothing due to him. . . . and then he directs his mind to the question whether there could be a right of retainer, saying that there were no assets, no money in his hands at the time the death matured—p. 121.

Harrison, In re, approved and applied.
Taffie v. Taffie [1902] 1 Ir R. 148.—CHATELTON, V.C.

Woodward v. Darcy (Lord) (1557) Plowd 184, and Chapman v. Turner (1758) 9 Mod. 268, discussed.

Gilbert In re, Gilbert, Ex parte (1897) 67 L. J. Q. B. 229, [1895] 1 Q. B. 282, 77 L. T. 775, 16 W. R. 431, 4 Manson 337.

WRIGHT, J.—That case [*Woodward v. Darcy*] is mentioned in Williams on Executors (5th edition) p. 568, with approval. . . . I doubt whether it is the law now that the property in the assets is absolutely altered without showing assent or appropriation by the executor. . . . But here the assets are of much less value than her [i.e., the executrix] debt and it seems to me, in the absence of authority that it would be unreasonable to hold that she was bound to go through the form of selling before she could pay herself. There is no authority that she ought, except the statement in *Chapman v. Turner*, as reported in 9 Mod 268. But that report is most unsatisfactory, and does not accord with the same case as reported in Viner's Abridgment, Executor, D. 2, p. 71, which is the only report referred to in Williams on Executors. In the absence of such authority, therefore, I think I ought not to hold that the executrix is bound to realise before she can exercise her right to retain. My judgment is confined to the case where the value of the whole of the assets is less than the debt due to the executrix.—p. 231.

Woodward v. Darcy, explained.

Burge v. Brutton (1843) 12 L. J. Ch 368, 2 Hare 373.—WIGGAM, V.C., discussed.
Rhoades, In re, Rhoades, Ex parte (1899) 68 L. J. Q. B. 804 [1899] 2 Q. B. 347, 80 L. T. 742, 47 W. R. 561, 6 Manson 277.—C.A.
LINDLEY, L.J. (for self, SIR P. JENNINGS and

ROMER, L.J.).—It is not denied that she [the executrix] had a right to retain and might have exercised it before the order [for administration in bankruptcy of the debtor's estate] was made, or, to be more accurate, before she knew that an application for such an order had been made *Gilbert, Ex parte* (supra, col 1073). But it is contended that, as she had not exercised her right before that date, she could not do so afterwards. The older common law authorities go far to show that if an executor was a creditor of his deceased testator, and had assets in his hands sufficient to pay his debt (and all others of a higher degree, if any), such debt was treated as extinguished. . . . Blackstone says so distinctly (vol 3, p. 18). His words are "So much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose." Plowden goes further, and says that the property in the assets is changed—see *Woodward v. Darcy*. But this can only be true if the assets spoken of can be identified and appropriated to the debt which they have satisfied, and this presupposes the exercise of the right in fact; and in the case in Plowden it had been so exercised—see p. 181. *Woodward v. Darcy* was as follows: Luttrell was the obligor, and Woodward, the plaintiff, was obligee. Windham was Luttrell's executor, but Windham was dead, and his executors were the defendants. Windham was a creditor of Luttrell, and had retained assets sufficient to pay himself, leaving nothing for Woodward. The debts were all specialty debts, and it was held that the defendants were entitled to judgment. Until the executor does some act to show which assets he retains, it is obvious that the property in them cannot be changed. This had been noticed before in *Gilbert, Ex parte*, and Wentworth's Office of Executors, cited in the margin of Plowden, p. 166. But it was settled that an executor sued by a creditor could give a retainer by himself in satisfaction of his own debt in evidence under a general plea of *plene administravit*, and that he need not plead a retainer specially—1 Wms Saunders, p. 833, n. 6. The extent to which the doctrine that his debt was carried is further illustrated by the cases collected in Williams on Executors (5th edition), vol. 2, p. 1180. . . . It is quite plain from these authorities that the executor's right to retain assets in his hands was as against him treated as enforced as soon as he could properly enforce it. . . . It is true that an executor with a right of retainer has not all the rights of a secured creditor—see *Lee v. Nuttall* (supra, col. 1074).

His right extends both in law and in equity to all legal assets which he has in his hands, and there is nothing in sect. 126 [Bankruptcy Act, 1883] to deprive him of his right. The judgment of V. Williams, L.J., in *Williams, In re* (1891) 8 Morr 65, supports this conclusion. Counsel for the appellant relied on authorities collected in Williams on Executors, vol. 1, p. 885, which show that if an executor dies without having exercised his right, his executor cannot exercise it unless he also represents the testator. But whatever difficulty there may be in reconciling these cases with Blackstone's statement above referred to, they are quite consistent with the right of the executrix to retain her debt as against the trustee claiming her testator's assets. A similar observation applies to Wigram, V.C.'s judgment in *Burge v. Brutton*. The only person who has a right of retainer is the legal personal

representative of the testator; and if such representative is dead, his representative cannot himself first exercise the right unless he also represents the testator—(*Wynne, In re* (*supra*, col. 1072). This doctrine has no application to this case. There is no analogy between death and an order for administering assets in bankruptcy under sect. 125 of the Bankruptcy Act, 1883—*per* 806, 808.

Rhodes, In re, Rhodes, Ex parte, commented on.

Pulman v. Meadows (1900) 70 L. J. Ch. 97, [1901] 1 Ch. 233, 81 L. T. 26.
CORKE-BARNES, J.—The right [of retainer] is only applicable to a fund which the legal personal representative has got into possession. Lindley, M.R. said so in terms in *Rhodes, In re*. This statement must be qualified in some degree. The fund may have been actually—as money in his own pocket—or constructively in his possession, but if neither the one nor the other, then the right of retainer clearly has no existence—*per* 98.

Bathurst v. De la Zouch (1773) 2 Dick 460; **S. C. nom. Bathurst v. De La Touche**, 81 Beav. 9 n.—*L.C., observed on.*

Boyd, Ex parte, Boyd v. Brooks (1865) 81 L. J. Ch. 605; 12 L. T. 38, 13 W. R. 419—**WYSEBURY, L.C.** (see judgment), *affirming* S. C. nom. **Boyd v. Brooks** (1861) 81 Beav. 7—**ROMILLY, M.R.**

Boyd, Ex parte, Boyd v. Brooks, and Nunn v. Barlow (1824) 1 Sm. & N. 588; 2 L. J. (O.S.) Ch. 123.—**LEACH, V.C., followed.**
And see post, col. 1078.

Orme, In re, Evans v. Maxwell (1889) 60 L. T. 61.—**KAY, J.**

Thomson v. Grant (1823) 1 Russ. 540, n., and **Boyd, Ex parte, Boyd v. Brooks, applied.**

Owen, In re (1889) 23 L. R. 1. 328—**PORTER, M.R.**

Nunn v. Barlow (*supra*), *examined and followed.*

Jones v. Evans (1876) 46 L. J. Ch. 751; 2 Ch. D. 420, 24 W. R. 778—**HALL, V.C., distinguished.**

Davies v. Parry (1899) 68 L. J. Ch. 346, [1899] 1 Ch. 602; 47 W. R. 420, 15 Times L. R. 186.
ROMER, J.—These (*Jones v. Evans*) the executrix, who claimed the right of retainer, did not represent a dead creditor who had proved in the administration action against the testator's estate, but was a mere legatee under that creditor's will, and nothing more. Of course, as legatee, that executrix had no right to prove for a legacy as if it were a debt, and it was held that she had no legal right to prove for the money. That case did not, in my opinion, differ from, or throw doubt on *Nunn v. Barlow* (p. 847). It occurred to me that possibly *Nunn v. Barlow* might prove to have been a case where there was no absolute decree for administration, but only a mere direction for an account; but I find that *Nunn v. Barlow* was actually a case where a full decree for administration had been made.

And, indeed, in *Lee v. Nuttall* (*supra*, col. 1074) James, L.J. pointed out that the right of retainer could not depend upon the right of the legal personal representative to prefer himself to one of the creditors, because, if that had

been the doctrine, the right would stop where there was a full decree for an administration. The law was, that a right of retainer remained, although the right to prefer one creditor to another had ceased. It appears to me, therefore, that it is impossible at the present day to impeach *Nunn v. Barlow*, or the subsequent decisions in which the doctrine as there laid down has been accepted and followed—*per* 359.

Davies v. Parry, approved. (*Creditors' Bonds* (1899) 16 Times L. R. 122—**TRUNE, P., commented on.** *Belham, In goods of, Richards v. Yates* (1899) 81 L. T. 309, 49 W. R. 418, 17 Times L. R. 340—**BARNES, J.**

Nunn v. Barlow (*supra*), and **Davies v. Parry, approved.**

Belham, In goods of, Richards v. Yates, disapproved.

Belham, In re, Richards v. Yates (1901) 70 L. J. Ch. 474, [1901] 2 Ch. 62; 84 L. T. 440, 49 W. R. 498, 17 Times L. R. 340.—**C. A. RUDY, COLLINS and STILLING, L.J.s.**

GOLLINS, L.J.—It was decided in that case [*Nunn v. Barlow*] that, notwithstanding an administration decree, the administrator keeps his right of retainer. . . . The administration bond does this: it writes at large that which is contained in an ordinary administration decree—that is, the obligation to administer rateably and proportionately and according to precedent. . . . If that is conceded, it disposes of that case point upon which Barnes, J. relied in differing from the view of Romer, J. . . . Barnes, J. said that in his view Romer, J. had not sufficiently considered the effect of the words "rateably and proportionately." . . . In my opinion, the decision of Romer, J. is simply justified by the previous decisions, and the opinion of Barnes, J. cannot be sustained.—*per* 476.

Set-off.

Dicken, Ex parte, Dicken, In re (1817) Buck 115—**ELDON, L.C., distinguished.**

Stammers v. Elliott (1867) 37 L. J. Ch. 335, L. R. 3 Ch. 193, 18 L. T. 1, 16 W. R. 489, *reversing*, L. R. 1 Eq. 675, 16 L. T. 260, 15 W. R. 618—**MALINS, V.C.**

CHELMSFORD, L.C.—This is a very different case from *Dicken, Ex parte*, where Lord Eldon held that the proof of a debt under a commission of bankruptcy by a trustee did not deprive the *cestui que trust* of a lien which they previously had in respect of the debt. But here the proof was made by . . . to whom the debt was due in his character of executor—*per* 357.

Stammers v. Elliott, applied.

Armstrong v. Armstrong (1871) L. R. 12 Eq. 614, 25 L. T. 199; 19 W. R. 971—**WICKENS, V.C.** *Whitehouse, In re, Whitehouse v. Edwards* (1887) 57 L. J. Ch. 161, 37 Ch. D. 689, 57 L. T. 761, 36 W. R. 181—**STIRLING, J.** (*and see post*, col. 1079), *discovered and distinguished.* **Palmer, In re, Palmer v. Clarke** (1895) 13 L. R. 220—**KEENEWICH, J.**

Man, Ex parte, Harvey, In re (1829) Mont

& Mac 210—**LEIGH, V.C., not followed.**
Cherry v. Boniface (1889) 9 L. J. Ch. 118; 4 Myl. & Cr. 442, 3 Jur. 1116—**COTTESHAM, L.C.** *affirming*, 2 Ken 319.—**LANGDALE, M.R.** *And see post*, col. 1079.

Cherry v Boulthée, followed, Bell v Bell (1849) 17 Sin. 127, 13 Jan 1840.—SHADWELL, V.-C.; *quarantined*, Freeman v. Lomas (1851) 20 L. J. Ch. 664, 9 Hare 109, 15 Jur 648.—TURNER, V.-C., followed, Hodgson, In re, Hodgson v Fox (1878) 18 L. J. Ch. 52, 9 Ch. D. 673, 27 W. R. 38.—HALL, V.-C. (*and see post*), Oopen, In re, Boswick v Oopen (1880) 50 L. J. Ch. 25, 16 Ch. D. 202, 33 L. T. 728, 29 W. R. 467.—HALL, V.-C. (*and see post*, col 1080), *principles applied*, Akerman, In re, Akerman v Akerman (1891) 61 L. J. Ch. 34, [1891] 3 Ch. 212. *See post*, col. 1080.

Jeffs v. Wood (1728) 2 P. Wms. 128, followed, Ranking v. Barnard (1820) 5 Mad. 32.—LEACH, V.-C.; *divided*, Courtenay v. Williams (1841) 13 L. J. Ch. 161, 3 Hare 539.—WIGRAM, V.-C. (*see judgment*), affirmed, (1846) 15 L. J. Ch. 204, 8 Jur 844.—LYNDHURST, L. C.

Courtenay v. Williams and Jeffs v. Wood, discussed, Dingle v. Copen, Copen v. Dingle (1898) 68 L. J. Ch. 847, [1899] 1 Ch. 726; 79 L. T. 693, 47 W. R. 279.—BYRNE, J.

Cordwell's Estate, In re, White v Cordwell (1875) 44 L. J. Ch. 716, L. R. 20 Eq. 614, 23 W. R. 826.—BACON, V.-C., and *Courtenay v. Williams*, discussed and *principles applied*, Akerman, In re, Akerman v. Akerman (1891) 61 L. J. Ch. 34, [1891] 3 Ch. 212; 65 L. T. 191; 40 W. R. 12.—KEKEWICH, J. *And see post*, col. 1080.

Akerman, In re, Akerman v. Akerman, distinguished and *dictum not followed*, Taylor, In re, Taylor v. Wade (1894) 8 R. 186; 63 L. J. Ch. 424; [1894] 1 Ch. 671; 70 L. T. 556, 42 W. R. 373.

CRITTY, J.—No doubt the law is settled in the case of a specific devise—that is a matter which lies outside the duties of executors, and a set-off is impossible. It is equally plain, on the authorities, in the case of a specific gift of leaseholds, that the rule laid down in *Akerman v. Akerman* extends to every gift of specific chattels. But if the proposition there is made as a universal one, that in no case of a specific gift can there be a right of retainer, then I am unable to assent to it, to do so would be to narrow the doctrine unnecessarily.—p. 188.

Whitehouse, In re, Whitehouse v. Edwards (*supra*, col. 1078), applied.

Cherry v. Boulthée (*supra*), and *Hodgson, In re, Hodgson v. Fox* (*supra*), and *Rees, In re, Rees v. Rees* (1889) 60 L. T. 260.—KEKEWICH, J., distinguished.

Watson, In re, Turner v. Watson (1896) 65 L. J. Ch. 533; [1896] 1 Ch. 925; 74 L. T. 463, 14 W. R. 571.

NORTH, J.—*Willes v. Greenhill* (col. 1080) and *Akerman, In re*, show quite clearly that the executor would be entitled to retain the debt from the son. *Courtenay v. Williams and Akerman, In re* (*supra*), show that the lapse of time from the son's bankruptcy in 1859, or from the realisation of the security in 1869, both upwards of twenty years ago, would not affect their right to retain. . . . In each of these cases [*Cherry v. Boulthée* and *Hodgson, In re*] the bankruptcy took place in the life-time of the testator, and the ground of the decision was that the executors

were never entitled to the debt, but only to a dividend upon it. These facts are quite different from the facts in the present case. In the present case no one ever proved against the bankrupt's estate. . . . There [*Oopen, In re*, col. 1079] the creditor had not proved, but there was a composition deed to which he had not assented, but to which the proper majority had assented, so that the composition became binding on all the creditors, whether assenting or not; and he being bound by the composition deed was in the same position as if he had proved; and that being so, it was held that there could be no retainer. Another case which was cited in support of the contention that there was no right of retainer is *Rees, In re*. . . . The testator had proved in his life-time against a bankrupt to whom he had left a legacy, but the debt due on the proof was suspended by statute till after the date when the legacy was payable. It was held that the executors could not retain a legacy payable *in presentis* in respect of a debt that would not become payable until a future date. That case is, therefore, quite distinguishable from the present [His Lordship then discussed *Whitehouse, In re*, and continued.] Then the same thing is laid down by Lord Chelmsford in *Summers v. Elliott* (*supra*, col. 1078) just as clearly. It is true that in that case it was a *dictum* merely, because there the executor had proved. Those two cases are, I think, in point—p. 554.

Watson, In re, Turner v. Watson, distinguished, Binns, In re, Lee v. Binns (1896) 65 L. J. Ch. 330; [1896] 2 Ch. 584, 75 L. T. 90.—NORTH, J.

Willes v. Greenhill (1860) 30 L. J. Ch. 808; 29 Beav. 376, 9 W. R. 217.—M.A., *principles adopted*.

Palmer, In re, Palmer v. Clarke (1895) 13 R. 220.—KEKEWICH, J.

Willes v. Greenhill, Akerman, In re (*supra*), and *Watson, In re* (*supra*), referred to, Goy & Co., In re, Farmer v. Goy & Co. (1900) 69 L. J. Ch. 481, [1900] 2 Ch. 149, 83 L. T. 309; 48 W. R. 425.—SETTLING, J.

Right of Preference.

Orford (Earl) v. *Daston* (1702) Colles 229, 182 (B.), reversing, B. C. nom. *Darston v. Orford* (Earl) Pic. Ch. 183, 3 P. Wms. 401, n. 3, applied.

Waiting v. Danvers (1716) 1 P. Wms. 295—M.R.; *Maltby v. Russell* (1825) 2 Sim. & S. 227, 3 L. J. (O.S.) Ch. 86, 25 R. R. 191.—LEACH, V. C.

Orford (Lord) v. *Daston*, applied, Radcliffe, In re, European Assurance Society v. Radcliffe (1878) 7 Ch. D. 733; 26 W. R. 417.—JESSER, M. R.

Radcliffe, In re, commented on, Phillips v. Jones (1884) 28 Sol. J. 360—C. A. COTTON, BOWEN and FRY, L.J.J., affirming BRISTOWS, V. C.

Radcliffe, In re, followed, Vibart v. Cole (1800) 59 L. J. Q. R. 152; 21 Q. B. D. 804; 62 L. T. 551; 33 W. R. 359.—C.A. COLRIDGE, C.J., ZSHER, M. R., and FRY, L. J.

Radcliffe, *In re*, *discussed*.

Philips v Jones and Harris, *In re*, Harris v Harris (1887) 56 L. J. Ch. 754; 56 L. T. 507, 35 W. R. 710—*CHIPPY, J.*, *principle applied*.
Wells, *In re*, Molony v Brooks (1890) 59 L. J. Ch. 810, 45 Ch. D. 569, 63 L. T. 521, 39 W. R. 139.—*STIRLING, J.*

Appropriation to satisfy Legacies.

Barclay v Owen (1889) 60 L. T. 220—*KAY, J.*; and Richardson, *In re*, Morgan v Richardson (1896) 65 L. J. Ch. 512, [1896] 1 Ch. 512; 74 L. T. 12, 44 W. R. 279—*NORTH, J.*, *discussed*.
Brooks, *In re*, Coles v Davis (1897) 76 L. T. 771.—*STIRLING, J.*

Lepine, *In re*, Dowsett v Culver (1891) 61 L. J. Ch. 153, [1892] 1 Ch. 210, 66 L. T. 300—*C.A.*. LINDLEY, BOWEN and FRY, L. J., and Richardson, *In re*, Morgan v Richardson, *applied and extended*.
Nickels, *In re*, Nickels v Nickels (1898) 67 L. J. Ch. 406, [1898] 1 Ch. 680, 78 L. T. 379, 46 W. R. 422.—*STIRLING, J.*

Elliott v Kemp (1840) 10 L. J. Ex. 321; 7 M. & W. 309—*EX.*. Richardson, *In re*; Lepine, *In re*, and Waters, *In re*, Preston v Waters (1889) 24 L. J. N. C. 30, W. N. (1889) 39, *principle discussed and applied*.
Bevelly, *In re*, Watson v Watson (1901) 70 L. J. Ch. 295; [1901] 1 Ch. 681; 84 L. T. 295, 49 W. R. 343.

BUCKLEY, J.—The cases are numerous in which it has been held that executors and trustees have power to appropriate personal estate under such circumstances as arise in this case. For instance, in *Elliott v Kemp* appropriation of furniture, in *Barclay v Owen*, appropriation of a mortgage debt, in *Richardson, In re*, appropriation of stock in a brewery company, in *Brooks, In re*, appropriation of shares in a brewery company; in *Nickels, In re*, appropriation of stock; and in *Waters, In re*, appropriation of mortgages and other securities, were all held to be valid. . . There was no trust for conversion in *Elliott v Kemp*, or in *Richardson, In re*, or in *Barclay v Owen* (*supra*). In each of the other cases there was a trust for conversion. Counsel have not referred me to, and I have not found any case relating to appropriation of chattels real. The question I have to determine is whether under circumstances such as these a valid appropriation can be made of chattels real—p. 297. [His lordship then discussed *Richardson, In re*, and *Lepine, In re*.]

Right to Residue.

Gibbs v Rumsey (1819) 2 Ves. & R. 294, 13 B. R. 68—*GRANT, M.R.*, *observed on*.
Buckle v Bristow (1864) 10 Jur. (N.S.) 1095
WOOD, V.-C.—Now, first, upon the will as it stands, what ought to be the construction, regard being had to the decision of *Gibbs v Rumsey*, on the one hand, and *Finley v Garlike* [(1830) 8 L. J. (O.R.) Ch. 66; 1 Russ. & M. 232], and *Ellis v Selby* [(1836) 6 L. J. Ch. 214; 1 Myl. & C. 286], before Lord Cottenham, and that class of cases on the other? *Gibbs v Rumsey* is a decision which is entitled to the weight attaching

at all times to a decision of Sir W. Grant. but I think one may safely say it goes to the very outside of the doctrine, as that will was construed not to imply any trust whatever, especially having regard to the word "direction," which was there used. Lord Cottenham does not appear to have been altogether satisfied with *Gibbs v Rumsey*, and I apprehend no case would be decided according to it, where the gift was not precisely and distinctly in the words there mentioned, "to trustees and executors, to be disposed of in such manner as they in their discretion shall think proper."—pp. 1096, 1097.

Robinson v Taylor (1789) 2 Bro. C. C. 589.—*THURLOW, L.C.*, *discussed*.
Dawson v Clark (1811) 18 Ves. 247; 11 B. R. 158—*ELDON, L.C.*; *affirming* 16 Ves. 409—*GRANT, M.R.*, *commented on*.
Elcock v Mapp (1851) 3 H. L. Cas. 492—*H.L. (B.)*, *affirming* 8 C. Ann. Mapp v. Elcock (1849) 18 L. J. Ch. 217, 2 Ph. 793; 13 Jur. 290.—*COTTENHAM, L.C.*

Love v Gaze (1846) 8 Beav. 472; 9 Jur. 910.—*M.R.*; and Saltmarsh v Barrett (1861) 30 L. J. Ch. 853; 3 De G. F. & J. 279; 7 Jur. (N.S.) 818; 4 L. T. 690.—*L.J.*; *affirming* 29 Beav. 474; 9 W. R. 564.—*M.R.*, *commented on*.
Williams v Arkle (1875) 45 L. J. Ch. 590; L. R. 7 H. L. 606, 39 L. T. 187, 24 W. R. 215.—*H. L. (B.)*.

CAIKINS, L.C.—Notwithstanding some dicta which appears to have fallen from Lord Langdale in *Love v Gaze*, I cannot entertain any doubt that this statute [1 Wm. 4, c. 40] did not introduce any new rule for the construction of wills.—p. 593. LORD HATHERLEY concurred.
LORD GHELMESFORD, who dissented, commented on *Saltmarsh v Barrett*.

Braddon v Farrend (1827) 4 Russ. 87; 6 L. J. (O.R.) Ch. 95.—*LEACH, M.R.*, *disapproved*.
Knowles, *In re*, Roosa v Chalk (1880) 49 L. J. Ch. 625; 43 L. T. 152, 28 W. R. 977.—*MALINS, V.-C.*

Farrington v Knightly (1719) 1 P. Wms. 544, 549, n. (1), *approved*.
Knowles, *In re*, Roosa v Chalk, *commented on*.
Dillon v. Reilly (1881) 9 L. R. Ir. 37.—*C.A.*
Middleton v Spicer (1788) 1 Bro. C. C. 201.—*THURLOW, L.C.*; *applied*, Taylor v Haygarth (1844) 14 Sim. 8.—*SHADWELL, V.-C.*; Johnstone v. Hamilton (*post*).

Muckleston v Brown (1801) 6 Ves. 52. 5 H. R. 211.—*L.C.*, *explained*.
Johnstone v. Hamilton (1865) 11 Jur. (N.S.) 777; 12 L. T. 322; 13 W. R. 961.—*STUART, V.-C.*

Middleton v Spicer, *referred to*.
Higginson and Dean, *In re*, Att.-Gen. Ex parte (1898) 68 L. J. Q. B. 198, [1899] 1 Q. B. 325; 79 L. T. 673; 47 W. R. 286, 5 Manson 289.—*WRIGHT and DARLING, JJ.*

White v Evans (1798) 4 Ves. 21.—*M.R.*, *applied*.
Lacy, *In re*, Royal General Theatrical Fund Association v Kydd (1898) 68 L. J. Ch. 483; [1899] 2 Ch. 143; 80 L. T. 706, 47 W. R. 664.—*STIRLING, J.*

8 LIABILITIES.

Tugwell v. Heyman (1812) 3 Campb 298.

approved

Ashton v. Sherman (1698) Holt 308, *disapproved*.

Bogues v. Price (1829) 3 Y. & J. 28.

VAUGHAN, B.—The *duties* of Holt, C.J. [“If A. employs B. to work for C., A. is liable to pay for it. An executor is not liable to pay for funeral expenses unless he contracts for them.”], is expressly at variance with the opinion of Lord Ellenborough [in *Tugwell v. Heyman*], and, were it necessary, I should feel no difficulty in assenting to the latter authority, but it is not necessary to draw any comparison between the two cases, because, from the note of the former it does not appear under what circumstances that opinion was delivered. The latter is a case precisely applicable to the present, acquiesced in by the counsel, and confirmed, if confirmation were required, by the opinion of the C.J. of the C.P. I consider the burden of the debt to be a clear obligation upon the executor, and think that he is liable for the expenses incurred, if in his absence that duty be performed for him by another.—p. 37

Hoyle v. Lunden (1677) 3 Keb 839; and

Norden v. Levett (1675) 3 Keb 778. Sir

T. Jones *ERR, disapproved*

Farr v. Newman (1792) 4 Term Rep. 621, 2 R. R. 479.

KENTON, C.J.—As to the case cited from 3 Keble, my brother Ashurst has already observed, that that reporter is not always accurate, and, if any instance were wanting to warrant the observation, the case referred to would prove it; because he there referred to another case of his own reporting, as of the preceding term, which is not there to be found. And, indeed, I cannot reconcile to my mind the principle said to have been established in *Norden's Case*, that an executor shall be compelled to commit a devastavit *notens videns*—p. 649

Baker, In re, Collins v. Rhodes (1881) 51

L. J. Ch. 315, 20 Ch. D. 230; 45 L. T.

658, 30 W. R. 858—C.A. **JESSEL, M.R.**

BAUGALLAY and LUSH, L.JJ., reversing

44 L. T. 414—KAY, J.: and Thorne v.

Kerr (1865) 25 L. J. Ch. 57, 2 K. & J.

54, 2 Jur. (N.S.) 322; 4 W. R. 131—

WOOD, V.-C., followed

Gale, In re, Blake v. Gale (1888) 22 Ch. D.

20, 48 L. T. 101, 31 W. R. 538—**BACON, V.-C.**

Baker, In re, and Birch, In re, Bos v. Birch,

(1884) 51 L. J. Ch. 119; 27 Ch. D. 662,

61 L. T. 777, 33 W. R. 72—**CHITTY, J.,**

referred to

Leahy v. De Moleyns (1895) [1896] 1 Ir. R.

206—C.A.

Gale, In re, Blake v. Gale, considered

Marsden, In re, Bowden v. Layland (1884) 54

L. J. Ch. 640; 26 Ch. D. 788; 61 L. T. 417, 33

W. R. 28.—**KAY, J.**

Marsden, In re, Bowden v. Layland, followed.

Gale, In re, distinguished

Hyatt, In re, Bowles v. Hyatt (1888) 57

L. J. Ch. 777, 38 Ch. D. 609; 59 L. T. 227

CHITTY, J., after discussing Baker, In re,

said: There has been delivered at the bar before

me an argument to the effect that Kay, J.'s

judgment [in *Marsden, In re*] was based upon an

erroneous proposition—namely, that the executor was a trustee for creditors—and therefore it was said it was in substance an erroneous decision. From the report it would appear that the learned judge spoke of the executor as a trustee.

I think it is quite immaterial whether Kay, J. did, or did not, call the executor a trustee. The language I prefer myself using is, that he owes a duty to the creditors, both at law and in equity, to administer the estate according to the well-established principles. . . . In *Gale, In re*

the V.-C. . . expressed himself thus: “Upon the authorities, and also upon the well settled rule of law, if you sue upon a *devastavit*, that is personal against the executor, and is barred by the six years.” I think he there enunciated the law correctly, and whether these may not have been some slight misapplication of the law in regard to the facts of the case and the mode in which it was shaped against the executors, it is quite unnecessary for me to inquire. I do not look upon that case as any authority that justifies the proposition that the executor, when simply sued as such, and simply charged with what he has received, and not sued, therefore, upon any *devastavit* at all can set up his own wrong, and then plead the statute by way of defence founded on his own wrong—p. 782

McCulloch v. Dawes (1826) 9 D. & R. 40,

5 L. J. (OS) K. B. 56, 30 R. R. 515—

K.R., dictum disapproved.

Hill v. Walker (1858) 4 K. & J. 166

[*Dictum* of **BAYLEY, J.**—“Executors have no right to waive any legal defence to such an action: and if they did, and were to pay a debt against the recovery of which there was any legal bar, they would render themselves liable over to those who were interested in the testator's property.”]

WOOD, V.-C.—It certainly cannot be considered to be law at the present day, that executors, paying a debt against the recovery of which the Statute of Limitations might be pleaded as a legal bar, render themselves liable over to those who were interested in the testator's property.—p. 169.

McCulloch v. Dawes, referred to.

Rownson, In re, Field v. White (1885) 54

L. J. Ch. 960, 29 Ch. D. 358; 52 L. T. 823; 33

W. R. 604.—C.A. **COTTON, BOWEN and FRY, L.JJ.**

Hill v. Walker, approved.

Rownson, In re, Field v. White, approved

Midgley v. Midgley (1893) 62 L. J. Ch. 905,

[1893] 3 Ch. 282, 2 R. 561, 69 L. T. 241, 41

W. R. 669—C.A. **LINDLEY, LOPES and A. L.**

SMITH, L.JJ.

Carmichael v. Wilson (1880) 3 Moll. 79.—**HART,**

L.C., varied, (1830) 4 Bligh (N.S.) 145, S. G. nom.

Wilson v. Carmichael, 2 Dow. & Cl. 61.—

H.L. (IR.).

4 DEBENT APPOINTED EXECUTOR.

Wekett v. Raby (1721) 2 Bro. P. C. 386.—

H.L. (R.), explained. And see post.

Byrn v. Godfrey (1798) 4 Ves. 5, 4 R. R.

155.—**L.C., principle applied**

Flower v. Martin (1837) 6 L. J. Ch. 167, 2

Myl. & Cr. 459; 1 Jur. 238.—**L.C., commented on**

Cross v. Spragg (1849) 18 L. J. Ch. 204, 6

Hare 562, 13 Jur. 785.—**WIGRAM, V.-C.; on**

approved, 19 L. J. Ch. 204; 2 Mac & G. 115, 2 Hall & Tw. 333.—COTTENHAM, L.C.

Strong v Bird (1874) 43 L. J. Ch. 814, L. R. 18 Eq. 815; 30 L. T. 745; 22 W. R. 788.—JESSEL, M.R., *distinguished*.
Bottle v Knocker (1876) 46 L. J. Ch. 169; 35 L. T. 645, 25 W. R. 209.—BACON, V.-C.

Strong v Bird, *followed*.
Brown v Selwin (1734) Cas t Talb 340; *affirmed*, *non Selwin v Brown* (1735) 3 Bro. P. C. 607, *distinguished*.
Wickett v Raby (*severe*), *approved*.
Applebee, In re, Leveson v. Beales (1891) 60 L. J. Ch. 793, [1891] 3 Ch. 422, 65 L. T. 406, 40 W. R. 90.—STIRLING, J.

Strong v Bird, *distinguished*.
Hyslop, In re, Hyslop v. Chamberlain (1894) 8 R. 680, 44 L. J. Ch. 168; [1894] 3 Ch. 522; 71 L. T. 378, 43 W. R. 6.

NORTH, J.—The appointment of executor is not enough in itself, though it may be enough in conjunction with other circumstances. **Strong v Bird**. If there had been a communication in the lifetime of the testator, it might have been sufficient; but it is clear that this document is one of instructions how to wind up the estate.—p. 681.

Wankford v Wankford (1699) 1 Salk. 299; and **Nedham's Case** (1611) 8 Co. 136 a, *explained*.

Hudson v. Hudson (1737) 1 Atk. 160.
HARDWICK, L.C.—These cases evince the different foundations on which the right of executors and administrators depend, the power of the latter arising wholly from the ordinary, of the former from the testator.—p. 461.

5. EXECUTOR DE SON TORT.

Baker v. Berisford (1662) 1 Sud. 76, *commented on*.

Curtis v. Vernon (1790) 3 Term Rep. 587, 2 H. Bl. 18; 1 R. R. 774.

KENYON, C.J.—The case in 1 Sud. 76 is reported in a confused manner; but it coincides with saying "that an executor *de son tort* cannot pay himself." Now that goes the length of deciding the present case.—p. 569.

And see post, col. 1086.

Tharpe v. Stallwood (1843) 12 L. J. C. P. 241.—C.P., *explained*.

Forster v. Bates (1843) 13 L. J. Ex. 88; 12 M. & W. 226, 1 D. & L. 400; 7 Jur. 1093.

PARKIN, B. (for the Court).—All the authorities on this subject were considered by the Court of C. P. in **Tharpe v. Stallwood**, and some are also to be found in 2 Roll Abr. tit. "Trespas per Relation." In that case, the Court determined that trespass was maintainable, under the circumstances, by the administrator, the reason for which relation is given by Rolle, C.J. in **Long v. Hebb** (1662) Styles 341, that otherwise there would be no remedy for the wrong done.—p. 90.

And see post, col. 1087.

Forster v. Bates, *discussed*.

Woolley v. Clark (1822) 5 B. & Ald. 744,

1 D. & R. 409, 24 R. R. 546.—K.B., *referred to*.

Kenrick v. Burges (1583) Moore 122.—K.B., *commented on*.
Morgan v. Thomas (1853) 8 Exch. 302, 22 L. J. Ex. 152 17 Jun. 283.

POLLOCK, C.B.—The only matter adduced by the defendant's counsel, which is in the least in his favour, is what fell from the Court of K. B. in **Kirack v. Burges**, and which turns out to have been a mere *dictum*, although, no doubt, the judges entertained that view of the question. But the modern authorities are opposed to the defendant's arguments, and, amongst other cases, that of **Hodley v. Clark** may be cited.—p. 306.

Padget v. Priest (1787) 2 Term Rep. 97;

1 R. R. 440.—K.B., *discussed*.
Sharland v. Mildon (1846) 15 L. J. Ch. 484, 5 Hare 469, 10 Jur. 771.—WIGRAM, V.-C.

Paull v. Simpson (1846) 15 L. J. Q. B. 352.

Q. B. 365.—Q.B. (*and see post*, col. 1087).

Padget v. Priest. Hooper v. Summersett

(1810) Wightw. 16, 12 R. R. 708; and

Curtis v. Vernon (col. 1085), *discussed*.

Carmichael v. Carmichael (1816) 2 Ph. 101;

10 Jur. 908.—L.C., *dictum discussed from*.

Hill v. Curtis (1865) L. R. 1 Eq. 90, 35 L. J. Ch. 133, 12 Jur. (S.S.) 4, 13 L. T. 581, 14 W. R. 125.

WOOD, V.-C.—How is a man, who has improperly got the property of a testator into his hands, to purge himself, except by putting it into the hands of the person who has a right to it? And if that be so, on what principle can it be said that, because there are matters of account, a suit must be brought in order to settle them? I confess I cannot see why. Then it is said that Lord Cottenham has decided otherwise in **Carmichael v. Carmichael**. But the remarks of Lord Cottenham were not requisite for the decision of the case, it was a *dictum*, and in these terms (p. 103)—"How can you distinguish this case from one in which there are two executors, and one dies, and his representative accounts for his receipts with the survivor? That does not discharge him from the liability to account in a suit for the administration of the estate, and the authorities show that an executor *de son tort* cannot say he is so against those who charge him as executor. He has all the liabilities, but none of the privileges that belong to that character." Now, I have considered that *dictum* with the respect that is due to so high an authority, and I confess I cannot follow the reasoning by which his lordship arrived at that conclusion. It is plain that an executor cannot discharge himself by accounting to his co-executor, because he is himself authorised, and it is his duty, to see how the assets are applied. When he has paid over the assets he is not discharged, he must see to their application. If he charged, he must see to part with possession of the assets to his co-executor, though he is not answerable for his co-executor's receipts, he is responsible for what he so pays over. But it may well be asked, what right have you to proceed against a man who has had wrongful possession of property; if he have discharged his duty by making it over to the executor? What claim have you to say, "You shall not be discharged by the rightful owner, but we will unite all you have done, and bring a suit against you

in respect of this property?" That is not the rule at law, it is clear, for an executor *de son tort* who pays over what he has received to the rightful owner before action brought is at once discharged. And I apprehend the rule here must be the same.—p. 97.

His lordship then discussed *Sharland v. Mildon* (*supra*), *Hopper v. Summersett*, *Kenrich v. Burges* (*supra*), and *Endor v. Bates* (*supra*)
And see post, col. 1122.

Carmichael v. Carmichael (*supra*), referred to.
Doyle v. Foley (1901) [1903] 2 Ir. R. 95.—Q.B.D.

Cottle v. Aldrich (1815) 4 M. & S. 175; 1 Stark 37; 16 B. R. 433.—K.B., approved.
Webster v. Webster (1804) 10 Ves. 93; 7 B. R. 351.—MILDON, L.C., referred to.

Sharland v. Mildon, explained.
Sykes v. Sykes (1870) L. R. 5 C. P. 119; 39 L. J. C. P. 179. 22 L. T. 236; 18 W. R. 551.
[It was submitted in argument by Field, Q.C., that "if the executors named in a will intermeddle with the goods of the deceased before taking out probate they can be sued as executors *de son tort*, and it follows that their agents can also be sued. This was expressly held in *Sharland v. Mildon*, it as appears from the report in the Law Journal, the widow of the testator was named executrix in his will"]

BOVILL, C.J.—It is true that executors may be sued as executors by reason of their intermeddling with the goods of their testator before probate, and an executor so circumstanced appears in *Webster v. Webster* to have been called an executor *de son tort*; but this cannot have been intended to imply that he was a wrongdoer. It is clear that a person acting for an executor who has proved the will cannot be treated as an executor *de son tort*, and several cases show that the same is the case if he has not proved the will. This seems to have been assumed in *Hopper v. Summersett* and *Cottle v. Aldrich*. In the case of an intestacy, if a person who is subsequently appointed administrator intermeddles with the goods before obtaining letters of administration, according to *Padgett v. Priest* (*supra*), both he and any agent employed by him may be treated as executors *de son tort*, but even this appears from *Hill v. Curtis* (*supra*) to be subject to some limitation. *Sharland v. Mildon* has been especially pressed upon us, the facts of that case do not very distinctly appear, but it is clear that the widow was there treated as a wrongdoer.—p. 117.

M. SMITH, J. to the same effect.
BRETT, J.—*Sharland v. Mildon* would, I think, be wrongly decided if it really bore the interpretation put upon it by Mr. Field.—p. 119.
[In note 2 to p. 115 of *Sykes v. Sykes* (L. R. 5 C. P.) it will be seen that an examination of the solicitors' papers in *Sharland v. Mildon* showed that the widow was not appointed executrix by the testator in either of the two wills left by him.]

Paul v. Simpson (*supra*, col. 1086), applied.
Rankin v. M'Curry (1889) 24 L. R. Ir. 290.—Q.B.D.

Paul v. Simpson and Hill v. Curtis (*supra*), followed.

Horsell v. Bird (1892) 65 L. T. 709.—MATHEW and M. SMITH, JJ.

6 MARRIED WOMAN EXECUTRIX.

Baynon v. Gollins (1788) 2 Bro. C. C. 323; 1 Dick 697.—THURLLOW, L.C., commented on.
Bellew v. Scott (1720) 1 Strange 410

applied.
Adair v. Shaw (1808) 1 Sch. & Lef. 243.—REDESDALE, L.C. See judgment, where the case is discussed.

Adair v. Shaw, approved.
Baynon v. Gollins, commented on.

Soady v. Turnbull (1886) 35 L. J. Ch. 784 L. R. 1 Ch. 494. 12 Jur. (N.S.) 612, 14 L. T. 813, 14 W. R. 955.—L.J., reversed (1885) 8 L. J. Ch. 539, 13 W. R. 1035.—STUART, V.-C.

TURNER, L.J. (after discussing the earlier cases said): It is not until we come to *Baynon v. Gollins* that I find any doubt suggested as to the liability of the wife surviving; but in that case Lord Thurlow appears to have held that she was not liable, for I think, that, looking at the fact of that case, as appearing in the note to Mr. Eden's edition of Brown's reports, it can hardly be doubted, notwithstanding the different report of the case by Dickens, that it was so held by Lord Thurlow; although looking to the frame of the suit, I find the greatest possible difficulty in reconciling his lordship's view on that point with the decree which appears to have been made. Whatever weight, however, might have been due to this opinion of Lord Thurlow seems to me to be removed by the masterly exposition of the law upon the subject, which is to be found in Lord Redesdale's judgment in *Adair v. Shaw* and by the authorities which are referred to in that judgment; to which it may be added that the analogy to the case of trover, on which Lord Thurlow seems to have relied, seems to be answered by *Bellew v. Scott* (*supra*), which does not appear to have been cited in the argument before him. Upon the authorities, therefore, speaking with all respect to the V.-C., I think that the declaration contained in this decree cannot be supported, and I am confirmed in this opinion by that of Sir E. V. Williams [Williams on Executors, 5th ed. vol. ii. p. 1667], to whom a higher authority upon such a point as this could not possibly be found. His opinion is most decidedly in favour of Lord Redesdale's view.—p. 788. KNIGHT BRUCE, L.J. concurred.

7. ADMINISTRATION.

Legal or Equitable Assets

Price v. North (1841) 4 Y. & C. 509.—ARINGER, C.B., reversed, (1841) 11 L. J. Ch. 68 1 Ph. 85; 5 Jur. 1147.—LYNDHURST, L.C.

Charlton v. Wright (1841) 12 Sim. 274.—SHADWELL, V.-C., commented on.
Turner v. Cox (1859) 8 Moore P. C. 288.—F.C. KNIGHT BRUCE, L.J. says, with reference to the above case, that "the argument there was not adversely conducted before that learned judge, who, probably, had not the benefit of such a discussion as would have taken place if the instructions under which the counsel proceeded had been of an adverse nature.—p. 317.

Burgess v. Wheate (1769) 1 Eden 177;

W DI 121, and *Walker v Denne* (1798) 2 Ves 170; 2 R R 185—*L.C.*, *followed*.
Taylor v. Haygarth (1844) 14 Sim 8—*SHADWELL, V.C.*

Burgess v Wheate, distinguished. *Downe* (Viscount) v *Morris* (1814) 13 L J Ch. 337, 3 flare 394—*WIGRAM, V.C.* *applied*. *Davall v. New River Co.* (1849) 18 L J Ch. 299; 3 De G & Sm 394—*KNIGHT BRUCE, V.C.*, *not applied*. *Onslow v. Wallis* (1849) 19 L J Ch 27. 1 Mac & G 506. 1 H. & T 513, 13 Jur. 1085—*COTTENHAM, L.C.*

Downe (Viscount) v Morris, observed on.
Burgess v Wheate, followed.
Beale v Symonds (1858) 22 L J Ch 798; 16 Beav 406, 1 W R 137.
ROMILLY, M R—*Downe (Viscount) v. Morris* alone appears to militate against *Burgess v Wheate*, and if followed it would affect or qualify that decision, unless it meant merely to establish the proposition, which would be new, viz., that if a term of years is vested in a tenant, and subject to that term the reversion in fees is vested in another, if the tenant should mortgage his term and die without heirs and next of kin, then that in every such case the reversion of the fee would be entitled to redeem the mortgage of the term. The V.C., however, in deciding that case, expressly admits the authority of *Burgess v Wheate*, and considers that it did not affect the case then before him.—p 712.

Mathews v Jones (1795) 2 Anst 506, *approved*.
Speckman v Timbrell (1837) 6 L J Ch. 147, 8 Sim. 273—*SHADWELL, V.C.*, *Richardson v. Horton* (1843) 13 L J Ch 186, 7 Beav. 112, 7 Jur 1144.—*LANGDALE, M.R.*

Speckman v Timbrell and Richardson v Horton, observed on.
Pimm v Insall (1819) 19 L J Ch 1; 1 Mac & G 419, 1 H & Tw 487, 14 Jur. 357—*COTTENHAM, L.C.*

Carter v Sanders (1854) 23 L J Ch 679; 2 Drew 248, 2 Eq R 891; 2 W. R. 325.—*KINDERLEY, V.C.*, *overruled*.

Baine, Ex parte, Boden, In re (1841) 10 L J. Rk 16; 1 Mont. D & D 192; 5 Jur. 105—*SIR J CROSS, approved*.

Coope v. Fryerwell (1866) 36 L J Ch 114. L R 2 Ch 112, 122, 15 L T 127, 15 W R 242.—*CHELMSFORD, L.C.*, *dictum followed*.

British Mutual Investment Co. v. Smart (1875) 14 L J Ch. 695, 1 L R. 10 Ch 567, 32 L T 849, 23 W R 724, 800, *reversing HALL, V.C.* See p 697. n. (1).

JAMES, L.J.—The V.C. proceeded entirely upon *Carter v Sanders*, a decision of *Kindersley, V.C.*, no doubt entitled to great respect, as every decision of that learned judge is. But that decision was pronounced in very few words and without reference to *Baine, Ex parte*, which had been decided previously by the Court of Bankruptcy, a Court of co-ordinate jurisdiction, . . . in the present case *Hall, V.C.* says, not only he takes that case as an authority binding

on him, which no doubt it was, but that as *Hall* found its way into the text-books, he might possibly be disturbing titles and the holdings of property if he were now to overrule it. I am bound to say I have been considering the thing all through the argument, and I cannot conceive the possibility of any disturbance of title arising from the overruling of that case. I can conceive the case of persons not being able to make title as easily and satisfactorily as they otherwise could by reason of that case being in the way, but I cannot conceive of any person having ever obtained a title based on it. Therefore I think we are not in any way governed by that case, nor to be deterred from the independent consideration of the present case by reason of the time which has elapsed since that decision was pronounced by *Kindersley, V.C.*, without it having been questioned, except by a very short and clear expression of opinion by *Lord Chelmsford*, certainly not necessary for the decision of the case then before him (*Coope v Fryerwell*) upon the very same point.—p 699.
MELLISH, L.J. to the same effect.

British Mutual Investment Co. v. Smart *referred to*.
Price v. Price (1887) 56 L J Ch. 539, 1 Ch. D. 297; 56 L T. 842; 35 W. R. 386—*KAY, M.R.*

Marshalling.

Pollexfen v. Moore (1745) 3 Atk 27 *discussed*.
Austen v. Halsey (1891) 6 Ves 475.—*ELDON, L.C.*, *Trimmer v. Bayne* (1804) 9 Ves. 209.—*GRANT, M.R.*

Pollexfen v. Moore and Coppin v. Coppin (1725) 2 P. Wms 291, *commented on*.
Mackintosh v. Symonds (1808) 15 Ves. 329; 1 R R 85.—*ELDON, L.C.*

Pollexfen v. Moore; Coppin v. Coppin
Headley v. Readhead (1813) 4 Coop 50—*M.R.*, and *Austen v. Halsey, discussed*.

Trimmer v. Bayne (supra), approved.
Selby v Selby (1828) 6 L J (O.S.) Ch. 117; Rans. 330, 28 R R 117—*LEACH, M.R.*

Coppin v Coppin, not followed.
Pollexfen v. Moore dictum held overruled.
Symonds v. Fryer (1836) 6 L J Ch. 1, 8 Sim 189—*STUART, V.C.*

Coppin v. Coppin, distinguished.
Williamson v. Naylor (1838) 3 Y. & C. 208. *ALDERSON, B.*

Coppin v. Coppin, discussed.
Williamson v. Naylor, applied.
Phillips v. Phillips (1844) 13 L J Ch. 445. *Hale 281*—*WIGRAM, V.C.*

Forrester v Leigh (Lord) (1753) Amb. 1 *followed*.
Clifton v. Bush (1729) 1 P Wms 678; 1 *Pollexfen v. Moore, discussed*.
Wythe v. Hemmiker (1833) 3 L J Ch. 21. *Myl. & K 635*—*LEACH, M.R.* *And see post.*

Forester v. Leigh (Lord), *explained*, *Mirehouse v. Scate* (*post*), *followed*, Buine, Ex. part.
Buine in re (1841) 10 L. J. Ch. 16; 1 Mont. D. & D. 492; 5 Jur. 105—*see* *CHURCH*.

Kearnan v. Fitzsimon (1793) 3 Balg. P. C.

16 *decree* *conceded*.

Vickers v. Oliver (1842) 11 L. J. Ch. 112; 1 Y. & C. C. 211; 6 Jur. 273—*KNIGHT BRUCE* v. c., *approved*.

Follenken v. Moore, *commented on* Elford v. Cooper (1851) 1 H. Ch. R. 376—BRADY, L.C.

Vickers v. Oliver and Busby v. Seymour (1844) 1 Jo. & Lat. 527; 7 H. Eq. R. 433—L.C., *distinguished*.

Fordham v. Wallis (1858) 22 L. J. Ch. 518; 16 Hare 217; 17 Jur. 238; 1 W. R. 118—TURNER, L.C.

Wythe v. Honnaker (*supra*), *not followed* Birds v. Askey (1878) 24 Beav. 618—M. R., *referred to*.

Lilford (Lord) v. Powys Keck (1845) L. R. 1 Eq. 317; 35 L. J. Ch. 392; 35 Beav. 77; 14 W. R. 240.

Robinson v. Tenge (1739) 1 P. Wms. 680, *overruled* Aldrich v. Cooper (1804) 8 Ves. 382; 7 R. R. 86—LIDON, L.C.

Aldrich v. Cooper, *distinguished*, Bate (Marquis) v. Cunningham (1826) 2 Russ. 275; 26 R. R. 72—LIDON, L.C. (*see* col. 1096); *Mitchome v. Scate* (*post*), *discussed*, Avenall v. Wade (1885) L. & G. (Temp. Sugden) 252—L.C.

Hanby v. Roberts (1731) Amb. 127. 8 C. 100. **Hanley v. Fisher**, 1 Dick. 101, *referred to*.

Kightley v. Kightley (1794) 2 Ves. 328; 2 R. R. 224; *Shallcross v. Finden* (1798) 3 Ves. 788; 3 R. R. 430; and *Keeling v. Brown* (1800) 5 Ves. 350; 5 R. R. 70, *discussed and approved*.

Joy v. Campbell (1801) 1 Sch. & Lef. 328; 3 Bligh (N.S.) 111; 8 R. R. 39, *explained*. And *see post*, col. 1092.

Spong v. Spong (1829) 3 Bligh (N.S.) 84; 1 How. & C. 365—H. L. (*see* *reversing* (1827) 1 Y. & J. 390; 32 R. R. 16. And *see post*, col. 1092).

Hanby v. Roberts (*supra*) and **Powell v. Robins** (1802) 7 Ves. 200, *explained*.

Scott v. Scott (1750) Amb. 383; 1 Eden 459; and *Keeling v. Brown*, *approved*.

Spong v. Spong, *commented on* *Mirehouse v. Scate* (1837) 7 L. J. Ch. 22; 2 Myl. & C. 635—COTTENHAM, L.C.; *affirming on different grounds*, 1 Jur. 184—V.C. And *see* *Cogswell v. Armstrong* (1855) 2 K. & J. 227; 1 Jur. (N.S.) 1182—WOOD, V.C.

Mirehouses v. Scate, 2 Myl. & C. at p. 708, *corrected* Ball v. Harris (1840) 8 L. J. Ch. 114; 4 Myl. & C. 261; 3 Jur. 110—COTTENHAM, L.C.

Mirehouse v. Scate, *discussed*, Whedon v. Howell (1857) 3 K. & J. 198—WOOD, V.C.; *Peacock v. Peacock* (1865) 31 L. J. Ch. 315 (*post*); *Hanman v. Fryer* (1868) 37 L. J. Ch. 97; 1 R. & C. 420 (col. 1093).

Spong v. Spong (*supra*) and **Joy v. Campbell** (*supra*), *commented on and reported corrected*, Barry v. Harding (1844) 1 Jo. & Lat. 179; 7 H. Eq. R. 313—SUGDEN, L.C. *See judgment*.

Joy v. Campbell, *discussed* *Shawman v. Mason* (1899) 69 L. J. Q. B. 3; [1899] 2 Q. B. 679; 81 L. T. 185; 18 W. R. 112—RIDLEY and DARLING, JJ.

Spong v. Spong, *approved* **Mirehouse v. Scate**, *commented on* Condon v. Condon (1858) 7 H. L. Chs. 168.

Spong v. Spong and Condon v. Condon, *distinguished* Cornwall v. Salmon (1886) 17 L. R. 1r 595—C. A. NASH, L.C., FITZGERALD and BARRY, L.JJ.

Galton v. Hancock (1744) 2 Atk. 430, *followed* Cornwall v. Cornwall (1841) 10 L. J. Ch. 364; 13 Sim. 298; 5 Jur. 744—SHADWELL, V.C.

Long v. Short (1717) 1 P. Wms. 103; 2 Vain 756, *approved* **Cornwall v. Cornwall**, *commented on* Young v. Harwood (1844) 1 Jo. & Lat. 466—SUGDEN, L.C.

Long v. Short, *followed* Tombs v. Roch (1846) 15 L. J. Ch. 308; 2 Coll. C. C. 490; 10 Jur. 534—KNIGHT BRUCE, V.C. *See judgment*, where the earlier cases are discussed.

Tombs v. Roch, *applied* *Hensman v. Fryer* (1868) 37 L. J. Ch. 97; 1 R. & C. 120 (*post*, col. 1093).

Cornwall v. Cornwall (*supra*), *overruled* **Long v. Short and Silk v. Prime** (1768) 1 Bro. C. C. 138, n. 1; Dick. 384, *followed* Gervin v. Gervin (1817) 16 L. J. Ch. 122; 14 Sim. 654; 11 Jur. 578—SHADWELL, V.C.

Fisher v. Fisher (1838) 7 L. J. Ch. 176; 2 Keen 610—M. R., and *Wood v. Ordish* (1856) 3 Sm. & G. 125—V.C. *principle applied*, *Peacock v. Peacock* (1865) 31 L. J. Ch. 315; 11 Jur. (N.S.) 280; 12 L. T. 299; 18 W. R. 516—WOOD, V.C.

Peacock v. Peacock, *followed*, *Ryves v. Ryves* (1871) 10 L. J. Ch. 262; 1 R. 11 Eq. 589—MALINS, V.C.

Ryves v. Ryves, *applied* *Stend v. Hardaker* (1873) 12 L. J. Ch. 317; 1 R. 15 Eq. 175; 21 W. R. 258—MALINS, V.C.

Stend v. Hardaker and Peacock v. Peacock, *approved* *Scott v. Cumberland* (1874) 44 L. J. Ch. 226; 1 R. 18 Eq. 578; 31 L. T. 26; 22 W. R. 840—MALINS, V.C. *See post*, col. 1130.

Dady v Hartridge (1858) 1 Dr. & Sm. 236; 6 W. R. 834 —V-C, *adhered to*
Barnwell v Iremonger (1860) 30 L. J. Ch. 13, 1 Dr. & Sm. 212; 8 W. R. 710 —KINDERSLEY, V-C.

Eddels v Johnson (1858) 27 L. J. Ch. 302; 1 Giff. 22, 4 Jur. (N.S.) 255, 6 W. R. 401. —V-C; and **Pearman v Twiss** (1860) 29 L. J. Ch. 892, 2 Giff. 130, 6 Jur. (N.S.) 337, 8 W. R. 329 —V-C, *adhered to*.

Dady v Hartridge and Rotherham v. Rotherham (1859) 26 Beav. 165, 5 Jur. (N.S.) 102 —ROMILLY, M.R., *dissented from*
Clark v. Clark (1865) 34 L. J. Ch. 177, 4 Giff. 702, 11 Jur. (N.S.) 820, 12 L. T. 485, 18 W. R. 735

STUART, V-C [who dissented from the opinion that the Wills Act does away with the rule that every devise of land, whether in particular or general terms, is necessarily specific].—There is no other distinction in regard to a residuary devise contained in a will, not within the operation of the Wills Act, and one within its operation than this, that that Act makes a will within its operation speak from the death of the testator, unless a contrary intention appears —p. 178

Rotherham v. Rotherham and Bethell v. Green (1865) 34 Beav. 402.—ROMILLY, M.R., *has overruled*

Gibbins v. Eyden (1869) 38 L. J. Ch. 377; L. R. 7 Ch. 371, 20 L. T. 516, 17 W. R. 481.

[**MALINS, V-C**, in the course of his judgment stated that when Lord Chelmsford reversed the decision of Kindersley, V-C, in **Hensman v. Fryer** (*post*) he thereby overruled **Rotherham v. Rotherham** and **Bethell v. Green**.]

Gibbins v. Eyden, followed.

Smith, In re, Hamington v. True (1886) 55 L. J. Ch. 914, 33 Ch. D. 195 (col. 1098).

Hensman v. Fryer (1868) 37 L. J. Ch. 97; L. R. 3 Ch. 420, 17 L. T. 301, 16 W. R. 162 —CHELMSFORD, L.C., *reversing* (1866) 35 L. J. Ch. 745, L. R. 2 Eq. 627. —KINDERSLEY, V-C., *not followed*.

Collins v. Lewis (1869) L. R. 8 Eq. 708 —**STUART, V-C**; **Dugdale v. Dugdale** (1872) 11 L. J. Ch. 555, L. R. 14 Eq. 234, 27 L. T. 706. —**MALINS, V-C.** *And see post*, col. 1091.

Hensman v. Fryer, followed.

Lancefield v. Iggulden (1874) L. R. 10 Ch. 136, 14 L. J. Ch. 203; 31 L. T. 813, 23 W. R. 223. —C.A., *reversing* 43 L. J. Ch. 570; L. R. 17 Eq. 556; 30 L. T. 156; 22 W. R. 726 —**BACON, V-C**
CALINS, L.C.—There is nothing in the Act (1 Vict. c. 26) to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises. Then, with regard to the authorities, it appears that Kindersley, V-C and the late M.R. took a different view from that which I have expressed, and **Stuart, V-C**, and **Hall, V-C**, and Lord Hatherley, when V-C, took the opposite view. But I feel bound to say that I look upon **Hensman v. Fryer**, decided by Lord Chelmsford, as a direct decision on this particular point. It was a most carefully considered judgment, and was a distinct expression of opinion by the judge who was then

at the head of this Court, that the Wills Act had made no alteration in the law in this respect —p. 141

JAMES, L.J.—I well recollect the decision of Lord Chelmsford in **Hensman v. Fryer**, and the extent to which it was canvassed at the time, and I was never able to see what answer could be made to the principle on which he based his judgment, namely, that the Wills Act said that the will must be construed as if it had been made just before the testator's death, and the Court had only to consider what would have been the consequence if it had been so made. But, independently of that, I think that the decision of Lord Chelmsford is binding upon the other branches of the Court. It was a decision deliberately pronounced for the purpose of settling the differences which existed between the various branches of the Court, and I think it ought to have been treated as settling the question —p. 142.

Hensman v. Fryer, not followed, as to the second of the two points decided by it.
Tomkins v. Colthurst (1875) 1 Ch. D. 626, 33 L. T. 391, 24 W. R. 267

MALINS, V-C.—It is urged upon me that the decision in **Hensman v. Fryer** has been recognised by the C.A. as a binding authority in **Lancefield v. Iggulden**, and that I must, therefore, follow it in the present case. The point now raised, however [whether, where the residuary personal estate of the testator is insufficient for the payment of his debts, pecuniary legatees and the residuary devisee will be called upon to contribute rateably to make up the deficiency], was not in question in **Lancefield v. Iggulden** and I think I am still at liberty to decide this case as I decide **Dugdale v. Dugdale**. Being of opinion, therefore, that the rule in **Hensman v. Fryer** as to contribution is not correct, I must continue to follow the old rule.—p. 627

Collins v. Lewis (*supra*, col. 1093), **Dugdale v. Dugdale** (*supra*, col. 1093); and **Tomkins v. Colthurst, followed.**

Hensman v. Fryer, not followed

Farrington v. Floyer (1876) 3 Ch. D. 109; 45 L. J. Ch. 750, 35 L. T. 355.

HALL, V-C—I am of opinion that it must be considered settled that pecuniary legacies must be devised to before real estate for payment of the debts of the testator. The decisions in **Collins v. Lewis** and **Tomkins v. Colthurst** are in accordance with the decision of Lord Chelmsford in **Mitcham v. Scarfe** (*supra*, col. 1091), and I shall follow them. I do not consider that in so doing I am acting in opposition to the authority of the C.A. in **Lancefield v. Iggulden**.—p. 111

[**Hensman v. Fryer** was entirely relied on by the plaintiffs, but **Hall, V-C**, in deciding against them made no special reference to the case. See, however, the argument.]

Hensman v. Fryer, followed.

Smith, In re, Hamington v. True (1886) 55 L. J. Ch. 914, 33 Ch. D. 195 (col. 1098)

Harrison v. Harrison, 28 L. T. 145.—ROMILLY, M.R., *reversed*, (1873) 42 L. J. Ch. 495; L. R. 8 Ch. 342; 28 L. T. 516, 21 W. R. 161, 490.—C.A. SELBORNE, L.C., **JAMES and MILLER, L.J.**

Bate, In re, Bate v. Bate (1896) 50 L. J. Ch. 277, 43 Ch. D. 600, 62 L. T. 559.—KAY, J. [collecting statement in *Sison on Decrees* (4th ed., pp. 889, 990)], *discovered*.
Stokes, In re, Parsons v. Miller (1892) 67 L. T. 223.—STIRLING, J. *See judgment.*

Stokes, In re, Parsons v. Miller, followed
Salt, In re, Brothwood v. Keeling (1895) 64 L. J. Ch. 494, [1895] 2 Ch. 203; 43 W. R. 500.—CITTY, J.

Stokes, In re, and Salt, In re, Brothwood v. Keeling, followed
Bate, In re, put on, treated as overruled
Roberts, In re, Roberts v. Roberts (1902) 72 L. J. Ch. 38; [1902] 2 Ch. 894, 87 L. T. 523; 51 W. R. 89.—KICKWORTH, J.

Execution of Personalty

Boote v. Blundell (1815) 1 Meriv. 193, 19 Ves. 517, G. Cooper 136, 15 R. R. 93, *approved*
Boughton v. Boughton (1848) 1 H. L. Cas. 406.—GOTTENHAM, L. C.

Boote v. Blundell, referred to.
Key v. Key (1853) 22 L. J. Ch. 641; 4 De G. M. & G. 73, 1 Eq. R. 82, 17 Jur. 769.—L. J.

Backhouse v. Middleton (1670) 1 Ch. Cas. 173, and **Boote v. Blundell, applied**
Metcalfe v. Hutchinson (1875) 45 L. J. Ch. 210, 1 Ch. D. 591.—JESSEL, M. R.

Boote v. Blundell, approved
Kilford v. Blaney (1885) 55 L. J. Ch. 185, 31 Ch. D. 56.—G. A. (post, col. 1099).

Metcalfe v. Hutchinson, rule applied.
Green, In re, Baldock v. Green (1888) 58 L. J. Ch. 157; 10 Ch. D. 610, 60 L. T. 225, 87 W. R. 300.—STIRLING, J.

Roberts v. Walker (1830) 1 Russ. & M. 752.—LEACH, M. R., *discovered*, *Allen v. Gott* (1872) 41 L. J. Ch. 571; L. R. 7 Ch. 439, 26 L. T. 412, 20 W. R. 127.—JAMES and MELLISH, L. J.; *followed*, *Simmons v. Rose* (1856) 25 L. J. Ch. 613, 6 De G. M. & G. 411, 2 Jur. (N.S.) 73.—CRANWORTH, L. C.

Simmons v. Rose, explained.
Luckie v. Pridham (1873) 48 L. J. Ch. 636.
HALL, V.-C.—Simmons v. Rose certainly is the strongest authority in favour of the general proposition that where there is a direction to convert the converted fund must be applicable for payment of legacies or debts, as the case may be, which are not directly ordered to be paid out of that common fund. But the L. C., in giving judgment on the second occasion, seems to have felt on looking into the authorities that it was necessary, if I may say so, to advert in rather a marked and special manner to the fact, which existed in that case of the property being directed to be treated as part of the personal estate of the testator—p. 636.

French v. Chichester (1707) 2 Vern. 568, 3 Bro. P. C. (2nd ed.) p. 16, *discovered and explained.*

Trott v. Buchanan (1885) 54 L. J. Ch. 678, 25 Ch. D. 449; 52 L. T. 248; 83 W. R. 339.

PEARSON, J.—The statement of the facts of that case (*French v. Chichester*) as given in 2 Vern. 568, is very meagre. But there are fortunately preserved in Lincoln's Inn Library the cases both of the appellants and the respondents upon the appeal to the H. L. I have referred to those cases because the facts are much more fully stated in them. The report in 2 Vern. states that the Lord Keeper held "that the devise to the testator's wife being in the same clause in which she was named executrix, and not said free and exempt from payment of debts, she must therefore take it as executrix, and the same must be applied to the payment of debts." But the question whether the testator's personal estate was exonerated by virtue of the deed which he had executed conveying real estate to trustees on trust for the payment of his debts, was raised by the cases both of the appellants and of the respondents in the H. L. It is to be observed that not a word is said . . . about the wife taking the personal estate as executrix. The report in 2 Vern. states that which does not appear in the recital of the deed in the decree—that the trust was for the payment of the testator's "debts, legacies, and funerals." Consequently, the deed in that case contained all the words which are contained in the deed in the present case. The nature of the deed appears from the recital of it in the original decree. It appears that by that deed provision was made for the payment of the testator's debts, legacies, and funeral expenses, out of the trust property, and it was only subject to that payment that the surplus was given over to the beneficiaries—just as in the present case the surplus is given over to the testator's two sons. I find it impossible, therefore, so far to discover any distinction between the two cases; and, if I had any doubt about the correctness of the decision, and there was nothing else in the present case, I should feel myself bound by *French v. Chichester*, which is a decision of the highest tribunal, to hold that the personal estate of the testator in the present case is not exonerated from the payment of his debts—p. 680.

Bute (Marquis) v. Cuninghame (1826) 2 Russ. 275, 26 R. R. 72.—ELDON, J. C., and **Lipscomb v. Lipscomb** (1868) 38 L. J. Ch. 90, 1 L. R. 7 Eq. 501, 17 W. R. 252.—MALINS, V.-C., *approved and followed*.
De Rocheport v. Dawes (1871) 40 L. J. Ch. 625, L. R. 12 Eq. 510, 25 L. T. 456.—MALINS, V.-C.

Lipscomb v. Lipscomb and De Rocheport v. Dawes, considered and questioned
Leonino v. Leonino (1879) 48 L. J. Ch. 217; 10 Ch. D. 460; 40 L. T. 359; 21 W. R. 388.—JESSEL, M. R.

Bute (Marquis) v. Cuninghame (supra), observed on.

• **Lipscomb v. Lipscomb and De Rocheport v. Dawes, explained.**

Athill, In re, Athill v. Athill (1880) 16 Ch. D. 211, 50 L. J. Ch. 123, 43 L. T. 681, 29 W. R. 308.—G. A.

JESSEL, M. R.—I do not intend to go through the cases which have been cited. I have done so to a very considerable extent in . . . *Leonino v. Leonino*, but I will say this, that they are no further a guide to another tribunal in deciding

a case upon this subject than any cases of construction and a guide to a Court of construction on another instrument, that is to say, they help the Court in considering what the true meaning of words and phrases may be, but lay down no absolute rule which prevents the Court of construction arriving at its own conclusion from the words used, irrespective of the actual authority of the decided cases not laying decisions upon the same instrument or on the same words.—p. 223. JAMES, J., concurred.

COTTON, J. J.—*Bute (Marquis) v. Cunningham*. No doubt the use of the word "collateral" in that case in a series of instruments relating to the property was held by Lord Eldon to mean that the result of the whole transaction was that one property was not to be called upon to provide for payment of part of the debt; but when it was said there in argument that "collateral" did not mean "secondary," so as to make the other the primary security, Lord Eldon did not lay down any rule saying that that was the meaning of the word. He expressly refused to do so, and went upon the whole of the subsequent transactions, as well as the transactions relating to the creation of the particular security, in determining, as he did, that the freehold estate in that case was to bear the whole of the mortgage, and that no part of it was to be thrown upon the collaterals. So that that case, as it seems to me, cannot be referred to as any authority for the purpose of showing that "collateral" security means "secondary" as regards another security for the same debt. *Lipcomb v. Lipcomb* and *De Rochefort v. Daines* do not establish the proposition that where there is a further security at a subsequent time, without anything more, it is to be considered as secondary as between the different persons claiming the two properties from the mortgagee. In each of these cases the judges came to the conclusion, as matter of construction, that, as regards the original debt—for there was an additional debt in both cases—the estate originally mortgaged was primarily charged. In neither of the cases was it laid down as a general proposition that, when a security is given and there is at a subsequent period a further security, as between the parties claiming the two estates, one is considered as the primary and the other the secondary security.—p. 225.

Gibbs v. Ogier (1806) 19 Ves. 413, 8 R. R. 348.—M. R., distinguished.
Fordham v. Wallis (1858) 22 L. J. Ch. 548, 10 Har. 217, 17 Jur. 228, 1 W. R. 118.—TURNER, V.-C.

Gibbs v. Ogier, applied
Buckley v. Buckley (1887) 19 L. R. Ir. 544.—PORTER, M. R.

Pembroke v. Friend (1860) 1 J. & H. 132; 2 L. T. 742.—WOOD, V.-C., dissented.
Woolstencroft v. Woolstencroft (1860) 30 J. J. Ch. 22, 6 Jur. (N.S.) 866, 1179, 3 L. T. 388; 9 W. R. 42.—CAMPBELL, L.C.; reversing 29 L. J. Ch. 511, 2 Giff. 192; 2 L. T. 526; 8 W. R. 405.—STUART, V.-C.

Woolstencroft v. Woolstencroft, dictum of L.C., explained
Eno v. Tatham (1863) 32 L. J. Ch. 311, 3 De G. J. & S. 443, 9 Jur. (N.S.) 481; 8 L. T. 127; 11 W. R. 476.—KNIGHT BRUCE and TURNER, L.JJ.

Eno v. Tatham, followed.
Moore v. Moore (1863) 32 L. J. Ch. 605; 1 De G. J. & S. 602, 8 L. T. 562; 11 W. R. 790.—KNIGHT BRUCE and TURNER, L.JJ. And see post.

Eno v. Tatham, reluctantly followed.
Maxwell v. Hylop (1867) L. R. 4 Eq. 407; 16 L. T. 660.—MALINS, V.-C., affirmed, *nom.* Maxwell v. Maxwell (1870) 39 L. J. Ch. 698, L. R. 1 H. L. 506, 23 L. T. 325; 19 W. R. 15.—H. L. (B.) HATHERLEY, L.C., LORDS WESTBURY, COLANSAY and CAIRNS.

Woolstencroft v. Woolstencroft (*supra*) and **Eno v. Tatham**, reversed.
Brownson v. Lawrence (1868) 37 L. J. Ch. 351, L. R. 6 Eq. 1, 18 L. T. 143, 16 W. R. 535.—BOMILEY, M. R. And see post.

Stone v. Parker (1860) 29 L. J. Ch. 874, 1 Dr. & Sm. 212, 8 W. R. 722.—KINDERLEY, V.-C.
Mellish v. Vallins (1862) 2 J. & H. 194, 8 Jur. (N.S.) 864, 6 L. T. 215, 10 W. R. 421.—WOOD, V.-C.; and

Eno v. Tatham, held overruled.
Lewis v. Lewis (1871) 41 L. J. Ch. 195; L. R. 13 Eq. 218; 25 L. T. 555; 20 W. R. 141.
MALINS, V.-C.—The Amendment Act (30 & 31 Vict. c. 68) has done away with those cases. A higher authority—that of Parliament—has decided that *Eno v. Tatham* is not to be considered as law.—p. 224.

Eno v. Tatham and **Moore v. Moore** (*supra*), explained.
Newmarch, in re, Newmarch v. Scott (1878) 48 L. J. Ch. 28; 9 Ch. 12; 39 L. T. 146, 27 W. R. 104.—C.A. JESSEL, M. R., BAGGALLAY and DRUMWELL, L.JJ.

Woolstencroft v. Woolstencroft (*supra*, col. 1097), applied.
Eno v. Tatham, Nelson v. Page (1868) 38 L. J. Ch. 138, L. R. 7 Eq. 26; 19 L. T. 447, 17 W. R. 27.—GIFFARD, V.-C.; **Newmarch**, in re, **Newmarch v. Scott**; and **Rosster**, in re, **Rosster v. Rosster** (1879) 49 L. J. Ch. 36; 13 Ch. D. 355, 12 L. T. 358; 28 W. R. 238.—JESSEL, M. R., discussed.
Buckley v. Buckley (1887) 19 L. R. Ir. 544.—PORTER, M. R.

Brownson v. Lawrence (*supra*), not followed.
Gibbins v. Eyden (1869) 38 L. J. Ch. 377, L. R. 7 Eq. 371 (*supra*, col. 1093).

Brownson v. Lawrence, dissented from.
Sackville v. Smyth (1873) L. R. 17 Eq. 153; 43 L. J. Ch. 194, 22 W. R. 179.

JESSEL, M. R.—It has been enacted that a general devise for payment of debts out of personal estate shall not be deemed to exonerate mortgaged properties, and what is there in this case to take it out of the general rule? If I were to decide otherwise, I should have to hold that every devise of a life interest in real estate was an expression of a contrary intention. It does not appear to me that Locke King's Act was intended to apply as between specific and residuary devises in the way it was held to apply in *Brownson v. Lawrence*—p. 155.

Brownson v. Lawrence, dissented from.
Sackville v. Smyth, followed.
Smith, in re, Hannington v. True, Giles & True (1886) 55 L. J. Ch. 914, 33 Ch. D. 195, 55 L. T. 549, 35 W. R. 103.

NORTH, J.—*Brownson v Lawrence* is inconsistent with the decision of Chelmsford, L. C., in *Hensman v Fryer* (supra, col. 1093), and with that of Mahon, V.-C., in *Gibbins v Byden* (supra, col. 1095), in which case the V.-C. pointed out that Lord Romilly had, in *Brownson v Lawrence*, overlooked *Hensman v Fryer*, which decided that a residuary devise is still specific. I cannot follow *Brownson v Lawrence* without departing from the decision of Jessel, M. R., in *Sackville v Smyth*. I am unable to find anything else in the will to take the case out of the general rule except the words "absolutely to do with as she thinks proper." But that is no more than a gift to the widow in fee, it does not say that she is not to take the house subject to its proportion of the mortgage debt. It would come to this that every devise of an absolute interest in real property would be an expression of a "contingent or other intention." I cannot follow *Brownson v Lawrence*. I prefer to follow the later decisions—p. 111.

Solomon v Solomon (1864) 33 L. J. Ch. 473, 10 Jun. (N.S.) 391, 10 L. T. 54, 12 W. R. 540—HOMILLY, M. R., *approved*.

Wormley's Estate, In re, Hill v Wormley (1876) 4 Ch. D. 665, 46 L. J. Ch. 102; 25 W. R. 141.

HALE, V.-C.—I consider that the decision in *Solomon v Solomon* was clearly a decision that leaseholds are not included in Locke King's Act. That has been the law for a long time, and I have no doubt that it has been acted upon in many cases. Moreover looking at the Act, I must say that I myself should, in the absence of that decision, have taken the same view. I desire, therefore, that it be understood, not only that I follow the decision of the M. R. in *Solomon v Solomon*, but that I construe the Act in the same manner as he did—p. 666.

Hancox v Abbey (1805) 11 Ves. 179; 8 R. L. 124, *disapproved*.

Buckham v Cutwell (1838) 7 L. J. Ch. 198, 3 Myl. & Cr. 769; 3 Jur. 342—COTTENHAM, L. C.

Buckham v Cutwell, *test applied*.

Brown v Groombridge (1819) 4 Mad. 496, 20 R. R. 326—LEACH, V.-C., *not followed*.

Dacre v Patricson (1860) 29 L. J. Ch. 846.

1 Dr. & Sm. 182, 6 Jun. (N.S.) 863; 8 W. R. 647.—KINDERSLEY, V.-C., *approved*. *Kilford v Blaney* (1885) 31 Ch. D. 66, 55 L. J. Ch. 188, 34 W. R. 109; 54 L. T. 287.—O. A., *varying* 29 Ch. D. 145; 53 L. T. 17; 33 W. R. 690—BACON, V.-C.

HALSBURY, L. C.—There remains another point which has been argued before us with great ingenuity by Mr. Stirling. I must admit in his favour that I do not see how *Brown v Groombridge*, to which he has referred, could have been decided or argued as it was without the point that he has impressed upon us being before the mind of the Court—but I must say that the decision has not passed at present into such a condition of authority that we cannot venture to differ from it. It is admitted that if the personal estate is directed to be exonerated out of the real estate the exoneration ceases so far as regards any personal estate which becomes undisposed of. Why should not the same rule apply to a direction to exonerate the general personal estate out

of a particular fund of personality? I can see no reason for a distinction between the two cases. The text-books are silent upon any such distinction. *Brown v Groombridge* has not been referred to as supporting it, and so far as I know the distinction between personality and realty in that respect has never since been discussed. I am therefore not disposed to be bound by that case so as to establish what appears to me an arbitrary and unreasonable distinction—p. 63.

LINDLEY, J.—There is another point as regards the leaseholds. Mr. Stirling contends that where a fund of personality is set apart to exonerate the general personal estate it is to be applied in exonerating leased gifts, as well as those which take effect, and he refers to *Brown v Groombridge*, which he contends has decided that point in his favour. It would seem that the Court must have so decided, but I am very much struck with the fact that it does not seem to have been treated as settling the law on this point. I cannot find any trace of it in any text-book, and I cannot see upon what rational principle such a distinction between personal estate and real estate can be drawn. It seems to me, therefore, that it is open for us to say that even if the Court did in that case decide the point, it never has become part of the law—p. 64.

FRY, J.—Upon the second point I conceive that the general rule of law is that which was laid down by Kindersley, V.-C., in *Dacre v Patricson*. He says there, "It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees, and, therefore, if the bequest of the personal estate fails, whether by the death of the legatee in the lifetime of the testator, or by reason of the Statute of Mortmain, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration." That enunciation of the rule no doubt applies to cases where there is a conflict between real estate and personal estate, but in my view it is only a branch of the more general principle—that where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails, the right to the benefit of the exoneration being in fact a part of the legacy which fails. That principle applies in my mind whether the property dealt with be realty or personality, and I think we should be wrong if we drew a distinction between them on the ground of a doubtful case in which the point appears never really to have been insisted upon and was not dealt with in the judgment—p. 66.

Dacre v Patricson, *referred to*. *Lacy*, In re, Royal General Theatrical Land Association v Rydd (1809) 68 L. J. Ch. 488; [1809] 2 Ch. 149, 80 L. T. 706, 47 W. R. 664—STIRLING, J.

Vandeleur v Vandeleur (1835) 3 Cl. & F. 82, 9 Bligh (N.S.) 167, 1 L. & G. t. Singd. 241, n.—H. L. (IR.). BROUGHAM, L. C., *discussed*, *Jenkinson v Harcourt* (1854) 23 L. J. Ch. 785, Kay 688, 2 W. R. 688.—WOOD, V.-C.; *dicta followed*, *Adair v Carden* (1802) 29 L. R. 469.—PORTER, M. R.

constituting the testator a complete shareholder but for requiring the undertaking itself a working concern. Having regard to the cases, I cannot help thinking that if the learned judge who decided *Jarques v. Chambers* had not thought himself bound by *Blount v. Hykiss* and *Barry v. Harding* (*supra*), he would not have arrived at the conclusion that he did arrive at. I think the M.R. in *Armstrong v. Burnet* felt some difficulty in reconciling the decision in that case with that which he felt to be the just principle, and upon which he decided *Addams v. Perick*, namely, that the question depends entirely upon this, whether the call was made before or after the testator's death—p. 265.

Marshall v. Holloway (*supra*, col. 1102), commented on.

Fitzwilliams v. Kelly (*supra*) and **Armstrong v. Burnet** (*supra*), referred to.
Hawkins v. Hawkins (1880) 13 Ch. D. 470, 42 L. T. 306; 28 W. R. 526—C.A.
JESSEL, M.R., BAGGALLAY and COTTON, L.J., approved.

Eccles v. Mills (1898) 67 L. J. P. C. 25; [1898] A. C. 380, 73 L. T. 206; 46 W. R. 398—P.C.
BASREUR, L.C., LORDS WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND, DAVEY and SIR R. COUCH.

Fitzwilliams v. Kelly; **Day v. Day** (*supra*, col. 1102); **Hawkins v. Hawkins**; and **Eccles v. Mills**, discussed and applied.
Betty, in re, **Betty v. Att-Gen** (1899) 68 L. J. Ch. 435. [1899] 1 Ch. 821, 80 L. T. 675—NORTH, J.

Jervis v. Wolferstan (1874) 43 L. J. Ch. 809; L. R. 13 Eq. 18, 30 L. T. 452—JESSEL, M.R., discussed, **Fennell** (or **Robinson**) v. **Murdoch** (1881) 6 App. Cas. 855, 45 L. T. 117, 30 W. R. 162—H. L. (SC.) (*see post*, col. 1106), **Att-Gen v. Murray** (1887) 20 L. R. 124—C.A. **ASHBOURNE, L.C., FITZGIBBON and BARRY, L.J.**; **Knott**, in re, **Bax v. Palmer** (1887) 56 L. J. Ch. 318, 56 L. T. 161, 35 W. R. 302—STIRLING, J.; **Hobbs v. Wayer** (1887) 56 L. J. Ch. 319, 36 Ch. D. 256, 57 L. T. 225, 36 W. R. 73—KEELWICH, J.

Jervis v. Wolferstan, approved.

Kershaw, in re, **Whittaker v. Kershaw** (1890) 60 L. J. Ch. 9, 15 Ch. D. 320; 63 L. T. 203, 39 W. R. 23—C.A.; affirming **NORTH, J.**

COTTON, L.J.—Now if an executor pays the money to the residuary legatee with knowledge of a debt, and he is afterwards obliged to pay that debt, he no doubt, cannot call on the residuary legatee to refund. It is said that here there was notice of a debt. But there was no debt until a call was made. There was only a liability which might become a debt. In *Jervis v. Wolferstan* it was held by Sir G. Jessel, M.R. that notice of liability when the executor pays over a residue, does not take away his right to make the residuary legatee refund if it afterwards becomes a debt. It is true that the M.R. speaks of the shadowy nature of the liability in that case; but he does not proceed on that, he goes on the principle that notice of a mere liability is not enough, there must be notice of a debt—p. 11.

FRY, L.J. to the same effect. **BOWEN L.J.** concurred.

Steel v. Rorke (1798) 1 Bos. & P. 807—K. N., and **Landau v. Ferguson** (1827) 3 Russ. 349.—M.R., followed.
Turner, in re, **Walter v. Turner** (1864) 33 L. J. Ch. 282, 3 N. R. 413; 10 Jur. (N.S.) 147; 9 L. T. 758, 12 W. R. 337—WOOD, V.-C.

Turner, in re, **Walter v. Turner**, followed.
Van Gheluwe v. Nerineckx (1882) 51 L. J. Ch. 929, 21 Ch. D. 189, 47 L. T. 46; 30 W. R. 789—FRY, J.

Van Gheluwe v. Nerineckx, approved.
Illidge, in re, **Davidson v. Illidge** (1884) 53 L. J. Ch. 991, 27 Ch. D. 478; 51 L. T. 523; 33 W. R. 18—C.A. (*supra*, col. 1070).

[The case is not mentioned in the report in the Law Reports.]

Carrying on Trade of Deceased.

Hankey v. Hammoek (or **Hammond**) (1881) 3 Madd. 148, n.; **Buck** 210—M.R., overruled.

Garland, Ex parte (1803) 10 Ves. 110, 1 Smith. 220; 7 R. R. 352—BLDON, L.C.

Garland, Ex parte, and **Hankey v. Hammoek**, distinguished.
Richardson, Ex parte, **Hodson**, in re (1818) 3 Madd. 138; **Buck** 202, 18 R. R. 204—LEACH, V.-C.

Hankey v. Hammond, discussed.
McNeill v. Acton (1853) 23 L. J. Ch. 11, 4 De G. M. & G. 741; 7 Jur. 1041, 2 Eq. R. 21.—**KNIGHT BRUCE and TURNER, L.J.**, reversing 22 L. J. Ch. 820.—STUART, V.-C.

McNeill v. Acton, approved.
Ashworth v. Outram (1877) 46 L. J. Ch. 637, 5 Ch. D. 923, 37 L. T. 85, 25 W. R. 896—C.A.
COTTERIDGE, C.J., JAMES, L.J., and BAGGALLAY, J.

McNeill v. Acton and **Hall v. Fennell** (1876) 13 R. 9 Eq. 615—BALL, L.C. and **CHRISTIAN, L.J.**, discussed.

Devitt v. Kearney (1883) 13 L. R. 145—C.A.
LAW, L.C., MAY, C.J. and FITZGIBBON, L.J., varying 11 L. R. 125—V.-C.

Garland, Ex parte, not applied.
Edmonds, Ex parte, **Beater**, in re (1862) 4 De G. F. & J. 488—**KNIGHT BRUCE and TURNER, L.J.**

Hankey v. Hammoek (*supra*), not applied.
Garland, Ex parte; **Richardson**, Ex parte and **Outbush v. Outbush** (1840) 8 L. J. Ch. 175, 1 Beav. 184; 3 Jur. 142—**LANGDALE, M.R.**, discussed.
Owen v. Delamere (1872) 42 L. J. Ch. 232; L. R. 15 Eq. 194; 27 L. T. 647; 21 W. R. 218—**BACON, V.-C.**

Garland, Ex parte, and **Owen v. Delamere**, discussed.
Fairclimb (or **Fairland**) v. **Percy** (1875) 44 L. J. P. 11, L. R. 8 P. 217, 32 L. T. 405, 23 W. R. 697—**SIR J. HANSEN**.

Garland, Ex parte, explained.
Edmonds, Ex parte, **Beater**, in re, applied.
Owen v. Delamere and **Fairland v. Percy**, distinguished.

Johnson, in re, **Shearman v. Robinson** (1880) 40 L. J. Ch. 745, 15 Ch. D. 648; 43 L. T. 872,

29 W. R. 163.—*FRISBY, M.R.* And see *post*, col. 1106.

Garland, Ex parte, followed.

FRISBY (or Robinson) v. Muntloch (1881) 6 App. Cas. 855, 45 L. T. 417; 30 W. R. 162—H. L. (80.).

LORDS MELBORNE, BLACKBURN and WATSON all followed *Garland, Ex parte*. LORD BLACKBURN further said in *Jervis v. Walferton* (*supra*, col. 1103) the M. R. goes so far as to say, "I take it to be a general rule that where persons accept at the request of another, and that other is a *cestui que trust*, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust." Perhaps this rule is too broadly stated, as something must depend on the nature of the trust and of the interest of the *cestui que trust*, but it is not necessary now to say more than that this rule has no application to a case where the maker of the trust is not a *cestui que trust*. . . . (p. 872). The extent of the right which trustees have to be indemnified, and the manner in which creditors can by encroachment work it for their own benefit, were discussed by the M. R. in *Johnson, In re* (*supra*). The M. R. there says what *Garland, Ex parte* decides is "that the claim of the creditors is limited to the assets devoted to trade."—p. 875.

Garland, Ex parte, considered

Strickland v. Symons (1884) 28 Ch. D. 215, 53 L. J. Ch. 582; 32 W. R. 886.—C.A.

MELBORNE, L.C.—On this settlement it is clear that it was intended that the asylum should be carried on by Dr. Sabben and not by the trustees; and that if he did not carry it on it should be sold with the goodwill. It is, therefore, impossible to compare the case with *Garland, Ex parte*, and *Johnson, In re*, and the other cases where there has been an express direction by the testator to carry on a business, and where he specially appropriated part of his property for that purpose. Those authorities proceed on this principle, that where a particular part of a trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned. But the authorities tend to limit that doctrine rather than to extend it. *Garland, Ex parte*, shows that the creditor can only have recourse to the particular part of the property of which there has been such an express dedication; and the right cannot be extended beyond that, either in bankruptcy or in administration. And that applies even to cases in which the trustee has merely done his duty in carrying on the business, and where he may be entitled to an indemnity for the expenses incurred by him.—p. 248. COTTON and FRY, L.J.J. concurred.

Garland, Ex parte, and Johnson, In re, Shearman v. Robinson (*supra*), *principles applied.*

Blundell, In re, Blundell v. Blundell (1890) 59 L. J. Ch. 269; 44 Ch. D. 1; 62 L. T. 620; 38 W. R. 707.—C.A. COTTON, LINDLEY and LOPES, L.J.J.

Abbott v. Parfitt (1871) 40 L. J. Q. B. 115; L. R. 6 Q. B. 346, 24 L. T. 469, 19 W. R. 718—Q. B., *followed*. See *post*, col. 1111.

Dowse v. Gorton [1891] A. C. 190, 60 L. J. Ch. 745; 64 L. T. 809, 40 W. R. 17—H. L. (B.) LORDS HERSCHELL, MACNAGHTEN and HANNEN; *concurring* N. C. *nom.* GILSON. In re, *Dowse v. Gorton* (1889) 58 L. J. Ch. 403; 40 Ch. D. 536; 60 L. T. 305; 37 W. R. 341.—C.A. COTTON, LINDLEY and LOPES, L.J.J.

LORD HERSCHELL.—With all deference, I am unable to concur in the distinction drawn [by the C. A.] between the assets which come into the hands of the executors at the time of the death of the testator, and property which, in the capacity of executors, they afterwards acquire. *Abbott v. Parfitt* seems to be a distinct authority that property so acquired is as much assets of the testator as that which was in his possession at the time of his death. It was there held that the price of goods sold to the defendant by the executors, who had carried on then testator's business, no part of the materials of which had belonged to the testator, would, when recovered, be assets of the testator, and I do not think it possible, on principle, to maintain the suggested distinction.—p. 198.

Dowse v. Gorton principle applied, *Owen, In re, Frisby, Dyke & Co. v. Owen* (1892) 68 L. T. 718.—KEKEWICH, J., Brooke, In re, Brooke & Brooke (1894) 64 L. J. Ch. 21, [1894] 2 Ch. 600, 38 L. T. 444, 71 L. T. 398.—KEKEWICH, J., *dissevered*, Millaud. In re, Yates, *Ex parte* (1895) 72 L. T. 823—C.A. A. L. SMITH and RIGBY, L.J.J.; *reversed*, M. R. *dissevering* 2 Manson 56.—V. WILLIAMS, J.

Dowse v. Gorton and Brooke v. Brooke, applied
Hodges v. Hodges [1899] 1 Ir. R. 480.—PORTER, M.R.

Dowse v. Gorton and Evans, In re, Evans v. Evans (1887) 34 Ch. D. 597; 56 L. T. 748, 35 W. R. 586.—C.A. COTTON, LINDLEY and LOPES, L.J.J., *applied*

Johnson, In re, Shearman v. Robinson (*supra*, col. 1104), *dissevered*.

Jennings v. Mather (1900) 70 L. J. Q. B. 53, [1901] 1 Q. B. 108; 83 L. T. 506.—KENNEDY and LAWRENCE, J.J., *affirmed*, (1901) 70 L. J. K. B. 1032; [1902] 1 K. B. 1; 85 L. T. 896, 50 W. R. 52; 8 Manson 392.—C.A. COLLINS, M.R., STRLING and MATHEW, L.J.J.

Johnson, In re, and Dowse v. Gorton, dissevered and explained

Frith, In re, Newton v. Rolfe (1902) 71 L. J. Ch. 199, [1902] 1 Ch. 342, 86 L. T. 212—KEKEWICH, J.

Morris, In re (1889) 23 L. R. Ir. 333.—PORTER, M.R., *followed*.

McAloon v. McAloon [1900] 1 Ir. R. 371—CHATTERTON, V.-G.

8 DISTRIBUTION.

Lookyer v. Vade (1741) Barnard Ch. 444—HARDWICK, B.C. and *Ross's Trusts, In re* (1871) 41 L. J. Ch. 130, L. R. 13 Eq. 286, 25 L. T. 817, 20 W. R. 231—WICKENS, V.-G., *followed*

Natt, In re, Walker v. Gammage (1888) 57

L. J. Ch 797, 37 Ch. D 517; 58 L. T. 722; 86 W. R. 548.—NORTH, J.

Natt, In re, Walker v. Gammage, followed
Valentine v. Fitzsimons (1893) [1894] 1 Ir. R. 93.—PORTER, M. R.

Hatfield v. Minet (1877) 46 L. J. Ch. 812—HALL, V.-C., *reversed*, (1878) 47 L. J. Ch. 712, 8 Ch. D. 186; 88 L. T. 629. 36 W. R. 701.—C. A. JAMES BAGAHLAY AND THESSIGER, L. J.

Goodman v. Goodman (1862) 3 Giff. 643. 6 L. T. 641.—STUART, V.-C., and **Boyes v. Bedale** (1863) 33 L. J. Ch. 283, 1 H. & M. 798, 10 L. T. 131, 12 W. R. 282.—WOOD, V.-C., *considered*

Wilson's Trusts, In re (1865) 35 L. J. Ch. 243. 1 R. L. Eq. 247, 13 L. T. 576, 14 W. R. 161.—KINDERSLEY, V.-C., *affirmed*, **and Shaw v. Gould** (1868) 37 L. J. Ch. 433, 1 R. 3 H. 55; 18 L. T. 833.—H. L. (C.), *followed*

Goodman's Trusts, In re (1880) 49 L. J. Ch. 805, 14 Ch. D. 619, 18 L. T. 14, 28 W. R. 902.—JESSEL, M. R., *reversed, post*.

Wilson's Trusts, In re, discussed
Boyes v. Bedale, disapproved

Goodman's Trusts, In re (1881) 17 Ch. D. 266, 50 L. J. Ch. 425, 14 L. T. 527, 29 W. R. 586, *reversing* 8 C. (supra).

COTTON, L. J.—In **Boyes v. Bedale** the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The V.-C. held that a child exactly in the same position as Hannah Perret was not entitled under the bequest. He said that the will being that of a domiciled Englishman must be construed according to English law, which in my opinion is correct so far as to require that this word "children" shall be construed "legitimate children." But he held that English law recognised as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate. The V.-C. at the end of his judgment in **Boyes v. Bedale**, expressed his opinion that any claim under the Statute of Distributions would be dealt with in the same way. There is, therefore, a conflict of decisions and, in my opinion, the decision in **Boyes v. Bedale** is contrary to principle, and erroneous—pp. 295, 296

JAMES, L.J., *concurrent*.
LUSH, L.J. *disented*. See judgment

Goodman's Trusts, In re, applied.
Lund, In re, Forrester v. Buddicom (1881) 72 L. T. 44.—FRY, J.

Boyes v. Bedale; Goodman's Trusts, In re, and Wilson's Trusts, In re, observed on.
Andros in re, Andros v. Andros (1883) 52 L. J. Ch. 637, 24 Ch. D. 637; 19 L. T. 163; 32 W. R. 30.—KAY, J.

Goodman's Trusts, In re, explained
Grove, In re, Vnucher v. Treasury Solicitor (1888) 58 L. J. Ch. 57; 40 Ch. D. 216; 59 L. T. 587, 37 W. R. 1.—C.A. COTTON, FRY and LOPES, L.JJ.

Andros, In re, Andros v. Andros, discussed
Grey's Trust, In re, Grey v. Stamford (1892) 61 L. J. Ch. 622; [1892] 3 Ch. 88, 41 W. R. 60.—STIRLING, J.

Goodman's Trusts, In re, and Andros, In re, referred to
Ferguson's Will, In re (1902) 71 L. J. Ch. 380, [1902] 1 Ch. 483, 50 W. R. 312.—BYRNES, J.

Wheeler v. Sheer (1729) Mos. 302, *followed*
Beard v. Beard (1744) 3 Aik. 72, and *followed*
Pickford v. Brown (1856) 25 L. J. Ch. 702, 2 K. & J. 126; 2 Jur. (N.S.) 781, 4 W. R. 173.—WOOD, V.-C. *And see post*, col. 1133

Walton v. Walton (1807) 11 Ves. 318—GRANT, M. R., *dictum commented on*.
Stewart, In re, Stewart v. Stewart (1880) 49 L. J. Ch. 763, 15 Ch. D. 539, 13 L. T. 370, 29 W. R. 275.—JESSEL, M. R.

Wilkinson v. Atkinson (1823) 2 R. & R. 255, 1 L. J. (O.S.) Ch. 222, and **Pitgerald v. Field** (1826) 1 Russ. 416, 4 L. J. (O.S.) Ch. 171, 25 R. R. 197, *discussed*
Harte v. Meredith (1881) 13 L. R. Ir. 341.—CHATTERTON, V. C.

Stewart, In re, Stewart v. Stewart, distinguished, **Limpus v. Arnold** (1884) 51 L. J. Q. B. 85; 13 Q. B. D. 300, 33 W. R. 537.—C. A.; *discussed*, **Lacy, In re** (supra), col. 1100.

Vachell v. Jeffreys (1701) Pro. Ch. 170, **Wheeler v. Sheer** (supra), **Wilkinson v. Atkinson**, and **Cowper v. Scott** (1731) 7 P. Wms. 119, *discussed and distinguished*
Stewart, In re, and Walton v. Walton (supra), *discussed*

Harte v. Meredith, approved and followed.
Ford, In re, Ford v. Ford (1901) 71 L. J. Ch. 24, [1902] 1 Ch. 218; 50 W. R. 91.—BUCKLEY, J. (see judgment), *affirmed*, [1902] 71 L. J. Ch. 773, [1902] 2 Ch. 605, 87 L. T. 113, 51 W. R. 20.—C. A. v. WILLIAMS, ROMER and MATHEW, L.JJ.

9 REPENDING LEGACIES FOR CREDITORS.

Gillespie v. Alexander (1826) 3 Russ. 130, 27 R. R. 85.—ELDON, L.C., *followed*, **Grang v. Somerville** (1830) 1 Russ. & M. 338.—LYNDHURST, L.C., *applied*, **March v. Russell** (1837) 6 L. J. Ch. 803; 3 Myl. & Cr. 31; 1 Jur. 588.—COTTEGRAM, L.C., *distinguished*, **Davies v. Nicolson** (1855) 27 L. J. Ch. 719; 2 De G. & J. 609; 5 Jur. (N.S.) 49; 6 W. R. 381, 790.—KENTISH BRUCE and TURNER, L.JJ.; *reversing* 4 Jur. (N.S.) 231.—STUART, V.-C.; *approved*, **Ridgway v. Newstead** (1902) 71 L. J. Ch. 691; [1902] 2 Ch. 684; 86 L. T. 814, 50 W. R. 614.—C.A. (post).

Dilkes v. Broadmead (1860) 30 L. J. Ch. 208, 2 De G. F. & J. 566, 7 Jur. (N.S.) 56, 3 L. T. 605; 9 W. R. 238.—CAMPBELL, L.C., *discussed*

Gregory v. Gregory (1820) G. Cooper 201, *affirmed*, (1821) Jacob 631, 14 R. R. 244, *distinguished*
Ridgway v. Newstead (1861) 30 L. J. Ch. 880,

3 De G. F. & J. 471; 7 Jur. (N.S.) 451; 4 L. T. 492, 9 W. R. 401—**CAMPBELL, L.C.**

Ridgway v. Newstead, explained and followed.

Blake v. Gale (1886) 32 Ch. D. 571, 55 L. J. (Ch. 559, 55 L. T. 281, 34 W. R. 555—**C.A.**

COTTON, L.J.—The present case is not at all like *Ridgway v. Newstead* in its circumstances, but in my opinion that case lays down a principle applicable to the present, viz., that as the right of the creditors to follow assets which have been distributed without providing for their debt is a right only in equity, equitable considerations, if sufficiently weighty, will make it the duty of the Court not to grant that equitable relief to which under ordinary circumstances creditors are entitled.—p. 578. **BOWEN and ERY, L.J.** concurred.

Ridgway v. Newstead and Blake v. Gale, distinguished.

Leahy v. De Moleyns (1895) [1896] 1 Ir. R. 206—**C.A.**

M'Murdo, In re, Penfield v. M'Murdo (*supra*), applied.

Leahy v. De Moleyns, explained.
Beattie v. Cordner (1902) [1908] 1 Ir. R. 1—**C.A.**

Harman v. Harman (1885) 2 Shower 492; 3 Mod. 115, referred to.

Blake v. Gale, distinguished.

Frutcyer, In re, Wingfield v. Erskine (1898) 67 L. J. Ch. 620, [1898] 2 Ch. 562; 79 L. T. 298, 47 W. R. 5.

ROMER, J.—Since *Harman v. Harman* it has been considered settled law that an executor who pays creditors without notice of the existence of a creditor of higher degree is not liable to account for the sums so paid at the instance of that creditor. . . . The plaintiffs referred to *Blake v. Gale*, where executors who were also some of the residuary legatees and had retained their own share of the residue were at the instance of creditors made liable to account for the shares of residue retained by them as being still in their hands. But that case is quite distinguishable. A legatee is a volunteer, and assets paid to him may be followed by a creditor. A creditor is not a volunteer, and a creditor of higher degree has no right because of that position only to follow assets in the hand of an executor paid to or retained by him in the discharge of his own debt.—p. 621.

David v. Frowd (1839) 2 L. J. Ch. 68; 1 Myl. & K. 200.—**LEACH, M.R.**; and **Sawyer v. Brothmore** (1837) 6 L. J. Ch. 277; 2 Myl. & Cr. 811.—**COTTENHAM, L.C.**, reversing (1836) 1 Keen 391.—**LANGDALE, M.R.**, applied.

Mohan v. Broughton (1899) 68 L. J. P. 91, [1899] P. 211; 81 L. T. 57.—**BARNES, J.**, affirmed, (1900) 69 L. J. P. 20, [1900] P. 56; 82 L. T. 29, 48 W. R. 371.—**C.A.** **LINDLEY, M.R.**, **V. WILLIAMS and ROMER, L.J.**

10. PROCEEDINGS.

At Common Law.

Wate v. Briggs (1694) 1 Ld. Raym. 35, 2 Saik. 565; 6 Mod. 8, overruled.
Bonafoos v. Walker (1787) 2 Term Rep. 126.

Hosier v. Arundell (Lord) (1802) 3 Bos. & P. 7, questioned.

Betts v. Mitchell (1714) 10 Mod. 318, overruled.

Partridge v. Court (1818) 5 Price 412.

GRAHAM, B.—On consideration I cannot but think that *Chambre, J.*, in *Hosier v. Arundell (Lord)*, carried his opinion too far in putting a promissory note on the same footing, in a question of this nature, as a bond. In that case where a bond was given to the executor in his own name, I think the judgment right, because such a speciality would have the effect of annihilating the previous debt, creating a new and personal obligation of a higher nature, and, therefore, I am obliged to say with deference that I cannot hold the opinion of *Chambre, J.* to be right, in putting a promissory note on the same footing as a bond.—p. 419.

WOOD, B.—But I consider that case [*Betts v. Mitchell*] to have been since properly overruled by subsequent decisions, and on very good grounds.—p. 421.

GARROW, B.—*King v. Thom (post)* has overruled *Betts v. Mitchell*.—p. 423.

Bull v. Palmer (1675) 2 Lev. 165, and **Mason v. Jackson** (1682) 3 Lev. 60, approved.

King v. Thom (1786) 1 Term Rep. 489; and **Cockerill v. Kynaston** (1791) 4 Term Rep. 277, questioned.

Henshall v. Roberts (1804) 5 East 150; 1 Smith 375.

ELLENBOROUGH, C.J.—If it had been alleged that they sued as executors, &c., that would have been enough to have raised the other question, whether a count, upon promises on an account stated with one as executor, can be joined with other counts on promises with the testator; upon which there are authorities both ways. The cases in favour of the proposition are *Bull v. Palmer* and *Mason v. Jackson*, together with the opinion of *Buller, J.* in the cases cited (*King v. Thom* and *Cockerill v. Kynaston*), that wherever the sum recovered by the executor on promises to himself would be assets in his hands, there the count may be joined with counts on promises made to the testator. But there are many authorities the other way; and I think you will hardly find the point tenable.—p. 154.

[*Cockerill v. Kynaston* had been previously doubted in *Bellard v. Spencer* (1797) 7 Term Rep. 358.]

Bull v. Palmer, disavowed.

Cowell v. Watts (1805) 6 East 405, 2 Smith 410.—**K.B.**

Barker v. Talbot (1687) 1 Vern. 473, distinguished.

King v. Thom and **Cowell v. Watts**, referred to.

Catherwood v. Chabaud (1823) 1 R. & C. 150; 25 R. R. 339.—**K.B.**

Cowell v. Watts and **Webster v. Spencer** (1820) 3 B. & Ald. 360, 22 R. R. 427, disavowed.

Heath v. Chilton (1844) 13 L. J. Ex. 225, 12 M. & W. 692.—**EX.**

Heath v Chilton (*supra*), approved

Bolingbroke v Kerr (1866) 35 L J Ex 137, L. R. 1 Ex. 232, 14 L T 365, 14 W R 657.—**POLLOCK, C.B.**

Bolingbroke v Kerr, distinguished

Moseley v Rendell (1871) 40 L J Q B 111, L. R. 6 Q B 348, 23 L T 774, 19 W R 619.—**Q.B.**

[The report in 35 L J. Ex. 137 was not before the Court here.]

Bolingbroke v Kerr and Moseley v Rendell, explained

Abbott, J. Parfitt (1871) L. R. 6 Q. B. 346; 40 L J Q B 115; 21 L T 169, 19 W R 718.

BLACKBURN, J.—The later cases have—as **Parke, B.** says in the passage cited from *Heath v Chilton*—conclusively settled that an executor has the option to sue in his representative character on contracts made with himself, where the money, when recovered, would be assets (though in a great many such cases he might sue in his personal capacity), and he adds that that rule ought not to be disturbed, in this I fully agree. When the executor, not acting in conformity with the directions of the will, there can be no doubt in what character they are acting. But it sometimes happens—and that is what often raises a difficulty—that the executor or administrator is also beneficially interested as legatee or next of kin, and as soon as he has assented to take, then the benefit would be no longer assets, and, on the other hand—as, for instance, in the case of a lease—he becomes personally responsible for any burthens attached to the subject-matter. And the question therefore sometimes might be, in what character was the business being carried on by the executor or administrator? By losing sight of this distinction, *Bolingbroke v Kerr* may very probably have been misunderstood. There the intestate died leaving a daughter, a minor, who, however, afterwards took out administration, probably, therefore, she was an only child and sole next of kin; she married, and she and her husband carried on the business for more than two years; the business was carried on with money which the wife had received from the intestate's estate—probably therefore with the wife's fortune, but it is hardly likely that they were carrying it on for such a length of time for the benefit of the estate. It is much more likely that it was carried on, though, in point of fact, by the administratrix, yet by the administratrix after having assented to take it as next of kin and so as belonging to her, in which case the husband ought clearly to have sued alone. So understood, the case would be in perfect conformity with the decided cases. In the Law Journal, it is true, it is said that the administratrix and her husband carried on the business for the benefit of the deceased's estate, but in the Law Reports there is no such statement, and I cannot but think that there must be a mistake in the Law Journal. For if that really had been found as a fact, the decision must have overruled very numerous cases on the subject, or the Court must have distinguished them in some way which I cannot understand; and it is incredible that the Court should have done this *sub silentio*. The facts in the Law Reports leave the case

consistent with previous cases, and the report is probably right. And the Law Journal must have misapprehended what was the evidence upon which the point was reserved.—p. 349.

MELLOR, J. to the same effect.

HANNEN, J., who also concurred, said. In *Moseley v Rendell* I rested my judgment on the fact that the materials employed belonged to the intestate; that was sufficient for the decision of that case, and it was unnecessary to consider *Bolingbroke v Kerr*—p. 351.

And see *supra*, col. 1106.

Moseley v Rendell, applied

Jennings v Mather (1906) 70 L J Q. B. 53; [1901] 1 Q. B. 108 (*supra*, col. 1106).

Knights v Quarles (1820) 2 B. & B. 102; 4 Moore 632, 22 R. R. 659; and **Potter v Metropolitan Ry.** (1871) 80 L T. 765.—**EX.**, affirmed, 32 L T 36—**EX. CH.**, discussed and fallen on.

Chamberlain v Williamson (1814) 2 M. & S. 408; 15 R. R. 206, distinguished. And see *post*, col. 1114.

Bradshaw v. Lancashire and Yorkshire Ry. (1875) L. R. 10 C P 189; 44 L J. C. P. 118; 31 L T 847, 28 W R 310.

DENMAN, J.—In *Williams on Executors* (7th ed. vol. i. p. 798), a work in itself of great authority, all the cases on the subject are commented upon, and the law is stated entirely in accordance with the dictum of Richardson, J. in *Knights v Quarles*. It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of the defendant, before the death of the testator. *Alton v. Midland Ry.* [(1864) 34 L J C P 292; 19 C. B. (N S) 213. See "CARPENTERS," col. 285] is also referred to in a note, and it is clear that the learned author, who was a judge of this Court when that case was decided, looked upon the dictum of Willes, J. in that case as a confirmation of the opinion of Richardson, J. in *Knights v Quarles*. He proceeds, however, to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of *Chamberlain v. Williamson*, viz., that an action by the executor for breach of contract will not lie where the damage is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record, and so the executor could not have an action because the only damages recoverable were purely personal. Here, the damages are not personal in their nature, but are damages to the estate, the case fails, therefore, within the rule as laid down by Sir E. V. Williams, and not the exception. Again, *Potter v. Metropolitan Ry.*, though not exactly in point, is to some extent an authority in favour of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it clearly is so here. There the wife was the person to whom the injury was done, and she sued as executrix to her husband, who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death,

and consequently is not on all fours with the present. The principle, however, of the decision is quite consistent with our judgment in this case.—p 194.

GROVE, J. to the same effect.

Chamberlain v Williamson, discussed.
Finlay v. Chirney (*post*, col 1114)

Bradshaw v. Lancashire and Yorkshire Ry. (supra), commented on, but followed.
Leggott v. G. N. Ry. (1876) 1 Q. B. D. 599, 45 L. J. Q. B. 587, 35 L. T. 334, 24 W. R. 784.
MELLOR, J.—With the single exception, so far as I am aware, of . . . *Bradshaw v. Lancashire and Yorkshire Ry.*, there appears to be no authority that an action will be by the executor in respect of what is claimed in this action. But as that case has been decided on the very point, I entirely yield to the authority of the decision, so far as to say that in this Court it cannot be questioned, and we must therefore abide by it. I must say, however, that we yield to it for the purposes of this case, and that, at all events, if it is to be questioned, it must be questioned in a C. A.—p 603

QUAIN, J. to the same effect

Bradshaw v. Lancashire and Yorkshire Ry. and Leggott v. G. N. Ry., discussed.
Pailing v. G. E. Ry. (1882) 51 L. J. Q. B. 453; 9 Q. B. D. 110, 30 W. R. 708, 46 J. P. 617—DENMAN, J. and POLLOCK, B.

Bradshaw v. Lancashire and Yorkshire Ry., approved and followed.
Daly v. Dublin, Wicklow and Wexford Ry. (1892) 30 L. R. Ir. 511—C.A. ASHBOURNE, L.C., FITZGIBBON and BARRY, L.JJ. See judgments at length

Bradshaw v. Lancashire and Yorkshire Ry., referred to.
The Greta Holme (1897) 66 L. J. Q. B. 672; [1897] A. C. 596; 77 L. T. 281—M.L. (E.). MALHURRY, L.C., LORDS WATSON, HERSCHELL, MACNAGHTEN, MORRIS and SHAND.

Crossfield v. Such (1853) 22 L. J. Ex. 325, 8 Ex. 825, 1 W. R. 471.—XX., adopted.
Law Guarantees and Trust Society v. Bank of England (1890) 21 Q. B. D. 406, 62 L. T. 496, 38 W. R. 493; 54 J. P. 682—MATHEW, J.

Morley v. White, 28 L. T. 802.—MALINS, V.-C., reversed, (1873) 42 L. J. Ch. 380; L. R. 8 Ch. 731, 29 L. T. 282, 21 W. R. 746.—JAMES and MELLISH, LJJ.

Action against

Hamblay v. Trott (1776) Cowp. 372—K.B., discussed. And see post

Phillips v. Homfray (1888) 52 L. J. Ch. 839, 21 Ch. D. 439, 19 L. T. 5, 32 W. R. 6—C.A. COTTON and BOWEN, L.JJ., BAGGALLAY, L.J. dissenting (see judgments at length, where the subjects are discussed), extending 52 L. J. Ch. 401—PEARSON, J., affirmed, on ground that appeal was out of time, non Phillips v. Pothergill (1886) 11 App. Cas. 466; 55 L. T. 615—M.L. (K.). HERSCHELL, L.C., LORDS BLACKBURN, FITZGERALD and ASHBOURNE.

Phillips v. Homfray, followed

Bathynay v. Walford (1887) 56 L. J. Ch. 881, 36 Ch. D. 269, 57 L. T. 206; 35 W. R.

814—C.A. COTTON, BOWEN and FREY, L.JJ., affirming, with a variation, 33 Ch. D. 624, 55 L. T. 509.—NORTH, J.

Hamblay v. Trott (supra) and Phillips v. Homfray, discussed. And see post
Finlay v. Chirney (1888) 57 L. J. Q. B. 247, 20 Q. B. D. 494, 58 L. T. 664, 36 W. R. 534, 32 J. P. 324—C.A. BAKER, M.R., BOWEN and FREY, L.JJ. See judgment of BOWEN, L.J., where all the cases are discussed

Finlay v. Chirney, referred to.
Daly v. Dublin, Wicklow and Wexford Ry. (1892) 30 L. R. Ir. 511—C.A. ASHBOURNE, L.C., FITZGIBBON and BARRY, L.JJ.

Hamblay v. Trott, approved.
Phillips v. Homfray, explained.
Phillips v. Homfray (1890) 39 W. R. 45—STIRLING, J.

Phillips v. Homfray (1883)—C.A., applied, Chapman v. Day (1883) 49 L. T. 136—C.A. BRETT, M.R. and BOWEN, L.J., reversing 48 L. T. 907, 31 W. R. 767—D.; referred to, Duncan, In re, Terry v. Sweeting (1899) 68 L. J. Ch. 253. [1899] 1 Ch. 387, 80 L. T. 322, 47 W. R. 379—ROMER, J. (and see post), principle applied, Ellis v. Wadson (1899) 68 L. J. Q. B. 604; [1899] 1 Q. B. 714. 80 L. T. 508, 47 W. R. 420—C.A. A. L. SMITH, COLLINS and ROMER, LJJ.

Phillips v. Homfray and Duncan, In re, Terry v. Sweeting (supra), principle applied.
Davoren v. Wootton [1900] 1 L. R. 273.—C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER and HOLMES, LJJ.

Thompson v. Dunn, 18 W. R. 334—MALINS, V.-C., reversed, (1870) L. R. 5 Ch. 573, 18 W. R. 854.—HATHERLEY, L.C. and GIFFARD, L.J.

Administration under the Court

Wilson, In re, Alexander v. Calder (1885) 51 L. J. Ch. 187; 28 Ch. D. 157, 33 W. R. 579—PEARSON, J., considered.
Blake, In re, Jones v. Blake (1885) 29 Ch. D. 913, 54 L. J. Ch. 880, 53 L. T. 302, 33 W. R. 886—C.A., varying KAY, J.

LINDLEY, L.J.—The decision . . . appears to me to be substantially correct, subject to one qualification. Care must be taken not to give countenance to the notion that by seeking out an infant plaintiff who may be a residuary legatee, or interested, perhaps, in a very small portion of the estate, an administration judgment may be obtained at the expense of the estate as a matter of course as it used to be obtained. I hope that state of things is gone, and gone for ever. It was one of the greatest scandals of the profession. It is stuck at, and I hope most effectively, by means of Ord. LV. and especially by Ord. LXV. as to costs, since, subject to a reservation made by the latter rule with regard to the right of executors and trustees and mortgages as to costs, the costs of administration actions, whether instituted by next friends of infants or by any one else, are in the discretion of the Court, and, being in the discretion of the Court, the Court will deal with them in a proper manner. Thus, if it finds (as

for anything I know, it may be found here) that these modified inquiries which we think ought to be made are really unnecessary. *Ray, J.* can make the next friend of the infant and the other plaintiff pay all the costs, including the costs of the appeal.—p. 918.

COTTON and *PRY*, *L.J.* to the same effect.

Att.-Gen. v. Cornthwaite (1788) 2 Cox 44, cited in *Sutton on Decrees*, 1st ed. p. 807, *commented on*.
Blount, in re, *Naylor v. Blount* (1879) 27 W. R. 865.

Walker v. Seligmann (1871) 40 L. J. Ch. 601, 25 L. T. 294.—*ROMILLY, M.R., followed*.
Parke, in re, *Simpson v. Parke* (1892) 66 L. T. 151.—*STIRLING, J.*

Woodridge v. Norris (1868) 37 L. J. Ch. 640; L. R. 6 Eq. 410, 19 L. T. 144; 16 W. R. 905.—*GIFFARD, V.-C., followed*.
Cooper v. Blissett (1876) 45 L. J. Ch. 272, 1 Ch. D. 691, 21 W. R. 237.—*HALL, V.-C. (and see post)*.
Hobbs v. Wayot (1887) 56 L. J. Ch. 819, 36 Ch. D. 256, 57 L. T. 225, 36 W. R. 273.—*KERKEWICH, J.*

Woodridge v. Norris, explained
Ponsford v. Hartley (1892) 2 J. & H. 736.—*WOOD, V.-C., referred to*.
**Cooper v. Blissett, supra, not followed.
Worraker v. Fryer (1876) 2 Ch. D. 109, 45 L. J. Ch. 273, 24 W. R. 269.**

JESSEL, M.R.—It is said that it was decided . . . in *Woodridge v. Norris* that it was unnecessary to file a bill on behalf of all the creditors in order to obtain administration of the real estate; but it does not appear to me that he [the V.-C.] did so decide. In the first place, there was in that case (as the V.-C. observed in his judgment) an express trust in the testator's will to pay the debt, and in the next place it was a decision on a demurrer, and all that the V.-C. said was that he would not, in any case have allowed the objection to prevail, which may have meant that he would have given liberty to amend. On the other hand, in *Ponsford v. Hartley*, Lord Hatherley, when V.-C., allowed a demurrer to a bill by a creditor for administration of real estate, on the ground that the suit was not on behalf of all creditors. It seems to me, therefore, that the old practice was clearly established; and, to my regret, I find nothing in the new rules to alter it. The good sense of the matter is entirely in accordance with the view of Hall, V.-C. in *Cooper v. Blissett*, but the rule is express, that, while no other provision is made by the orders, the old procedure and practice remain. The writ had better be amended by making the plaintiff sue on behalf of himself and all other creditors.—p. 110.

Cooper v. Blissett, not followed.
Worraker v. Fryer, followed
Royle, in re, *Fryer v. Royle* (1877) 5 Ch. D. 540; 36 L. T. 411, 25 W. R. 528.—*BACON V.-C.*
Vincent, in re, *Faham v. Vincent* (1877) 26 W. R. 94.—*HALL, V.-C.*

Eyre v. Cox (1876) 24 W. R. 317.—*JESSEL, M.R., explained*.
Tottenham, in re, *Tottenham v. Tottenham* (1896) 65 L. J. Ch. 549; [1896] 1 Ch. 628; 74 L. T. 376; 44 W. R. 539.

WORTH, J.—I think it must have been stated in the title of the statement of claim in that case that the plaintiff was suing on behalf of all the other creditors. I think that the reference there to the action being entitled "In the matter of the estate" shows that the matter with which the M.R. was dealing was the title of the action. The whole judgment deals only, I think, with the title of the action, and the reason why he considered it unnecessary that the writ should be amended was because the title of the statement of claim showed that the plaintiff was suing in a representative capacity.—p. 550.

Greenwood v. Taylor (1890) 1 Russ. & M. 185.—*LEACH, M.R., questioned*.
Mason v. Bogg (1837) 2 Myl. & Ch. 418, 2 Jur. 330.—*COTTENHAM, L.C.*

Greenwood v. Taylor and Mason v. Bogg, referred to.
Tipping v. Power (1842) 11 L. J. Ch. 257; 1 Hauc. 406, 6 Jur. 481.—*WIGRAM, V.-C.*

Mason v. Bogg, explained, *Armstrong v. Stores* (1851) 14 Beav. 535.—*ROMILLY, M.R.*
Tuckley v. Thompson (1860) 29 L. J. Ch. 548, 1 J. & H. 126, 2 L. T. 565, 8 W. R. 302.—*WOOD, V.-C.; on appeal, 3 L. T. 257*

Mason v. Bogg, approved, *Barnold's Banking Co., in re, Kellock's Case, Xeres Wine Shipping Co., in re, Alliance Bank, Ex parte* (1868) 39 L. J. Ch. 112, L. R. 3 Ch. 769.—*WOOD and SELWYN, L.J.*
Pinehead v. Fellows (1874) 43 L. J. Ch. 227; L. R. 17 Eq. 121; 20 L. T. 882, 22 W. R. 612.—*HAGON, V.-C.; explained*, *Withensca Brickworks, in re* (1880) 50 L. J. Ch. 185, 36 Ch. D. 337, 49 L. T. 713, 29 W. R. 178.—*C.A. JAMES, COTTON and LUSH, L.J., referred to*.
Hopkins, in re, Williams v. Hopkins (1881) 18 Ch. D. 870, 45 L. T. 117, 20 W. R. 767.—*C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J. (and see post)*; *Maisey Steel and Iron Co. v. Naylor* (1882) 51 L. J. Q. B. 576, 9 Q. B. D. 648; 47 L. T. 369, 31 W. R. 80.—*C.A. JESSEL, M.R., LINDLEY and HUGHES, L.J., affirmed*, (1884) 53 L. J. Q. B. 497, 9 App. Cas. 431, 52 L. T. 637; 32 W. R. 989.—*H.L. (2), distinguished*, *Leonard v. Kellett* (1891) 27 L. R. 11 418.—*CHATTERTON, V.-C.*

Hopkins, in re, Williams v. Hopkins, supra, distinguished
Metcalf v. In re, Hicks v. May (1879) 49 L. J. Ch. 192, 18 Ch. D. 230; 42 L. T. 383, 28 W. R. 499.—*C.A. JAMES, BAGGALLAY and THESIGER, L.J., applied*.
McMunio, in re, *Penfield v. McMunio* (1902) 71 L. J. Ch. 691; [1902] 2 Ch. 684; 86 L. T. 814, 50 W. R. 644.—*C.A. V. WILLIAMS, ROMER and STIRLING, L.J.*

ROMER, L.J.—That case [*Hopkins, in re*] to my mind is clearly distinguishable and does not apply to the present case. Under the Bankruptcy Act and Rules applying at that time, the creditor who in that case wished to come in and change his proof could not have amended his proof in bankruptcy, and would not have been allowed to do so; and when he came in and was obliged to confess that, in bankruptcy, he would not have been allowed to change his proof, he was met by the unanswerable objection in Chancery, "Who

is your special circumstance? There is no special circumstance, and the Bankruptcy Rules are against you"; and accordingly it was held that, not being allowed to change his proof in bankruptcy, there were no special circumstances entitling the Court to allow him to vary the certificate or alter his proof in Chancery. That is the whole case.—p. 699

STIRLING, J., discussed and applied *Metcalf v. In re*, and also distinguished *Hopkins, In re*—See pp. 700–701.

Hilton v. Jones (1878) 47 L. J. Ch. 470, 4 Ch. D. 620; 38 L. T. 808, 26 W. R. 787—MALINS, V.-C., *overruled*

Sherwin v. Selkirk (1879) 12 Ch. D. 68; 40 L. T. 701; 27 W. R. 842—C.A. JAMES, BAGGALLAY and THESIGER, L.J.

Williamson v. Naylor (1888) 8 Y. & C. 208

—ALDERSON, D., and Wild v. Banning (1866) 35 L. J. Ch. 594, 1 L. R. 2 Eq. 577—ROMILLY, M.R., *distinguished*

Alderson v. Petrie (1873) 25 W. R. 361, n.—LORD SELBORNE, *followed*

Ashley v. Ashley (1877) 46 L. J. Ch. 322; 4 Ch. D. 757, 36 L. T. 200, 25 W. R. 356—C.A. BAGGALLAY, J.A. (for self and JAMES, J.)—In some of the cases cited, and which have been much relied upon, as for instance, in *Williamson v. Naylor*, it will be found that the Court simply made a decree or order for carrying into execution certain trusts for the benefit of creditors, and, having directed an inquiry as to who were entitled to the trust funds, eventually made an order for payment to the persons whose titles were certified. There was not in any of these cases any general administration decree operating as a judgment in favour of the creditors. Again, the facts of *Wild v. Banning* hardly support the marginal note, for though the M.R. intimated an opinion that the creditors who ultimately established their claims would be entitled to divide the funds, he only decided that the trustee was not entitled to the unrecieved funds, and he directed an inquiry as to who were entitled to them. But, whilst the orders relied upon by the appellants fail to show any lengthened uniform practice as the direction contended for by them, *Alderson v. Petrie* singularly illustrates the course, which, in our opinion, ought to be adopted in like cases. The principle upon which that decision was based is, in our judgment, unimpeachably sound, and we must act on the same principle in the case before us—pp. 328–330.

Ashley v. Ashley, referred to.

Higginbottom and Dean, In re. Att.-Gen. v. Ex parte (1898) 68 L. J. Q. B. 198, [1899] 1 Q. B. 325, 70 L. T. 678; 47 W. R. 285, 5 Manson 289.—WRIGHT and DARLING, JJ.

Higginbottom, In re (1826) 2 G. & J. 123, *commented on*

Bower v. Marris (1841) 10 L. J. Ch. 356—Ch. & Ph. 351—COTTENHAM, L.C. See judgment

Bower v. Marris, applied

Higginbottom, In re, questioned

Whittinghall v. Grover (1886) 35 W. R. 4; 55 L. T. 213.

OHITTY, J.—All the dividends have been paid in process of law, and the account ought to be taken in the manner pointed out in *Bower v.*

Marris, and *Humber Iron Works, &c. Co., In re, Warrant Finance Co.'s Case* [(1869) 38 L. J. Ch. 712, 1 L. R. 4 Ch. 648, 20 L. T. 859, 17 W. R. 780—L.J. See "COMPANY"], viz., by treating the dividends as ordinary payments on account and applying each dividend, in the first place, to the payment of interest calculated to the day of such dividend, and the surplus (if any) to the reduction of the principal. The decision of Sir J. Leach in *Higginbottom, In re* I consider to be overruled by Lord Cottenham in *Bower v. Marris*.—p. 5

Summers, In re, Boswell v. Gurney (1879) 18 Ch. D. 136, 27 W. R. 865—JESSEL, M.R., *approved, but not applied.* And see post. Talbot, In re, King v. Chick (1888) 58 L. J. Ch. 70, 39 Ch. D. 567, 60 L. T. 45, 37 W. R. 233.—NORTH, J. And see "BANKRUPTCY," col. 159.

Smith v. Morgan (1880) 49 L. J. C. P. 410, 5 C. P. D. 347—COLERIDGE, G. and LINDLEY, J., *approved and followed.*

Maggi, In re, Winehouse v. Winehouse (1892) 20 Ch. D. 545, 61 L. J. Ch. 500, 46 L. T. 362, 30 W. R. 720.

FRY, J.—In *Smith v. Morgan*, the Common Pleas Division, consisting of Lord Coleridge, C.J., and L.J. (then Mr. J.) Lindley, held, that the last clause of sect. 32 [Bankruptcy Act, 1869] which is now in question, is not imported into the administration of the assets of deceased persons. In this conflict of authority, it is not easy to say whether I am following or differing from the prior authorities, but I think the weight of authority is in favour of my conclusion, that sect. 32 is not introduced into the administration of the estates of deceased persons—p. 550. And see post, col. 1119.

Summers, In re (*supra*), *followed*
Maggi, In re, Winehouse v. Winehouse, explained

O'Brien v. Gilman (1883) 13 L. R. Ir. G.—SULLIVAN, M.R.

Maggi, In re, and Smith v. Morgan (*supra*), *followed.*

Scott v. Murphy (1888) 13 L. R. Ir. 10—SULLIVAN, M.R.

Maggi, In re, followed

Williams, In re, Jones v. Williams (1887) 57 L. J. Ch. 261, 36 Ch. D. 578; 57 L. T. 756, 36 W. R. 34—NORTH, J.

Maggi, In re, and May, In re, Crawford v. May (1890) 60 L. J. Ch. 34; 45 Ch. D. 499; 63 L. T. 375, 38 W. R. 765—NORTH, J., *dissented.*

Moore v. Smith (1894) [1895] 1 Ir. R. 512—O.A. WALKER, L.C., FITZGIBBON and BARRY, L.J.

Maggi, In re (*and see post*), and **May, In re**, *discussed*

Long, In re, Tait v. Emmerson (1895) 64 L. J. Ch. 468, [1895] 1 Ch. 652; 12 B. 202; 72 L. T. 407; 43 W. R. 406—C.A. LORD HALSBURY, LINDLEY and A. L. SMITH, L.J.J. See judgment of LINDLEY, J.

Long, In re, Tait v. Emmerson, discussed
Heywood, In re, Markington v. Heywood (1897)

67 L. J. Ch. 25; [1897] 2 Ch. 593; 77 L. T. 423; 46 W. R. 72, 4 Manson 321.

STIRLING, J.—It was there held that, in the administration by the Court of the assets of a deceased person the claim of a woman for money lent to her husband for the purposes of his trade or business was, by the combined effect of sect. 3 of the Married Women's Property Act, 1882, and sect. 10 of the Judicature Act, 1876, postponed to the claims of his other creditors. This case seems to me to be decided on the principle (expressly stated by the present M.R. in his judgment) that "the rules in bankruptcy as to debts and liabilities provable must now, I think, include all rules as to priorities expressly enacted by any statute and made applicable in the event of bankruptcy." It is contended on behalf of the creditors for rates that this principle ought to be applied in the present case. It is said that sect. 3 [of the Preferential Payments Act, 1886] expressly limits the operation of the Act to receiving orders, orders made under sect. 125 of the Bankruptcy Act and the winding-up of companies. Sect. 3 appears to me to provide that not every administration in bankruptcy or winding-up is to be affected by the Act, but only those where an order has been made after the period fixed for the commencement of the Act. I do not think it was meant to exclude the application of sect. 10 of the Judicature Act, 1875. . . I have the least difficulty in arriving at this conclusion that it agrees with the opinion expressed by the present M.R. in *Leng, In re*. . . It is true that his lordship does not make any reference to sect. 3, but it seems most improbable that this section should have been overlooked. —p. 27.

Smith v Morgan and Maggs, In re (*supra*, col. 1118), *overruled*.
Whitaker, *In re*, Whitaker v Palmer (1900) 70 L. J. Ch. 6, [1901] 1 Ch. 9; 83 L. T. 449, 49 W. R. 106—C.A.

RIGHT, J.—I think we should be cutting

should have thought that the decision of the C.A. in *Leng, In re*, was absolutely inconsistent with the decision of Fry, J., in *Maggs, In re*. But Lindley, J.J., in his judgment in *Leng, In re*, seems plainly to take the view that the two decisions are reconcilable, though I do not quite understand it.—*h*

ROMER, J.—*Maggs, In re*, can, I think, no longer be regarded as an authority. The attention of Fry, J., when he decided that case, was not directed to, and he did not in his judgment deal with, those words of sect. 10 which formed the basis of the decision in *Leng, In re*, and which form the basis of our present decision.—p. 8.

Claims against Estate—*Reverce*.

Grant v. Grant (1865) 34 Beav. 623, 13 W. R. 1057—M.R., and **Dowd v. Ellis** (1865) 35 Beav. 578—M.R., *followed*.
Hartford v. Power (1869) L. R. 3 Eq. 602—CHATTERTON, V.-C.

Hill v. Wilson (1874) 42 L. J. Ch. 817, L. R. 8 Ch. 888; 20 L. T. 238, 21 W. R. 757.—**JAMES** and **MELLISH, L.J.**, **Beak v. Moore** (1881) 7 L. R. Ir. 322—C.A. **MAY, C.J.**, **DEARY** and **FITZGIBBON, L.J.**, and **Finch, In re, Finch v. Finch** (or **Wynne-Finch, In re, Wynne-Finch v. Wynne-Finch**) (1885) 28 Ch. D. 207, 18 L. T. 120, 31 W. R. 626—C.A. **JESSUP, M.R.**, **BAGGALLAY** and **LINDLEY, L.J.**, *followed*.
Garnett, In re, Gandy v. Macaulay (1885) 31 Ch. D. 1—C.A. **BRETT, M.R.**, **COTTON** and **FRY, L.J.**, and **Hodgson, In re, Beckett v. Ramsdale** (1885) 55 L. J. Ch. 241; 31 Ch. D. 177; 54 L. T. 229; 34 W. R. 127.—C.A. **SIR J. HANNEN, BOWEN** and **FRY, L.J.**, *dicta not followed*.
Harnett, In re, Leahy v. O'Grady (1886) 17 L. R. Ir. 543.—CHATTERTON, V.-C.

Garnett, In re, and Hodgson, In re, referred to.
Farman, In re, Farman v. Smith (1887) 57 L. J. Ch. 637, 58 L. T. 12.—**NORTH, J.**

Farman, In re, Farman v. Smith, explained.
Hodgson, In re, and Finch, In re, discussed.
Wildish v. Fowler (1888) 5 Times L. R. 113—**KEKEWICH, J.**

Hodgson, In re, followed.
Finch, In re, dissented from.
Rawlinson v. Scholes (1896) 79 L. T. 350—**RUSSELL OF KILLOWEN, C.J.** and **WILLS, J.**

Injunction

Bond (1850) 1 Ir. Ch. R. 198—*adhered to*.
Hibbins (1850) 1 Ir. Ch. R.

Receiver

Cash v. Parker (1879) 18 71, 12 Ch. D. 243; 10 L. T. *distinguished*.
Atkins v. Shephard (1889) 18 Ch. D. 181, 62 L. T. 337.—C.A. **COTTON, BOWEN** and

Partee.

Bacole v. Atlee (1687) 2 Vern. 37; *questioned*.
Rush v. Higgs (1799) 4 Ves. 638—**LOUGH-BOUGH, L.C.**, *not followed*.
Mandeville v. Mandeville (1888) 23 L. R. Ir. 339.—C.A. **ASHBOURNE, L.C.** **FITZGIBBON, BARRY** and **NAIEN, L.J.**

Groves v. Lane (or **Levi**) (1852) 9 Haic App. 419 n., 16 Jur. 854, 1061; 1 W. R. 31—**KINDERESLEY, V.-C.**, *approved*.
Davis v. Chanter (1848) 17 L. J. Ch. 297; 2 Ph. 515.—**COTTENHAM, L.C.**, *reversing*

(1816) 15 Sim. 93.—SHADWELL, V.-C.,
explained
 Dowdeswell v Dowdeswell (1878) 48 L. J. Ch. 23, 9 Ch. D. 294, 48 L. T. 828, 27 W. R. 241.
 —C.A. JAMES, BRETT and COTTON, L.Js.

Vickers v. Bell (1861) 10 Jur. (N.S.) 376,
 10 L. T. 77.—L.J., *applied*.
 * Cooke v. Gittings (1856) 21 Beav. 497;
 4 W. R. 268.—M.R., *commented on*.
 Rayner v. Koehler (1872) 41 L. J. Ch. 497,
 L. R. 14 Eq. 262; 27 L. T. 506; 20 W. R. 859
 —MALINS, V.-C.

Rayner v. Koehler, *disapproved*.
 Cary v. Hills (1872) 42 L. J. Ch. 100; L. R. 15 Eq. 79, 28 L. T. 6; 21 W. R. 166
 ROMILLY, M.R.—If that case is law as reported, I must overrule this plea, and I must also alter all my notions of pleading. . . I think Rayner v. Koehler must be wrongly reported.—p. 102.
 [In this judgment, as reported in the Law Reports, the case is not specially referred to.]

Rayner v. Koehler, *adhered to*.
 Cary v. Hills, *dissented from*.
 Coote v. Whittington (1873) 42 L. J. Ch. 846;
 L. R. 16 Eq. 534; 29 L. T. 208; 21 W. R. 839.
 —MALINS, V.-C.

Penny v. Watts (1845) 16 L. J. Ch. 116, 2 Ph 149.—C.; and Beadmore v. Gregory (1865) 34 L. J. Ch 392; 2 H. & M 491; 11 Jur. (N.S.) 363, 12 L. T. 863; 13 W. R. 674.—V.C., *followed*.

Rayner v. Koehler and Coote v. Whittington, *dissented from*.
 Rowseell v. Morris (1878) L. R. 17 Eq. 20, 43 L. J. Ch. 97, 29 L. T. 416; 22 W. R. 67.
 JESSEL, M.R.—But for two recent decisions of Malins, V.-C., I should have thought that that question [whether a Court can administer an estate without having before it the legal personal representative of the testator or intestate, where an executor *de son tort* or the legal personal representative of such an executor is before the Court] was unarguable. I have always supposed that this Court could not make a decree for general administration in the absence of the legal personal representative. In Rayner v. Koehler, the first of his two decisions, Malins, V.-C. decided the contrary, but he did not go into the subject very fully, nor perhaps very carefully. Then followed Cary v. Hills, in which my predecessor, Lord Romilly, declined to follow Rayner v. Koehler. Then came Coote v. Whittington, the second of the two cases, and in it unquestionably the V.-C. did examine the subject with the greatest minuteness and care. I have read his judgment most carefully, but am unable to follow his reasoning, or to agree with his conclusion. I should not, however, have ventured to express so strongly my dissent from the V.-C., had not my attention been called to two decisions which are in opposition to his, one by Lord Cottenham, Penny v. Watts, which is binding upon me, and the other by Lord Hanbury, Beadmore v. Gregory, which is not absolutely binding, but is of equal authority with the decisions of Malins, V.-C., and I should prefer to follow it in a case where difference of opinion exists. Such being the state of the authorities, I must hold the law of the Court to be, that a suit for administration is defective when the legal personal representative is not before the Court.—p. 22.

O.C.

Bowsher v. Watkins (1830) 1 Russ. & M 277, 32 R. R. 210.—M.R., *discussed*. And see post.
 Holland v. Prior (1834) 1 Myl & K 297, Coop. t. Brough, 426.—BROUGHAM, L.C.; Davies v. Davies (1837) 2 Keen 534, 1 Jun. 446.—LANGDALE, M.R.; Wright v. Hamilton (1846) 3 Jo & Lat. 465, 3 Ir Eq. R. 119.—SUGDEN, L.C. And see post, col. 1123

Elmalle v. M'Aulay (1792) 3 Bro. C. C. 624;
 Lancaster v. Evans (1841) 4 Beav. 158, 5 Jur. 525; Barker v. Birch (1847) 1 De G. & Sm 376, Consett v. Bell (1842) 11 L. J. Ch. 401, 1 Y & C C C 569, and Burroughs v. Elton (1806) 11 Ves 29; 8 R. R. 79, *principles explained*.
 Travis v. Milne (1831) 20 L. J. Ch. 665; 9 Hare 141.—V.-C., *applied*.
 Stainton v. Carron Co. (1854) 23 L. J. Ch. 299, 18 Beav. 146, 18 Jur. 137, 2 Eq. R. 466; 2 W. R. 176.—ROMILLY, M.R.

Bowsher v. Watkins and Travis v. Milne, *adapted*.
 Brett v. Beckwith (1856) 26 L. J. Ch. 130, 3 Jur. (N.S.) 31; 5 W. R. 112.—ROMILLY, M.R.

Lancaster v. Evans, Travis v. Milne and Stainton v. Carron Co., *discussed*.
 Rowsell v. Morris (*supra*), *commented on*.
 Lovett, in re, Ambler v. Lindsay (1870) 3 Ch. D. 198, 45 L. J. Ch. 768, 35 L. T. 93, 24 W. R. 982

MALINS, V.-C.—I am aware that Coote v. Whittington was subjected to criticism by Sir G. Jessel in Rowseell v. Morris, and I think, in answer to the observations made by him, I may say that he expressed himself somewhat incoherently, for he decides that you cannot administer an estate in this Court without having before it the legal personal representative of the testator or intestate, although an executor *de son tort* or the legal personal representative of such an executor is before the Court. If, as he says, you cannot sue a person as executor *de son tort*, then any person may enter upon and take possession of the property of a deceased, and he cannot be sued for doing so. I know of no character in which such a man can be sued, except it is that of an executor *de son tort*, as I pointed out in Coote v. Whittington. It would be the height of injustice if a man could possess himself of the assets of a testator, and because he did not choose to clothe himself with the character of administrator, could not therefore be sued in respect of such assets. I have already decided the contrary, first in Rayner v. Koehler (*supra*), and then in Coote v. Whittington, and I believe that what I decided in those cases has been the rule ever since the statute of Elizabeth.—p. 305.

[In support of this decision the V.-C. cited Cottle v. Aldrich (*supra*, col. 1087), Sharland v. Midon (*supra*, col. 1086), Gedge v. Truill (1823) 1 Russ. & Myl 281, n.; Bowsher v. Watkins (*supra*); Holland v. Prior (*supra*) and Webster v. Webster (*supra*, col. 1037).]

Travis v. Milne, *approved*.
 * Benningfield v. Baxter (1886) 56 L. J. P. C. 13, 21 App. Cas. 117 (*Anger*, col. 1061).

Coote v. Whittington (*supra*); Lovett, in re; and Penny v. Watts (*supra*), *referred to*.
 Doyle v. Foley (1801) [1803] 2 Ir. R. 46.
 —K.B.D.

Bowsher v Watkins (*supra*) and **Hilliard v. Biffe** (1874) L. R. 7 H. L. 39—H. L. (18.), commented on
Yentman v Yentman (1877) 7 Ch. D. 210, 47 L. J. Ch. 6, 37 L. T. 374

HALL, V.-C.—*Bowsher v Watkins* has been frequently cited, and there is apparently in the report of the judgment, which is very short, some ground for saying that an opinion was there expressed by the M. R. which might warrant the general proposition that in every case where there is a refusal to sue, a residuary legatee might himself sue the alleged debtor—the alleged debtor in that case, as in many others, being a surviving partner. But that case has, as was stated during the argument, been commented upon on several occasions, and suffice it to say, in *Darcey v. Davies* (*supra*) and in *Wright v. Hamilton* (*supra*), it is stated by the judges who decided those cases that there were special circumstances in *Bowsher v. Watkins* which accounted for the view that was taken by the Court; therefore it is not to be considered an authority establishing that a mere refusal to sue is sufficient to entitle a residuary legatee to institute an action against the debtor to the estate. I agree therefore, with what was said by the defendant's counsel here, that that case had better never be referred to again as supporting any such general proposition. [His lordship then discussed *Laundrie v. Elors*, *Tavis v. Midor* and *Stratton v. Crenshaw*, and continued.] In *Hilliard v. Biffe* there is a judgment given of the V.-C. of Ireland, in which he says (L. R. 7 H. L. 44, n.). "The rule now appears to be subject to the exceptions of cases of collusion, of insolvency of the personal representatives, of refusal by them to sue, whether collusively or bona fide, on the existence of what has been rather vaguely termed 'special circumstances.'" I do not, however, consider that the V.-C. in that case had down, or meant to lay down, any such rule as that mere refusal to sue would in any case be sufficient without the Court taking into consideration the circumstances of the particular case, and I cannot treat it as an authority of the V.-C. for such a proposition. But if his statement of the rule is to be construed and read otherwise, I must say I respectfully dissent from it, and I think that it is at variance with the other authorities to which I have been referred.—pp. 214, 215.

Wilkinson v Henderson (1838) 2 L. J. Ch. 191, 1 Myl & K. 582—M. R., *affirmed*,
Brown v Weatherly (1841) 12 Sum. 6.—SHADWELL, V.-C.

Brown v Weatherly, *corrected*
Bridges v Hinckman (1847) 16 Sum. 71.—SHADWELL, V.-C.

Wilkinson v Henderson, *followed*
Doetsch, In re, Matheson v Ludwig (1896) 65 L. J. Ch. 855; [1896] 2 Ch. 836; 75 L. T. 69, 45 W. R. 57—ROMER, J.

Cleland v. Cleland (1896) 65 Ch. 63, *not followed*,
Cresson v Robinson (1881) 21 L. J. Ch. 64, 14 Ben 584, 15 Jur. 1049—ROMILLY, M. R.

Roberts v. Roberts (1848) 17 L. J. Ch. 171, 2 De G. & Sm. 29.—V.-C., *affirmed*, 2 Ph. 534—COTTENHAM, L.C., *explained*,
Davis v Angel (1863) 31 L. J. Ch. 618; 4 De G. F. & J. 521, 10 W. R. 722.—ROMILLY, M. R., *affirmed*, WESTBURY, L.C.

Roberts v. Roberts, *questioned*
Davis v Angel, *applied*,
Cloves v Hilliard (1876) 4 Ch. D. 418; 46 L. J. Ch. 271, 25 W. L. 224

JESSUP, M. R.—*Roberts v. Roberts* was a case of great singularity. Now, speaking with all deference to Lord Cottenham, who decided that case, there are portions of his judgment I am unable to follow. The testator gave his residuary personal estate to his three daughters, who were his only children, with an ultimate trust, in the event of their all dying under twenty-one, and without having been married, for those who would then be entitled under the Statutes of Distribution. The testator's widow was joined as co-plaintiff in a suit for the administration of the estate, and a general demurrer was put in on the ground of misjoinder, if being contended that the widow has not such an interest as entitles her to be a party. It was held that she was a proper party, but for a reason I cannot understand. If it had been said that she was at present actually entitled to a portion of the testator's personal estate I could have understood the decision. She had no doubt an interest as well as the next-of-kin at the testator's death, but subject to its being defeated. But that was not the ground of the decision. The ground upon which I feel a difficulty is this, that Lord Cottenham makes a distinction between the widow and the next-of-kin. He says, "There is a great difference between the widow and the next-of-kin. The next-of-kin are unascertained. The widow is no part of a class, but entitled in her own individual right, to a share of her husband's estate." Now, the gift was to a class to be ascertained at a future time, and the widow was not at present a member of that class. She might have been if she had lived so long, so might the testator's present next-of-kin if they had lived so long. It seems to me therefore, that the distinction which Lord Cottenham makes was not a sufficient answer to the question. He says in his judgment, "Now, even assuming the appellant's construction of the will to be correct, the widow is already contingently entitled to a share of the testator's estate in the event of her surviving her children, and their all dying under twenty-one and unmarried. Nothing can prevent her taking a share, but her dying before the period arrives at which the interest of the daughters ceases. She is no part of a class, but has a separate and individual right to a portion of her husband's property not disposed of." Now, if Lord Cottenham means that as the widow takes a share now, and therefore will be entitled even if the contingent class fails, I can understand his decision. It is clear that he makes a distinction between the members of the class and the widow, but, with great deference, I see no such distinction. The gift is to a class of persons of whom the widow may or may not be one. How can that be such an interest as to enable her to maintain a suit?—p. 416.

Cloves v Hilliard and **Davis v Angel**, *disapproved*,
Pencock v Colling (1885) 54 L. J. Ch. 748, 58 L. T. 620; 33 W. R. 528—C. A.
COTTON, L.J.—In *Cloves v Hilliard* the persons claiming to have an interest were persons who claimed to be next-of-kin under a gift to the testator's next-of-kin, to be ascertained at a period which had not then arrived. Had the

time arrived they would have had an interest as members of the class designated, but they had not then. A person who if he lives to a certain time, and no one else comes in to cut off his claim, will become entitled, has only a possibility, and not such an interest as will entitle him to maintain an action. I think that *Clowes v. Hilliard* is no authority for the proposition for which it was cited. Nor was *Davis v. Angel*, because there, there was a gift of a share of residue to the testator's nephew for his life, conditional on his marrying a certain lady, with remainder for his eldest or any child which should attain twenty-one years. During the life of the testator, and apparently with his consent, the nephew married another lady. The testator never altered his will, but the nephew's son, in spite of his father's having made this marriage, brought an action, contending that as it was possible that his father might, after the death of his mother marry the lady named by the testator, he, the son, had still an interest in the fund. Neither of these cases applies here, the plaintiff has an actual interest, and one which may very possibly arise.—p 745. BOWMAN and PRY, L.J. concurred.

Clowes v. Hilliard, *discovered*.

Parsons, in re, Stockley v. Parsons (1890) 59 L J Ch 469, 45 Ch D 51, 62 L T 929, 38 W R 712.—KAY, J.

Clowes v. Hilliard and Parsons, in re, Stockley v. Parsons, *followed*.

Molynaux v. Fletcher (1898) 67 L J Q B 892; [1898] 1 Q. B. 648, 78 L T 111, 46 W R 576.—KENNEDY, J.

Salvidge v. Hyde (1821) Jacob 151 —ELDON, L.C., *reversing* (1820) 5 Madd 138.—LEACH, V.-C. *disallowed*.

Campbell v. Mackay (1836) 6 L J. Ch. 73, 1 Myl. & Cr 603.—COTTENHAM, L.C.; *affirming* 7 Sim 504.—SHADWELL, V.-C.

Campbell v. Mackay and Pointon v. Pointon (1871) 40 L J Ch. 609; L R 13 Eq. 547; 23 L T 294, 19 W R. 1051.—WICKENS, V.-C. *followed*.

Cotter v. Legard (1874) 44 L J Ch. 201, L R 19 Eq. 56, 51 L T 625, 23 W R. 40.—JESSE, M.R.

Noble v. Stow (1862) 30 Beav. 512.—ROMILLY, M.R. *applied*.

Stratford v. Baker (1867) L R 4 Eq 256.—ROMILLY, M.R.

Stratford v. Baker, *approved and applied*.

Delaney v. Delaney (1883) 27 Sol J 418.—CHITTY, J.

Delaney v. Delaney, *distinguished*.

Dobson v. Faithwaite (1861) 81 L J. Ch. 215; 30 Beav 228.—ROMILLY, M.R., *followed*.

Burstell v. Fearon (1883) 53 L J Ch. 124; 24 Ch. D 126, 81 W R 581.

PEARSON, J.—I think the decision in *Delaney v. Delaney* is quite consistent with *Dobson v. Faithwaite*. The note of the decision of the L.J. in the latter case shows that a person who has obtained liberty to attend the proceedings under an administration decree stands in the position of a party to the suit, and may obtain an order of course for revivor.—p. 145

Willful Default.

Hildiek, in re, Ripkins v. Hildiek (1881) 44 L T 847, 29 W R 733.—FRY, J., *not followed*.

Murray, in re, Woods v. Greenwell (1882) 45 L T 707; 30 W R 283.—HALL, V.-C.

Long v. Hughes (1831) 7 L J. (O.S.) Ch 105; 1 De G. & Sm. 364, n. *followed*.

Ross, in re, Ashton v. Ross (1899) 69 L J. Ch. 192, [1900] 1 Ch 162, 81 L T 578, 48 W R. 264.—NORTH, J.

Coope v. Carter (1852) 21 L J Ch. 570, 2 De G. M. & G. 292.—KNIGHT BRUCE and TURNER, L.J.; *dictum of* KNIGHT BRUCE, L.J., *applied*.

Sleight v. Lawson (1857) 28 L J Ch. 553; 3 K. & J. 292; 5 W R. 589.—WOOD, V.-C.

Sleight v. Lawson, *adhered to*

Coope v. Carter, disapproved.

Massey v. Massey (1862) 32 L J. Ch. 13; 2 J & H. 728, 7 L T 811, 11 W R 19.

WOOD, V.-C., said he adhered to the view expressed by him in *Sleight v. Lawson*. The observations of Knight Bruce, L.J., in *Coope v. Carter*, did not go further than to say that where circumstances raised a suspicion in the mind of the Court, if it was likely that further evidence might be obtained, the Court ought to direct an inquiry short of directing as to the willful default, in order to ground upon that a new order directing an inquiry as to willful default at a future stage.—p 14.

Crosse v. Smith (1806) 7 East 246; 3 Smith 203, *approved but distinguished*.

Foster v. Blakelock (1826) 5 B & C 328; 8 D. & R. 48, 4 L J (O.S.) K B. 170; 29 R R 238.—K.B. *disapproved*.

Stearn v. Mills (1835) 2 L J K B 106, 4 B & Ad 657, 1 N & M 484.

LITTLEDALE, J.—I was not present at the decision of *Foster v. Blakelock*; the point, in that case, regarding the effect of a prolate stamp, as *prima facie* evidence of assets, does not seem to have been much considered, and the stamp in such a case is less conclusive, as the Stamp Act [56 Geo. 3, c. 184, s. 38] requires the whole value of the estate and effects to be sworn to, without deducting anything on account of debts due from the deceased.—p 663.

PARKER, J.—No doubt it was rightly held, in *Crosse v. Smith*, that an executor, having received assets, cannot discharge himself by paying the money over to his co-executor. Here, however, the presumption of such receipt is not raised, but, on the contrary, rebutted by the evidence. The point referred to as decided in *Foster v. Blakelock* does not appear to have undergone much discussion there, and I cannot concur in that decision.—p 663.

Crosse v. Smith and Jones v. Lewis (1750)

2 Ves. sen 240, *discovered*.

Job v. Job (1877) 6 Ch D 562, 26 W R. 206.—JESSE, M.R.

Crosse v. Smith, *referred to*

Gilligan and Nugent v. National Bank [1901] 2 Ir R 518, 543.—MADDEN and BARTON, JJ.

Job v Job, *supra*, explained
Mayer v Murray (1876) 8 Ch D 424, 47 L J
 Ch. 605, 26 W. R. 690

JESSE, J., M. R.—I will here say a word upon *Job v. Job*, which was recently before me, and which I understand has led to some misapprehension. I there said that in administration actions an order charging an executor with wilful default may be made at any time during the progress of the action. Now an order charging an executor with wilful default could not be made unless he was so charged in the pleadings; therefore the charge, unless originally pleaded, must be introduced by amendment—that is, of course, by amendment at any stage of the action at which amendments may be made, that is, before judgment. The general rule is that, in every case an order charging wilful default must be based upon a charge of wilful default in the pleadings. There has, however, been always an exception to that rule, namely, in the case of a mortgage in possession. You always make a decree against him of wilful default in respect of *rents* and profits, though no charge of wilful default has been made in the pleadings, and there has been no proof of it at the trial. That is the exception to the general rule. On what principle does that exception depend? Now, upon that one may refer to the books to see what is the extent of the exception to the general rule, and, secondly, what is the supposed reason on which the exception is founded. One reason, perhaps, formerly was that the Court looked with less favour on a mortgagee, who, though a trustee, derives a benefit from his trust, than on ordinary or gratuitous trustees, who receive no remuneration for their duties. I will first of all refer to the text books. On referring to Mr Fisher's very learned book on mortgages, I find he says this (8th ed. vol. ii. p. 943): "The account usually directed against the mortgagee in possession, either of tangible property or of a business, is of what he has, or without wilful default might have received from the time of his taking possession." . . . Mr. Fisher's statement of the rule is quite general, and would, in my opinion, be sufficient to decide the case, even if it stood alone, but there are two authorities which seem to me to be conclusive on the point.—p. 426.

[His lordship referred to *William v. Peter* ((1824) 2 L. J. (O.S.) Ch. 105, 18 & 8 581) and to *Arncliffe (Lord) v. Bonville* ((1855) 24 L. J. Ch. 269, 7 De G. M. & G. 134)]

Job v Job and **Mayer v Murray**, *observed on*.
Barclay v. Mackrell (1879) 12 Ch D 534, 47 L. T. 32; 27 W. R. 894.—CA JAMES, BRIGHT and COTTON, L.J.J., *affirming* FRY, J.

Job v Job and **Mayer v Murray**, *followed*.
Symons, In re, Luke v. Tonkin (1882) 52 L. J. Ch. 709, 21 Ch. D. 757; 46 L. T. 684; 30 W. R. 874.—FRY, J. *And see post*, col. 1128

Armitage, In re, Smith v. Armitage (1885) 62 L. J. Ch. 711, 24 Ch. D. 727, 49 L. T. 236, * 32 W. R. 88.—DENMAN, J., *commented on*

Blount v O'Connor (1886) 17 L. R. Ir. 620.
Porter, M.R.—Smith v. Armitage . . . is not an authority for the proposition that an inquiry on the basis of wilful default may be directed at any time without any averment or charge in

the pleadings, or any amendment of them.—p. 632

Symons, In re, Luke v. Tonkin (*supra*), and **Armitage, In re, Smith v. Armitage**, *referred to*
Barclay, In re, Barclay v. Andrew (1899) 68 L. J. Ch. 383 [1899] 1 Ch. 671, 80 L. T. 702.—STIRLING, J.

Notes

Freeman v Moyes (1834) 1 A & E 338, 3 N & M 883.—Q. B., *discontinued from*
Pimble v Souster (or Souster) (1855) 21 L. J. Ex. 336, 8 Ex. 188

[In argument it was said that in *Freeman v Moyes* the 3 & 4 Will. 1, c. 43, s. 31, which rendered executors and administrators liable for the costs of actions brought by them in their representative character, was held to extend to actions commenced before the statute came into operation, but tried afterwards.]

PARKE, B.—Littlehale, J. dissented from that judgment, and, looking at the words of the statute, I think with very good reason.—p. 337.

Lysons v Barrow (1834) 3 L. J. C. P. 192, 10 Bing 563. 1 Moore & S. 163, 2 D. P. C. 807.—C.P., *overruled*.

Ashton v Poynter (1835) 1 C. M. & R. 738; 4 L. J. Ex. 71; 3 Tyrw 822; 3 D. P. C. 465; 1 Gale 57

PARKE, B.—On looking at Lysons v Barrow, I have no doubt that the point, as it arises, was not brought under the consideration of the Court. Since that decision, the question has been before the Court of K. B. [*Spencer v. Albert*, 11 T. 5 Will. 4], and they agree in opinion with this Court that *Lysons v. Barrow* cannot be supported.—p. 740

Major v Major (1854) 23 L. J. Ch. 718, 2 Drew. 281, 2 Eq. R. 155, 2 W. R. 882.—KINDERSLEY, V.-C., *followed*

Mayhew, In re, Rowles v. Mayhew (1877) 46 L. J. Ch. 562, 5 Ch. D. 590, 37 L. T. 48; 25 W. R. 521.—CA JAMES and MELLISH, L.J.J. and BAGGALLAY, J.A.

Jackson v. Pease (1871) L. R. 19 Eq. 96, 23 W. R. 13.—HALL, V.-C., *referred to*.
Puce, In re, Williams v. Jenkins (1885) 53 L. J. Ch. 501, 81 Ch. D. 485, 51 L. T. 116, 31 W. R. 291.—PEARSON, J.

Johnson v. Telford (1827) 3 Russ. 477, 27 R. R. 116; **Lowson v. Copeland** (1787) 2 Bro. C. C. 156, and **Major v. Major**, *referred to*

Brown v. Burdett (1888) 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533.—KAY, J.; *affirmed*, CA. COTTON, LINDLEY and BOWEN, L.J.J.

Morrell v. Fisher (1851) 4 De G. & Sm. 422.—KNIGHT BRUCE, V.-C., *followed*.
Miles v. Harrison (1874) 43 L. J. Ch. 585, L. R. 9 Ch. 816, 80 L. T. 190, 22 W. R. 441.—CA. CAIRNS, L.C., JAMES and MELLISH, L.J.J. *And see post*.

Morrell v. Fisher, *followed*.
Gray v. Warner (on *Bial's Estate, In re, Gray v. Warner*) (1878) L. R. 16 Eq. 577; 42 L. J. Ch. 556, 28 L. T. 885, 21 W. R. 808.—WICKENS, V.-C., *distinguished*.
Stringer v. Harper (1855) 28 L. J. Ch. 643;

26 Beav. 585; 5 Jur. (N.S.) 401—M.R.; *Webb v. De Beauvoisin* (1812) 82 L. J. Ch. 217, 31 Beav. 578, 2 J. & H. 194, 11 W. R. 142—M.R.; and *Gilbertson v. Gilbertson* (1865) 34 Beav. 354, 12 L. T. 876; 13 W. R. 765—M.R. *considered*.

Harloe v. Harloe (1875) 44 L. J. Ch. 512; L. R. 20 Eq. 171, 33 L. T. 247; 23 W. R. 789.

HALL, V.-C. said he could not regard *Miles v. Harrison* (*supra*) otherwise than as an authority that the costs of an administration suit were included in the words "testamentary expenses." The headnote to the report of that case in the Law Reports was imperfect, and, looking at the note only, one wondered how the argument arose. The main question was as to the marshalling of assets in favour of charities, but still other questions arose, including that of costs. As to the other authorities, the late M.R. in *Gilbertson v. Gilbertson*, and *Stringer v. Harper*, considered that "testamentary expenses" did not include the costs of a suit. In *Webb v. Beauvoisin*, on the other hand, he thought that "testamentary and other expenses" did include costs of suit, though it was not very apparent why the words "and other expenses" should be considered as making a distinction. As to *Morrell v. Fisher*, he did not think there was a sufficiently substantial distinction between that case and the present. The decision in *Brief's Estate, In re*, depended on particular circumstances and on the form of a codicil, and did not affect the general question.—p. 518.

Stringer v. Harper, principle overruled

Middleton, *In re* (*post*, col. 1133)

Harloe v. Harloe, approved.

Sharp v. Lush (1879) 48 L. J. Ch. 281, 10 Ch. D. 468; 27 W. R. 528.—JESSEL, M.R. *And* *see Penny v. Penny* (1870) 48 L. J. Ch. 691; 11 Ch. D. 110, 40 L. T. 393—FRY, J.

Taylor's Estate, In re, Daubney v. Leake (1860) 35 L. J. Ch. 317, L. R. 1 Eq. 495; 14 W. R. 113.—ROMILLY, M.R. *followed*.

Armstrong v. Armstrong (1871) L. R. 12 Eq. 611, 25 L. T. 199; 19 W. R. 971.—WICKENS, V.-C.

Eyre v. Marsden (1839) 1 Myl. & Cr. 281, 3 Jur. 150. 48 R.R. 73.—COTTENHAM, L.C. (see judgment, where cases on costs are discussed), *reversing, on point of costs*, 7 L. J. Ch. 220, 2 Keen 564, 2 Jur. 658.—M.R. *explained*.

Mutkell-on v. Eyre (1863) 32 Beav. 658.—ROMILLY, M.R.

Eyre v. Marsden, applied, *Elborne v. Good* (1841) 19 L. J. Ch. 391, 14 Sim. 165, 8 Jur. 1001.—SHADWELL, V.-C. (*and see post*, col. 1130). *Oddie v. Brown* (1859) 28 L. J. Ch. 542, 4 De G. & J. 179, 5 Jur. (N.S.) 635.—O.A. CHILMSFORD, L.C. and TURNER, J.S., KNIGHT BRUCE, L.J. *dissenting*, reversing 6 W. R. 541.—STUART, V.-C.; *dissenting*, *Scott v. Cumberland* (*post*); *Gowan v. Broughton* (*post*, col. 1130).

Maddison v. Fye, disapproved

Davies v. Topp (1780) 1 Bro. C. C. 524.—L.C.

Manning v. Spooner (1796) 3 Ves. 114, 3 R. R. 67.—M.R. *Bagot v. Legge* (1864) 34 L. J. Ch. 158, 2 Dr. & Sm. 259, 10 Jur. (N.S.) 1092; 11 L. T. 268, 13 W. R. 1.—KINDERBLEY, V.-C.; *Row v. Row* (1869) L. R. 7 Eq. 114, 17 W. R. 485.—JAMES, V.-C. (*and see post*, col. 1131); and

Ham's Trust (or Will), In re (1851) 21 L. J. Ch. 217; 2 Sim. (N.S.) 106; 15 Jur. 1121.—KINDERBLEY, V.-C. *referred to*. *Scott v. Cumberland* (1874) L. R. 18 Eq. 578; 44 L. J. Ch. 226, 31 L. T. 26; 22 W. R. 840.

MALINS, V.-C., after considering *Eyre v. Marsden*, said—"This decision evidently proceeded on the grounds of the charge of debts and costs contained in the will . . . Now, with regard to that case [*Maddison v. Fye*], I must say that I think it is a pity that cases which are to be reported at all should be reported as that was. The particular form of the will is not given, and there are no arguments, or even the name of the counsel engaged, and not a single authority is stated to have been cited. There is nothing to show whether the estate was charged with debts or legacies. Somebody must have told Mr. Beavan that such a case had occurred when he himself was not in Court. The rule is thus laid down, and evidently incorrectly—"Eyre v. Marsden (4 Myl. & Cr. 281) settles this. Where a real estate is disposed of in favour of several persons, and the suit is solely for the administration of the real estate, and some of the shares lapse, these shares are not to be made to bear the costs of the suit, but the costs are to be borne by the real estate"—which was not done in *Eyre v. Marsden*—"generally, and the heir-at-law's estate is not to bear all the costs." Further on, the M.R. says, "I have always understood the rule to be this: in suits for the administration of the personal estate the part of it undisposed of is first applicable to the payment of the costs, but the rule is different as to real estate. There the heir-at-law is only charged with his proportion of the costs of the suit." The rule as thus laid down is entirely erroneous, and I cannot believe that the M.R. ever stated it in those broad terms; and if he did, I can only say it is impossible that I can follow it.—p. 584.

[His lordship also discussed *Elborne v. Good* (*supra*) and *Oddie v. Brown* (*supra*)]

And see post, col. 1131

Bagot v. Legge, considered.

Lancefield v. Iggleden (1874) 43 L. J. Ch. 370, L. R. 17 Eq. 565; 30 L. T. 156, 22 W. R. 726.—BAGGOT, V.-C.; *reversed* (*supra*, col. 1093), *not followed*.

Jackson v. Pease (1874) L. R. 19 Eq. 96, 23 W. R. 43.

HALL, V.-C.—Notwithstanding the decision in *Bagot v. Legge*, I think that in this case the residuary personal estate must bear the costs so far as it will go. With regard to the mode of bearing the deficiency, the authorities are in an unsatisfactory state, and not easily reconcilable with one another. On this point I shall follow *Bagot v. Legge*, and not *Lancefield v. Iggleden*.—p. 97. *And see supra*, col. 1128.

Scott v. Cumberland (*supra*), *applied*

Gowan v. Broughton (1874) 44 L. J. Ch. 275; L. R. 19 Eq. 77; 31 L. T. 638; 23 W. R. 392.—MALINS, V.-C. *And see post*, col. 1131

Gowan v. Broughton, dictum dissenting from

Elborne v. Good (*supra*, col. 1129), and *Shuttleworth v. Kowarth* (1841) Cr. & Ph. 228, 5 Jur. 199.—COTTENHAM, L.C., *applied*.

Trethow v. Helyar (1870) 4 Ch. D. 53, 46 L. J. Ch. 125

JESSEL, M.R.—I am sorry that I must entirely differ from the learned V.-C. Malins in the conclusion he has come to as to the state of the law respecting the incidence of costs of administration suits as between a share of residue well bequeathed and another share of residue which has lapsed and therefore devolved upon the next of kin. It appears to have been long settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle.—p. 56

Trethewy v. Helyar (*supra*), followed
Penton v. Wills (1877) 47 L. J. Ch. 191; 7 Ch. D. 33, 37 L. T. 378. 26 W. R. 139.—
DAGGON, V.-C.

Gowan v. Broughton (*supra*), dissented from.
Blann v. Bell (1877) 47 L. J. Ch. 120, 7 Ch. D. 382. 37 L. T. 533.—HALL, V.-C.

Scott v. Cumberland (*supra*) and *Gowan v. Broughton*, explained
Jones, in re, Jones v. Caless (1878) 10 Ch. D. 40; 39 L. T. 287. 27 W. R. 108.

MALINS, V.-C.—No one can doubt that the residuary personal estate is primarily the fund for payment of the costs of administration, and all that I intended to decide in *Gowan v. Broughton* [in which his lordship had applied the rule in *Scott v. Cumberland* to a lapsed share of residuary estate] was, that where the residuary personality is given to a person who dies in the lifetime of the testator, such personality is no less the primary fund for payment of the costs than it would have been if the legatee had survived. [His lordship then referred to *Trethewy v. Helyar* and *Penton v. Wills*, and pointed out that the decision in those cases was in accordance with his decisions in the cases before him.]—p. 11.

Row v. Row (*supra*, col. 1125), disapproved
Lefkowitz v. Pildham (1879) 18 L. J. Ch. 636.—
HALL, V.-C.

Scott v. Cumberland, *Gowan v. Broughton*, and *Row v. Row*, distinguished
Hurst v. Hurst (1884) 28 Ch. D. 159. 54 L. J. Ch. 190. 33 W. R. 473.

PEARSON, J.—A great number of cases have been cited, amongst others, *Scott v. Cumberland* and *Gowan v. Broughton*. I should very much regret if I were compelled to sit in judgment upon those two cases. I say this from personal motives, because I happened to be counsel in both of them, and I know that I was very much dissatisfied with the decisions in both those cases, and I should, therefore, distrust myself exceedingly in expressing an opinion upon those cases, either for them or against them, unless I had so long a period of tranquillity in which to consider them that I could be perfectly satisfied I had come to a conclusion without being influenced by that which I know was weighing upon me at the time when they were decided. But I am not going to express any opinion on either of those cases, or any other cases. To my mind, the present case is not like either *Scott v. Cumberland* or *Gowan v. Broughton*. It is, no doubt, far more like *Row v. Row* but I do not think it is even quite analogous to *Row v. Row*. In

Row v. Row there was a devise in the will which was so obscure and so uncertain that it was impossible to affix any meaning to it, and the Court determined that the will must be read as if that devise had not been contained in it. The result was, that, so reading the will and striking the devise out of it, there was no devise whatever of the property, which the V.-C. held to be applicable to the payment of the costs.—p. 160.

Coates v. Coates (1861) 33 Beav. 249. 3 N. R. 355. 12 W. R. 394.
Greedy v. Lavender (1848) 18 L. J. Ch. 63; 11 Beav. 417.—M.R., not followed.
Geor. v. Mahood (1874) 23 W. R. 71.

HALL, V.-C. said that *Coates v. Coates* had overruled *Greedy v. Lavender*, or, at any rate, expressed the present practice of the Court.—*ib*

Greedy v. Lavender, not applied.
Belchier v. Williams (1890) 15 Ch. D. 510, 63 L. T. 673; 39 W. R. 266.—NORTH, J.

Trick's Trusts, In re, Willoby, Ex parte (1869) 39 L. J. Ch. 201, L. R. 5 Ch. 170; 21 L. T. 789. 18 W. R. 123.—GIFFARD, L.J., varying STUART, V.-C., and BIRKETT, in re (1878) 47 L. J. Ch. 816. 9 Ch. D. 579. 39 L. T. 418. 27 W. R. 164.—
JESSEL, M.R., followed.

(Hibboms' Will, in re (1847) 56 L. J. Ch. 911; 36 Ch. D. 486, 58 L. T. 8. 36 W. R. 180.—
CHITTY, J.

Reece's Estate, In re, Gould v. Gould (1866) 35 L. J. Ch. 794, L. R. 2 Eq. 609; 12 Jur. (N.S.) 611. 14 L. T. 881. 14 W. R. 1038.—ROMILLY, M.R., explained.

Sanderson, In re (1877) 7 Ch. D. 176; 48 L. T. 379. 26 W. R. 399.

JESSEL, M.R.—Now I should have felt no doubt at all upon the point had it not been for *Reece's Estate, In re*. Looking at that case, I may observe, in the first place, that the *headnote* itself is right. The note is thus:—"In administration suits, where the gross value of the estate to be administered amounts to £1,000 at the time of the institution of the suit, the higher scale of costs applies." There the suit was a creditor's suit for the administration of a testator's estate subject to a mortgage; therefore what was sought to be administered was what he had, namely, his equity of redemption. In taxing the costs the taxing master had taxed according to the lower scale, and a summons was taken out by both plaintiff and defendant for the purpose of having the costs allowed on the higher scale. Now comes the remarkable part of the case. The same firm of solicitors appeared for both the plaintiff and defendant; both counsel argued the same way, and the only point submitted to Lord Romilly was that the lower scale referred to the gross value at the time of the institution of the suit, and not to the ultimate net value after deducting payments made after the suit had been instituted. But the real difficulty in the case was not brought to Lord Romilly's attention at all, and accordingly he passes it over in his judgment. He says: "I am of opinion that the lower scale applies where the gross value of the estate to be administered is below £1,000 at the time when the suit is instituted and not where the net value is below that amount." Now I entirely agree that you are to have regard to the gross value of the estate which

is to be administered, but Lord Romilly does not say how you are to apply the scale when the estate to be administered is an equity of redemption only. A man may have property worth £100,000, but if it is in mortgage, all he has actually belonging to him, that is, all that can be administered as his estate, is the equity of redemption, which may be almost valueless. How, then, could you say his estate was worth £100,000? Lord Romilly never did decide this point, and his attention was not called to it. That case therefore cannot be considered an authority, and I shall not follow it. The rule is rightly laid down in the judgment, though it is wrongly applied to the facts.—p. 179.

Sanders v. Miller (1858) 25 Beav. 154.—ROMILLY, M.R., *not followed*.

Middleton, *in re*, Thompson v. Harris (1881) 50 L. J. Ch. 525; 15 L. T. 40, 29 W. R. 731. PRY, J.—*In Morgan on Costs*, p. 117, it is stated that the decision in *Sanders v. Miller* is contrary to the current of authority. In *Sanders v. Miller* the M.R. apportioned the costs, but I cannot help thinking that, in that case, his honour proceeded upon the mistaken impression that there was a trust for conversion. Whether that be so or not, that case is contrary to the current of authority—p. 526. [*Varied, post*]

Pickford v. Brown (1856) 23 L. J. Ch. 702; 2 K. & J. 426; 2 Jur. (N.S.) 781, 4 W. R. 173.—WOOD, V.-C., **Ripley v. Moysey** (1836) 1 Keen 578.—LANGDALE, M.R.; and **Randfield v. Randfield** (1868) 11 W. R. 847.—KINDERSLEY, V.-C., *principles overruled*.

Patching v. Barnett (1862) 51 L. J. Ch. 74, 45 L. T. 292.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.JJ., *approved and followed*.

Middleton, *in re*, Thompson v. Harris (1882) 51 L. J. Ch. 273; 19 Ch. D. 532; 46 L. T. 359. 30 W. R. 293.—C.A. *varying* 8 C. (*supra*). JESSEL, M.R.—I think that this case is covered by *Patching v. Barnett*, but even if it is not, there is no practice established binding on the Court, such as Fry, J. has considered to exist—p. 274.

BRETT, L.J.—I think that, even if *Patching v. Barnett* were not binding on us, the rule laid down by it is one which we ought to follow. The rule is a just and a fair one, while the contrary rule would be unjust and oppressive.—p. 275. HOLKER, L.J. concurred.

[The effect of this decision, taken with that of *Patching v. Barnett*, is to overrule the above cases.]

Pickford v. Brown, *discussed*. **Harte v. Meredith** (1884) 13 L. R. Ir. 341.—CHATTERTON, V.-C.

Patching v. Barnett, *applied*.

Buckley v. Buckley (1887) 19 L. R. Ir. 344.—PORTER, M.R., *Warning*, *in re*, **Great v. Warning** [1896] 1 Ir. R. 137.—PORTER, M.R.

Patching v. Barnett and **Middleton, in re**, **Thompson v. Harris**, *followed*.

Jones, *in re*, Elgood v. Jones (1901) 71 L. J. Ch. 6. [1902] 1 Ch. 92; 85 L. T. 608, 50 W. R. 215. BUCKLEY, J.—If I am right in thinking, as I do, that the Land Transfer Act [1897] has not

made any difference as to costs in an ordinary action for administration of real and personal estate, then the right order as to costs in the present case will be, following the rule laid down by *Patching v. Barnett* and *Middleton, in re*, that the costs of this action, so far only as they have been increased by the administration of the real estate, must be borne by the real estate—p. 8.

Bluett v. Jessop (1821) Jacob 240, 23 R. 335.—M.R. *applied*. **Hibernian Bank v. Lande** (1897) [1898] 1 Ir. R. 262.—CHATTERTON, V.-C.

Merlin v. Blagrove (1858) 25 Beav. 125, ROMILLY, M.R., *discussed*. **Redington v. Browne** (1893) 82 L. R. Ir. 347.—BREWLEY, J.

Heighington v. Grant (1839) 1 Beav. 228.—LANGDALE, M.R., *followed*. **Begbie v. Fenwick**, **Fenwick v. Begbie** (1871) L. R. G. Ch. 869, 25 L. T. 441, 20 W. R. 67.—JAMES and MELLISH, L.JJ.

Birks v. Micklethwait (1864) 33 L. J. Ch. 510, 33 Beav. 109; 10 Jur. (N.S.) 902; 10 L. T. 85; 12 W. R. 505.—ROMILLY, M.R., *reversed* 34 L. J. Ch. 362; 13 L. T. 31.—WESTBURY, L.C.

Raphael v. Boehm (1803—1807) 11 Ves. 92; 13 Ves. 407, 590. 8 R. R. 95, *applied*. **Seers v. Hind** (1791) 1 Ves. 294, *commented on*. **Ashburnham v. Thompson** (1807) 13 Ves. 401.—GRANT, M.R.

Raphael v. Boehm, **Seers v. Hind** and **Ashburnham v. Thompson**, *discussed*. **Tebbs v. Carpenter** (1816) 1 Madd. 210, 16 R. R. 224.—PLUMER, V.-C. *See* judgment, where the cases on charging interest are discussed.

Raphael v. Boehm, 11 Ves. 92, *followed*. **Binnington v. Harwood** (1826) T. & R. 477.—GIFFORD, M.R.; **Wilson v. Metcalfe** (1829) 1 Russ. 630; 23 R. R. 128.—GIFFORD, M.R. (*and see* "Costs," col. 712), and **Tebbs v. Carpenter**, *distinguished*. **Hosington v. Grant** (1840) 10 L. J. Ch. 12.—COTTENHAM, L.C., *reversing* 9 L. J. Ch. 112.—BRADWELL, V.-C.

Harmer v. Harris (1826) 1 Russ. 155, 25 R. R. 20.—GIFFORD, M.R., *discussed*. **Smith v. Dale** (1881) 50 L. J. Ch. 352; 18 Ch. D. 516, 44 L. T. 460, 29 W. R. 830.—JESSEL, M.R. *And see post*, col. 1135.

Turner v. Mullineux (1861) 3 L. T. 687; 9 W. R. 252.—WOOD, V.-C., *approved and applied*. **Bowyer v. Griffin** (1869) 39 L. J. Ch. 159. L. R. 9 Eq. 340, 18 W. R. 227.—MALINS, V.-C., *considered*.

Lewis v. Trusk (1882) 21 Ch. D. 802.—NORTH, J. *And see post*, col. 1135.

Bowyer v. Griffin and **Smith v. Dale** (*supra*), *followed*. **Clare v. Clare** (1882) 51 L. J. Ch. 553; 21 Ch. D. 865, 46 L. T. 851. 30 W. R. 789.—HALL, V.-C.

Samuels v. Jones (1849) 12 L. J. Ch. 406; 2 Harc. 216. 7 Jur. 845.—WIGRAM, V.-C.; and **Gibbons v. Hawley** (1889) 2 Harc. 217, n.—LANGDALE, M.R., *discussed*.

Lewis v. Trask (*supra*), *followed*.

Clare v. Clare (*supra*), *not followed*.

Basham, In re, Hannay v. Basham (1888) 23 Ch. D. 195, 52 L. J. Ch. 408, 48 L. T. 476; 31 W. R. 743.

CHITTY, J., after discussing **Samuel v. Jones**, **Gibbons v. Hawley**, **Bourger v. Griffiths** and **Smith v. Dale**, said—"I now come to the two last decisions on the point. The first is that of North, J., in **Lewis v. Trask**, in which he declined to order payment to a defaulting executor of any costs out of the estate until he had made good his default. This is what he says. "With regard to **Bourger v. Griffiths**, I shall only follow it to this extent, that the trustee may have his costs after he has paid into Court the sum in which he is in default. Otherwise I do not think that case applies to the present, because there was no money due from the trustee to be paid into Court, whereas in the present case there is a sum due and an order for its payment into Court." He takes the same ground as that on which I have proceeded. Then Hall, V.-C., in **Clare v. Clare**, decided a few days afterwards, appears to have made inquiries as to **Lewis v. Trask**, which had not then been reported, and he makes the following statement, which is worthy of observation, because it has been said that the practice was settled. The V.-C. said that the practice did not appear to him to be settled, and then he went on to say that he preferred to follow the decision in **Bourger v. Griffiths**, "as it seemed to him to be consistent with good sense to hold that any person who, though adjudicated bankrupt, was retained as a party to an action, as executor or trustee, should be paid his costs." I therefore make an order similar to that in **Lewis v. Trask**.—pp. 208, 204.

Lewis v. Trask and **Basham, In re, Hannay v. Basham**, *followed*.

Smith v. Dale (*supra*, col. 1184) and **Clare v. Clare**, *not followed*.

McEwan v. Crounse (or **Porter v. Grant**) (1883) 53 L. J. Ch. 24, 25 Ch. D. 175, 49 L. T. 499, 32 W. R. 115.—NORTH, J.

Basham, In re, *approved and followed*.

Vowles, In re, O'Donoghue v. Vowles (1886) 55 L. J. Ch. 661; 32 Ch. D. 243, 54 L. T. 846; 34 W. R. 639.—PEARSON, J.

Palmer v. Jones (1874) 48 L. J. Ch. 349, 22 W. R. 909.—JESSEL, M.R., *followed*.
Kitto v. Luke (1879) 28 W. R. 411.—MALINS, V.-C.

Palmer v. Jones and **Kitto v. Luke**, *followed*.
Griffiths, In re, Griffiths v. Lewis (1884) 53 L. J. Ch. 1003, 26 Ch. D. 465; 51 L. T. 278.—O.A. COTTON, BOWEN and FRY, L.J.

Taylor v. Gorman (1888) 1 Dr. & Wal. 255, n.—PUNNET, L.C., *qualified*.

Kelly v. Kelly (1889) 1 Ir. Eq. R. 317.—O'LOUGHLIN, M.R.

Burkitt v. Ransom (1848) 2 Coll. C. C. 536.—KNIGHT BRUCE, V.-C., *disapproved*.

Weston v. Clowes (1847) 15 Sim. 610.—SHADWELL, V.-C. *And see post*.

Cross v. Kennington (1848) 11 Beav. 89.—LANGDALE, M.R., *discussed*.

Thomas v. Jones (1880) 29 L. J. Ch. 570, 1 Dr. & Su. 181, 6 Jur. (N.S.) 391, 8 W. R. 328.—KINDERSLEY, V.-C. *And see post*.

Weston v. Clowes (*supra*) and **Thomas v. Jones**, *followed*.

Wetenhall v. Davis (or **Dennis**) (1863) 33 Beav. 285, 9 Jur. (N.S.) 1216, 9 L. T. 361; 12 W. R. 66.—ROMILLY, M.R.

Wetenhall v. Davis (or **Dennis**), *followed*.
Henderson v. Dodds (1846) L. R. 2 Eq. 532; 14 L. T. 752; 14 W. R. 308.—KINDERSLEY, V.-C.

Henderson v. Dodds, *followed*.

Ferguson v. Gibson (1872) 41 L. J. Ch. 640; 18 L. R. 14 Eq. 379.—WICKENS, V.-C. *And see supra*, col. 1071.

Wetenhall v. Dennis, *followed*.

Spensley's Estate, In re, Spensley v. Harrison (1872) 42 L. J. Ch. 21; 18 L. R. 15 Eq. 16, 27 L. T. 600, 21 W. R. 95.—ROMILLY, M.R.

Thomas v. Jones (*supra*), *approved*.

Burrell, In re, Burrell v. Smith (1870) 39 L. J. Ch. 544, L. R. 9 Eq. 413; 22 L. T. 263.—JAMES, V.-C., *disented from*.

Richardson, In re, Richardson v. Richardson (1880) 14 Ch. D. 611; 49 L. J. Ch. 612; 13 L. T. 279, 28 W. R. 912.

JESSEL, M.R.—It seems to me that the principle has been correctly laid down by Kindersley, V.-C. in **Thomas v. Jones**. Then the point came before James, V.-C. in **Burrell, In re**, where the costs of the plaintiff, a residuary legatee in a suit for administering an insufficient estate, were allowed as between solicitor and client. Now I am satisfied that the V.-C. did not intend to lay down any general rule. The only authorities that were cited to him were **Burkitt v. Ransom** (*supra*) and **Weston v. Clowes** (*supra*), and the V.-C. seems to have been unaware that there were any other authorities on the subject, or, at all events, they were not called to his attention. The V.-C. was evidently dealing only with the particular case before him, and I feel satisfied that he did not intend to interfere with the general rule.—p. 613.

Thomas v. Jones, *principle applied*.

McRae, In re, Norden v. McRae (1886) 55 L. J. Ch. 708, 32 Ch. D. 613, 54 L. T. 728.—KAY, J.

McRae, In re, Norden v. McRae, *principle applied*.

Queen's Hotel (Cardiff) Co., In re, London and Provincial Bank v. Queen's Hotel (Cardiff) Co. (1900) 69 L. J. Ch. 414. [1900] 1 Ch. 792; 82 L. T. 675, 48 W. R. 567, 7 Manson 238.—COZENS-HARDY, J.

Thomas v. Jones (*supra*), *principle applied*.

Queen's Hotel (Cardiff) Co., In re, distinguished.

Tootal v. Spicer (1891) 4 Sim. 510—V.-C. and **Hood v. Wilson** (1891) 2 Russ. & M. 687.—BROUGHAM, L.O., *referred to*.

Stanton v. Hatfield (1836) 5 L. J. Ch. 301, 1 Keen 358.—LANGDALE, M.R.; and **Goldsmith v. Russell** (1855) 25 L. J. Ch. 232.

5 De G M. & G. 517, 1 Jui. (N.S.) 985,
8 W. R. 218 — CHANWORTH, L.C., *discussed*

McRae, In re, commented on
New Zealand Midland Ry., in re, Smith v
Lubbock (1901) 70 L. J. Ch. 695. [1901] 2 Ch.
357, 84 L. T. 852. [19 W. R. 529. 8 Manson 363.
—G.A. COLLINS and STIRLING, L.Js. See judgments at length.

Groom, In re, Booty v. Groom (1897) 66 L. J.
Ch. 778. [1897] 2 Ch. 107, 77 L. T. 151.

—NORTH, J., *considered*

Baumgarten, In re, Bevan v. Rosenbaum (1900)
82 L. T. 711 — FARWELL, J.

EXTRADITION.

Reg. v. Wilson (1877) 3 Q. B. D. 42, 47
L. T. 354, 26 W. R. 14, 23 Cox C. C.
630. — Q.B.D., *considered*.
Galwey, In re (1896) 65 L. J. M. C. 38. [1896]
1 Q. B. 280, 73 L. T. 756; 44 W. R. 813; 18
Cox C. C. 213, 60 J. P. 87. — RUSSELL, C.J.,
WRIGHT and KENNEDY, JJ.

Hugnet, Ex parte (1873) 29 L. T. 41 — EX,
approved and followed.

Reg. v. Maurer (or Maurer, Ex parte) (1883)
52 L. J. M. C. 104; 10 Q. B. D. 513, 31 W. R.
609 — FIELD and MATHKW, JJ.

Castioni, In re (1890) 60 L. J. M. C. 22;
[1891] 1 Q. B. 149, 64 L. T. 344, 39
W. R. 202; 17 Cox C. C. 226, 35 J. P.
328. — DENMAN, HAWKINS and STEPHENS,
JJ., *dicta questioned*

Arton, In re (1896) 65 L. J. M. C. 50,
[1896] 1 Q. B. 509, 74 L. T. 249, 44
W. R. 351, 18 Cox C. C. 277; 60
J. P. 132. — RUSSELL, C.J., WRIGHT and
KENNEDY, JJ., *dicta approved*

Rex v. Holloway Prison (Governor), Siletti,
In re (1902) 71 L. J. K. B. 995; 87 L. T. 832, 51
W. R. 191 — BIGHAM and DARLING, JJ.

FINES AND RECOVERIES.

Blewitt, In re (1834) 3 Myl. & K. 260; and
Wood, In re (1886) 3 Myl. & Cr. 266; 7
L. J. Ch. 144, 2 Jui. 201. — COTTENHAM,
L.C., *accredited*

Blewitt, In re (1855) 25 L. J. Ch. 393, 6
De G. M. & G. 187, 2 Jur. (N.S.) 217, 4 W. R.
195. — G.A.

Hall Dare v. Hall Dare, 39 Ch. D. 138; 52
L. T. 381; 33 W. R. 515 — BAGOX, V.-G.; *reversed*,
(1886) 56 L. J. Ch. 154, 31 Ch. D. 261; 54 L. T.
120; 34 W. R. 82. — G.A. HALSBURY, L.C.,
LINDLEY and FRY, L.Js.

Dudson's Contract, In re (1878) 47 L. J. Ch.
632, 8 Ch. D. 628, 39 L. T. 182; 27
W. R. 179. — G.A., *applied*.

Annle v. Annle, Annle, In re (1884) 54 L. J.
Ch. 8; 51 L. T. 780, 33 W. R. 148. — PEARSON, J.

Magdalen College Case, Warren v. Smith
(1814) 11 Co. Rep. 66; 1 Rolle's Rep.
151, and **Stratfield v. Dover** (1597—1598)
Moore 467; Cro. Eliz. 595. Co Litt
373 a, *commented on*
Abergavenny (Earl) v. Brace (1872) 41 L. J.
Ex. 120, L. R. 7 Ex. 145, 26 L. T. 514, 20
W. R. 462 — EX

Goodrick v. Brown (1664) 1 Ch. Ca. 49, 213,
2 Freem. 180, 1 Eq. Ca. Abr. 255, *approved*

North v. Way (1681) 1 Vein 13, 2 Ch. Ca. 78.
— L.C., L. & S. W. Ry. v. Gomm (1882) 51 L. J.
Ch. 530, 20 Ch. D. 562, 575, 16 L. T. 149, 30
W. R. 620. — G.A.

Williams v. Cooke (1863) 4 Giff 343; 9 Jur.
(N.S.) 658, 8 L. T. 145, 11 W. R. 505 —
V.-G., *distinguished*

Newton's Trusts, In re (1882) 23 Ch. D. 181.
CHITTY, J. — The decision in *Williams v. Cooke*
established that a married woman who, with her
husband, is entitled to a mortgage debt, has a
charge or incumbrance within the meaning of
the 77th section (3 & 4 Will. 1, c. 74) taken in
connection with the interpretation clause, but in
the present case the point is different. Here, the
married woman, together with other beneficiaries,
had an interest in the mortgage debt, so that
she and her husband together could not have
disposed of it, and, moreover, there was another
party interested, who was not a party to the
deed. — p. 187

Newton's Trusts, In re, accredited.

Miller v. Collins (1896) 65 L. J. Ch. 353,
[1896] 1 Ch. 573, 74 L. T. 122, 44 W. R. 466
— G.A. LINDLEY and SMITH, L.Js., KAY, L.J.
dissenting, reversing STIRLING, J.

LINDLEY, L.J. (for self and SMITH, L.J.) — In
Newton's Trusts, In re, CHITTY, J. appears to
have decided the exact point which arises in the
present case, and to have decided that the
reversionary interest of a married woman in
money invested by her husband on mortgage was
not within the Fines and Recoveries Abolition
Act. I confess I have great difficulty in under-
standing that case. It seems to have turned on
the fact that the married woman had a rever-
sionary interest in only two-thirds of the mort-
gage debt, and that the owner of the other third
did not join in the assignment. The decision
appears to me to be opposed to those which I have
mentioned, although, no doubt, it is consistent
with *Hobby v. Collins* (20 L. J. Ch. 199, 4
De Gex & S. 289). I feel compelled to say that
I think *Newton's Trusts, In re*, was decided on
too narrow a view of the Act. — p. 360

KAY, L.J. — In *Newton's Trusts, In re*, trustees
of personal estate invested part of it on mort-
gage. A married woman was entitled to one-
third of the personal estate in reversion after a
life estate. She and her husband by a deed in
1854, before Malins's Act, purported to con-
vey the tenant for life and the other *cestui que*
trust in reversion in assigning the mortgage
debts, and all other the personal property, by
way of mortgage, and the married woman ac-
knowledgeed this deed under the Fines and
Recoveries Act, and that the deed was not
sufficient to pass the interest of the married
woman in the mortgage debts. The learned
judge afterwards referred to the non-concurrence

of one of the *cestui que trust* in remainder. I suppose because the other *cestui que trust* could not alone require a transfer to themselves of the mortgage. But I understand the main reason of the decision to be that what the married woman purposed to assign was an equitable interest in a debt secured by mortgage, and not merely an "interest in land," within the meaning of those words in the Fines and Recoveries Act.—p. 362, 363.

Darley v Darley (or Langworthy) (1767) Amb. 653; Dick. 397. 3 Wils. 6.—**CAMDEN, L.C.** *reversed in H.L.* See *Southery v Somerville* (1807) 13 Ves. 486, 492.—**L.C. Bridges v Strachan (1878) 8 Ch. D. 553, 561, 88 L. T. 502, 26 W. R. 691.—**V.-C.** *Towry, In re, Dallas v. Towry* (1880) 58 L. J. Ch. 358; 41 Ch. D. 64, 84, 60 L. T. 715, 87 W. R. 417.—**G.A.****

Adams v Gamble (1861) 12 Ir. Ch. R. 102.—**G.A. v. reversing** 11 Ir. Ch. R. 269.—**L.C.**, *diverted from*.
Lechmere v. Brothcridge (1868) 82 L. J. Ch. 577; 9 Jur. (N.S.) 705, 8 L. T. 751, 11 W. R. 814.

ROMILLY, M.R.—In this case, it was held that a married woman could dispose of freeholds settled to her separate use as if she were a *feme sole*, without an acknowledgment under the statute . . . I have carefully read and considered that case, but am unable to concur with the two learned judges who dissented from and overruled the decision of the Lord Chancellor of Ireland. If the decision had been unanimous, I should not have ventured to differ from it, but as the Lord Chancellor, on reflection, adhered to his previous opinion, the case has not that weight which it would otherwise have possessed. The distinction that the words "separate use," applied only to what the husband would have taken if those words had not been used, does not appear to have been sufficiently presented to the minds of the learned judges who dissented from the Lord Chancellor. I must choose between conflicting decisions, and I am of opinion that on principle, and by the preponderance of authority, it is established, that before the 3 & 4 Will. 4, c. 74, a fine was necessary to pass the interest of a married woman in that part of her fee-simple estate which did not belong to her husband, and that since that statute an acknowledgment, under the 3 & 4 Will. 4, c. 74, s. 77, is necessary for that purpose, notwithstanding that the estate of the wife is given for her separate use.—p. 589 [Overruled. See "HUSBAND AND WIFE," *post*, col. 1253.]

Crofts v Middleton, 2 Kay & J. 194; 1 Jur. (N.S.) 1133.—**V.-C.** *reversed*, (1856) 25 L. J. Ch. 513; 8 De Ch. M. & G. 192; 2 Jur. (N.S.) 628; 4 W. R. 439.—**L.J.**

Crofts v Middleton.—**L.J.** *approved*.
Prince v. Bubb (1871) 41 L. J. Ch. 105, L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220.

HATHERLEY, L.C.—I am quite satisfied, with reference to the Fines and Recoveries Act, that the course of the observations in *Crofts v Middleton* was intended to displace the error that I fell into, of saying the statute was not intended to give effect to that which could only be operated upon *de facto* if the deed were executed, and not as to matters settled by contract.—p. 110.

Crofts v Middleton, discussed.
General Finance, & Co., v. Liberator Permanent Building Society (1878) 10 Ch. D. 15; 39 L. T. 600. 27 W. R. 210.—**M.R.**

Hayes, In re (1861) 9 W. R. 763, *observed upon*
Stanley v. Hall (1879) 11 Ch. D. 652, 48 L. J. Ch. 882, 27 W. R. 749.—**M.R.**
[Counsel cited **Kipdusley, V.-C.** in *In re Hayes*.—"He would make the order for payment out on her examination only." This was in fact substituting examination for an acknowledgment by deed.]

JESSEL, M.R.—That cannot possibly be the principle. There must have been some mode before the Fines and Recoveries Act of enabling married women to make their election in such cases (p. 654). The object, therefore, of requiring the married woman to be examined was to enable her to elect whether she would take the money as land or as money. In the case before **Kindersley, V.-C.**, the true reason for examining the wife had evidently been overlooked.—p. 655

Voss, In re, King v. Voss (1880) 13 Ch. D. 504, 505. 42 L. T. 78; 28 W. R. 565.—**JESSEL, M.R.**, *dictum observed upon*.
Johnson v. Johnson (1887) 55 L. J. Ch. 326, 35 Ch. D. 345, 56 L. T. 163; 35 W. R. 829.—**STIRLING, J.**

Webster v. Carline (1812) 4 Man. & G. 27; *nom. Webster, Ex parte*, 1 D. (N.S.) 678, 4 Scott (N.S.) 636, *not followed*.
Blackman v. Blackman (1870) 15 L. J. Ch. 710; 3 Ch. D. 638, 24 W. R. 900.
JESSEL, M.R.—The difficulty arises from a decision of Chief Justice Tindal in *Webster v. Carline*. But for that decision I should have thought it too clear for argument that the commissioners for taking acknowledgments appointed under sect. 81 were able, when appointed, to act for any county. The Act does not say they are to be appointed for taking acknowledgments for such county, but they are to be appointed "for every county" to be perpetual commissioners for taking such acknowledgments. I am of opinion that this acknowledgment is valid. With the greatest deference to the Court of Common Pleas, I am unable to find any such restriction as they found in the Act, and I must further suppose that if Chief Justice Bovill had not taken the same view as I do he would not have allowed the certificate to be filed.—p. 901.

Eady, In re (1888) 6 D. P. C. 615, 1 Arn. 156, *followed*.
Howard, In re, Ashcroft, In re (1874) L. R. 9 C. P. 347, 43 L. J. C. P. 245, 30 L. T. 171, 22 W. R. 653.—**C.P.**

COLERIDGE, C.J.—In the case of *Re Eady*, the affidavit was signed by the judge and not by the deponent, it being contrary to the practice of the Courts in Hamburg that any signature should be attached to an affidavit except that of the judge before whom the oath is administered. The Court however, required that fact to be verified by affidavit. Tindal, C.J. observing that, "to the eye of a person merely looking at the affidavit, the evidence would otherwise appear incomplete." Here we are asked to go a step farther, but it is to be observed that that case occurred before the Rule of Court of Hilary Term, 1863. I am of

opinion that, having regard to that case and to the rule, there is enough here to cure the defect —1, 352

Lewis v Derby (Earl) v Witham (1742—1743) 2 Str 1185, 1 Wils 48, *disapproved*. Goodright v Burton v Rigby (1793) 5 Term Rep. 177

KENYON, C.J.—Lord Derby's case (*Witham v Lewis*), which has been cited, has always been considered as a strange case, and the judges of succeeding times have been astonished that no application was made to the Court of Common Pleas to rectify the defect in that recovery, according to the usual practice of that Court—p 179.

Leech v Cole (1598) 2 Cro Eliz 670, *held overruled*

Gressley v Nelson (1809) 2 Taunt 60.

[The Common Pleas held that the doctrine in *Leech v Cole* had been shaken by *Martin v Strahan*, Willes 444.]

FIRES AND FIREARMS.

Lewis v. Arnold (1875) 44 L. J. M. C. 68, L. R. 10 Q. B. 245, 32 L. T. 558, 23 W. R. 729.—Q. B., *overruled*

Sale v. Phillips (1891) 63 L. J. M. C. 79, [1894] 1 Q. B. 319, 70 L. T. 559; 58 J. P. 460. **COLERIDGE, C.J.**—It is clear to my mind that we cannot consider ourselves bound by the decision in *Lewis v. Arnold*. That case must have been decided under a misapprehension, for in the Law Journal Reports it is stated that the Court were, I do not say intentionally, but plainly, informed that no parliamentary definition had been given in the statute itself, which was correct as regards the Town Police Clauses Act, 1847, but they were not told, through some oversight, that in the Public Health Act, 1848, which was in existence at the time this decision was given, there was such a definition. That definition enacts that "owner" is to be interpreted as "the person for the time being in receipt of the rack rent"—p 80.

FISH AND FISHERIES.

Reg. v. Plymouth Corporation (1896) 65 L. J. Q. B. 238; [1896] 1 Q. B. 158, 44 W. R. 620.—**HAWKINS and WILLIAMS, JJ.**, *considered*

Reg. v. Yorkshire (N.R.) County Council (1898) 68 L. J. Q. B. 93, [1899] 1 Q. B. 201; 70 L. T. 521, 47 W. R. 203, 63 J. P. 63.—**RUSSELL, C.J.** and **WILLES, J.**

RUSSELL, C.J.—Then comes this provision [in the order of the Board of Trade of July 9th, 1890, constituting the North Eastern Sea Fisheries Committee], which is also important "All the members shall retire, and the new members shall come into office in each year on the 9th day of November." I refer to that because it makes intelligible what at first sight did not seem to me so in some of the observations of the then V. Williams, J. (*quod V. Williams, L.J.*) in the

Plymouth Case, where he spoke of the appointment each year of the fishery inspector. It would appear from the constitution of this body that, unlike most similar bodies, as to which the usual provision is that a certain proportion of them retire annually—it seems to be the scheme of the constitution of this body that they shall all retire, being capable of re-election, but that they shall all retire at the end of each year. So that there would seem to be, therefore, a moment of time when the Fisheries Committee did not exist, although its members were capable of being re-elected, or fresh persons might be elected in their place. Therefore, there does seem to have been ground for the language used by V. Williams, J. in the *Plymouth Case*, in which he spoke of the reappointment annually of the fishery inspector. . . . Perhaps I ought explicitly to add that if the *semble* to the headline in the report of the *Plymouth Case* is rightly attributed to V. Williams, J., I do not agree with it.

Goodman v. Saltash Corporation (1882) 52

L. J. Q. B. 193; 7 App. Cas. 633, 48

L. T. 239, 31 W. R. 293, 47 J. P. 276.—

H. L. (B.), *distinguished*

Tilbury v. Silva (1890) 45 Ch. D. 98, 62 L. T. 254.—**KAY, J.**, *affirmed on other grounds*, 45 Ch. D. 98; 63 L. T. 141.—**C.A.** **COTTON, BOWEN and FRY, JJ.**

Goodman v. Saltash Corporation and Blount

v. Layard [1891] 2 Ch. 681, n.—**C.A.**

ESHER, M.R., LINDLEY and WOOD, JJ., *applied*.

Smith v. Andrews (1891) [1891] 2 Ch. 678, 63 L. T. 175.—**NORTH, J.**

Goodman v. Saltash Corporation, *held*

inapplicable

Tighe v. Sinnott (1896) [1897] 1 Ir. R. 140.

Goodman v. Saltash Corporation, *applied*

Att.-Gen. v. Wright (1897) 66 L. J. Q. B. 834;

[1897] 2 Q. B. 318, 77 L. T. 296, 46 W. R. 85

—**C.A.** **ESHER, M.R., SMITH and RIGBY, JJ.**

Holford v. Bailey (1850) 13 Q. B. 426; 18

L. J. Q. B. 109; 13 Jur. 278.—**EX. CH.**, *followed*

Marshall v. Ullswater Steam Navigation Co. (1863) 32 L. J. Q. B. 139, 3 B. & S. 732, 9 Jur. (N.S.) 988; 8 L. T. 416; 11 W. R. 489.—**Q. B.**

Holford v. Bailey and Marshall v. Ullswater

Steam Navigation Co., *adopted*.

Att.-Gen. v. Emerson [1891] A. C. 649, 654,

65 L. T. 564, 55 J. P. 709.—**H. L. (B.)**

Carlisle Corporation v. Graham (1869) 38

L. J. Ex. 226; L. R. 4 Ex. 361, 21 L. T.

333, 18 W. R. 318.—**EX.**, *distinguished*.

Foster v. Wright (1878) 49 L. J. C. P. 97; 4

C. P. D. 438, 44 J. P. 7.—**C.P.D.**

Holford v. Bailey; Marshall v. Ullswater

Steam Navigation Co.; Carlisle Corporation

v. Graham, Foster v. Wright

(supra), **Smith v. Andrews** (1891)

[1891] 2 Ch. 678; 66 L. T. 176.—

NORTH, J., **Smith v. Kemp** (1892) 2 Salik

637; 40th 285; Comb. 11, 438, 461, 4

Mod. 186, **Seymour v. Courtenay** (Lord

(1771) 5 Burr. 2811, and **Somerses (Duke)**

v. *Fogwell* (1826) 5 B. & C. 875; 8 D. & R. 747; 5 L. J. (o.s.) K B 49, 29 R. R. 449, *applied*.

Hindson v. Ashby (1896) 65 L. J. Ch. 515; [1896] 2 Ch. 1; 74 L. T. 327, 60 J. P. 484.—G.A. LINDLEY, KAY AND SMITH, L.J., *reversing* 44 W. R. 184.—BOMER, J.

Holford v. Bailey; Foster v. Wright; Seymour v. Courtenay (Lord); and *Hindson v. Ashby, applied*.

Hambury v. Jenkins (1901) 70 L. J. Ch. 739, [1901] 2 Ch. 401, 49 W. R. 615, 65 J. P. 631.—BUCKLEY, J.

Holford v. Bailey and Smith v. Kemp, considered.

Fitzgerald v. Fubank (1897) 66 L. J. Ch. 529, [1897] 2 Ch. 96, 76 L. T. 684.—G.A. LINDLEY, LOPES AND RIGBY, L.J.

Hudson v. Macrae (1863) 4 B. & S. 585, 33 L. J. M. C. 65, 9 L. T. 678; 12 W. R. 80.—Q.B., *followed*.

Hargreaves v. Dicklams (1875) 44 L. J. M. C. 178, 1 L. R. 10 Q. B. 582, 32 L. T. 600, 23 W. R. 828.—Q.B.

Hudson v. Macrae and Hargreaves v. Diddams, applied.

Mussett v. Burch (1876) 35 L. T. 486.—Q.B.D.

Hudson v. Macrae; Hargreaves v. Diddams; and Mussett v. Burch, applied.

Horne v. McKenzie (1897) 6 Cl. & F. 628.—H. L. (SC.), *distinguished*.

Reece v. Miller (1882) 51 L. J. M. C. 61; 8 Q. B. D. 626, 47 J. P. 37.—GROVE AND STEPHEN, JJ.

Metrieks v. Cadwallader (1881) 51 L. J. M. C. 20, 46 L. T. 29; 46 J. P. 216.—GROVE AND LOPES, JJ., *unapplied*.

Hall v. Reid (1882) 10 Q. B. D. 134, n. (1).—FIELD AND CAVE, JJ.

Hall v. Reid, distinguished.

Harbottle v. Terry (1882) 52 L. J. M. C. 81; 10 Q. B. D. 131, 48 L. T. 219, 31 W. R. 289; 47 J. P. 186.—FIELD AND STEPHEN, JJ.

Field, J.—My language in *Hall v. Reid* may perhaps have been too wide, but it was applied to the facts of that particular case, which altogether differed from, and does not govern, this case. The language I used therefore has no application here.

Harbottle v. Terry, followed.

George v. Carpenter (1893) [1893] 1 Q. B. 505; 5 R. R. 266; 68 L. T. 714; 41 W. R. 366; 57 J. P. 311.—LAWRENCE AND COLLINS, JJ.

Merrieks v. Cadwallader and Harbottle v. Terry, distinguished.

Evans v. Owen (1804) 15 R. 228, 64 L. J. M. C. 69; [1895] 1 Q. B. 237; 72 L. T. 54, 43 W. R. 237.—WILKS AND WRIGHT, JJ.

WILKS, J.—A tributary is that which contributes, and I cannot understand why a stream of water should be any less a tributary because before it reaches the Severn it falls into another stream which has another name. That this stream is a "tributary" seems to me to be absolutely free from doubt. I can

understand the views taken in *Harbottle v. Terry*, where the Court was dealing with an artificial construction, but in the present case there is nothing of the kind, and it is therefore perfectly distinguishable from that case. It is also distinguishable from the earlier case of *Merrieks v. Cadwallader*, for in that case there were a number of streams which were mentioned as confluent of the Severn, there the ground word "tributary" was used and the Court thought they ought to apply it as being *ejusdem generis* with the word confluent. It is clear to my mind that the larger language of the present order was adopted in consequence of that decision.—p. 230.

Stuart v. McBarnet (1868) L. R. 1 H. L. 8c.

387, *dicta referred to*.
Warand v. Mackintosh (1890) 15 App. Cas. 52.—H. L. (SC.). LORDS HERSHELL, WATSON AND MACNAGHTEN.

Reg. v. Cubitt (1880) 58 L. J. M. C. 132, 22 Q. B. D. 622; 60 L. T. 638; 37 W. R. 492; 16 Cox C. C. 618; 53 J. P. 170.—COLERIDGE, C.J. AND CHARLES, J., *held applicable*.

Anderson v. Hamlin (1890) 59 L. J. M. C. 151, 25 Q. B. D. 221, 63 L. T. 168; 54 J. P. 757. 17 Cox C. C. 129.—COLERIDGE, C.J. AND MATHEW, J.

Reg. v. Cubitt, distinguished.
Reg. v. Stewart (1896) 65 L. J. M. C. 88, [1896] 1 Q. B. 300, 71 L. T. 54, 44 W. R. 368. 18 Cox C. C. 232, 60 J. P. 356.—LINDLEY AND KAY, L.J.

Anderson v. Hamlin, held overruled.

Pollock v. Moses (1894) 63 L. J. M. C. 116; 10 R. 169; 70 L. T. 378, 17 Cox C. C. 737; 58 J. P. 627.

MATHEW, J.—The section of the Act [sect. 13 of the Fisheries Act, 1891] clearly overrules the decision in *Anderson v. Hamlin*, and was in all probability passed expressly for that purpose.—p. 117.

Rothe v. Whyte (1868) 37 L. J. Q. B. 105; L. R. 3 Q. B. 246, 17 L. T. 660; 16 W. R. 593, 8 B. & S. 116.—Q.B., *followed*.
Leonoffield (Lord) v. Lonsdale (Earl) (1870) 39 L. J. C. P. 305; L. R. 5 C. P. 667, 23 L. T. 155; 18 W. R. 1165.—C.P.

Pike v. Bossiter (1877) 37 L. T. 635, 26 W. R. Dig. 90.—Q.B.D., *followed*.

Rosseter v. Pike (1870) 48 L. J. M. C. 81; 4 Q. B. D. 21; 27 W. R. 389, 39 L. T. 196.—Q.B.D.

Lyne v. Leonard (1868) 9 B. & S. 65, L. R. 8 Q. B. 156, 18 L. T. 55, 16 W. R. 562.—Q.B., *distinguished*.

Marshall v. Richardson (1889) 58 L. J. M. C. 45, 61 L. T. 605, 16 Cox C. C. 611; 53 J. P. 396.—CAVE AND CHARLES, JJ.

Truro Corporation v. Rowe (1901) 70 L. J. K. B. 1026, [1901] 2 K. B. 870; 85 L. T. 423; 50 W. R. 151; 65 J. P. 806.—WILKS, J., *varied*, (1902) 71 L. J. K. B. 974; [1902] 2 K. B. 709; 87 L. T. 886, 51 W. R. 68.—G.A. COLLINS, M.R., FITZLING AND COZENS-HARDY, L.J.

FIXTURES.

Trappes v. Harter (1833) 2 C & M 153, 3 Tyr. 604. 3 L J Ex 24 —EX, explained
Bauchly, Ex parte, Gawan v. Bauchly (1855) 5 De G M & G 403, 1 Jur. (N.S.) 1145, 25 L J Bk 1.—L.C. and L.J.

Trappes v. Harter, not followed.
Nutter, In re, Cotton, Ex parte (1842) 2 M D, & D. 725, followed
Waterfall v. Penistone (1856) 6 El. & B. 876, 26 L J Q. B. 100, 3 Jur. (N.S.) 15.—Q.B., distinguished
Cullwick v. Swindell (1866) 36 L J Ch. 173; 14 L J 3 Eq 249; 15 W R. 216.—M.R.

Cullwick v. Swindell, followed.
Olimie v. Wood (1868) 37 L J. Ex. 158; 14 L J Ex 257, 18 L T. 609, affirmed, 38 L J Ex 223, L R. 1 Ex. 328, 20 L T. 1012.—EX, UT

Cullwick v. Swindell and *Olimie v. Wood*, referred to
Longbottom v. Berry (1869) 39 L J Q B 37, L R. 5 Q B. 123; 22 L T. 385; 10 B & S. 852.—Q.B.

Nutter, In re, Cotton, Ex parte (supra), and *Cullwick v. Swindell*, referred to.
Sanders v. Davis (1886) 54 L J Q. B. 576, 15 Q. B. D. 218, 33 W R. 655.—POLLOCK, B. and MANISTY, J.

Hollawell v. Eastwood (1850) 6 Ex. 295, 20 L J. Ex. 154.—EX., dictum disapproved

Mather v. Fraser (1865) 2 Kay & J 536, 25 L J Ch 361, 2 Jur. (N.S.) 900; 4 W R. 387, WOOD, V.C.—This consideration disposes of the decision—I do not say, of the dictum—in *Hollawell v. Eastwood*. For the decision in that case there was abundant ground, irrespective of the dictum. The tenant had annexed to the freehold property which as between him and his landlord, would have been held, on a determination of the lease, to be chattel property, which the tenant was entitled to remove. The landlord sought to distrain. There would have been a manifest inconsistency in holding such property exempt from distress, on the ground of

of cases ending with that of *Fisher v. Dixon* (12 Cl. & F 312), which does not appear to have been cited in *Hollawell v. Eastwood*, could not have been present to the mind of the learned judge to whom that dictum is attributed—p 549.

Mather v. Fraser, approved
Haley v. Hammeisley (1861) 30 L J Ch. 771, 3 De G F & J. 587, 7 Jur. (N.S.) 765, 4 L T. 269, 9 W R. 562.—L.C. and Boyd v. Shorrocks (1867) 37 L J Ch 144, L R. 5 Eq. 72; 17 L T. 197; 16 W R 102.—V.C.

Hollawell v. Eastwood, considered.
Reg. v. Lee (1866) 35 L J M C. 105, L R. 1 Q. B. 241; 12 Jur. (N.S.) 225; 13 L T. 704, 14 W R. 311.—Q.B.

Hollawell v. Eastwood, distinguished
Mather v. Fraser, followed
Longbottom v. Berry (1869) L R. 5 Q B 123; 39 L J Q. B. 37, 22 L T. 385, 10 B & S. 852.—Q.B.

HANNEN, J. (for the Court).—It is observable that *Hollawell v. Eastwood* was decided before any of the cases to which we have referred (*Mather v. Fraser*, *Walsley v. Milne* (7 C B (N.S.) 115, 29 L J C. P. 97), *Cullwick v. Swindell* (L R. 3 Eq. 249), *Olimie v. Wood* (L R. 3 Ex. 257, L R. 4 Ex. 328)), and was cited in all or most of them, but not followed in any. On the contrary, it was distinguished in *Mather v. Fraser* by the present Lord Chancellor (Hatherley), then Vice-Chancellor, who observed that it was a case between landlord and tenant, and was altogether inapplicable to the question whether machines fixed by an owner of the soil passed to a mortgagee of the freehold. In that case machinery fixed in the same manner as the machines in *Hollawell v. Eastwood* was considered to pass to a mortgagee as fixtures; and so also in *Walsley v. Milne*, the fact that the machinery was so fastened as to admit of severance without injury to the building, or the things fixed was also disregarded by the Court; as were also in *Olimie v. Wood*, the special additional facts found by the jury, that the object of annexation was for the more convenient use of the things fixed, and not to improve the inheritance (p. 137). We think that the case of *Hollawell v. Eastwood* was well distinguished from cases like the present in

question depended mainly upon (1) the mode and extent of annexation to the soil or fabric of the house whether it can easily be removed *integro, salve et commodum* or not without injury to itself or the fabric of the building. (2) whether it was for permanent and substantial improvement in the dwelling, or merely for a temporary purpose.] does state the true principles, though it may be questioned if they were in that case correctly applied to the facts (p. 387). But there is another view of the matter which weighs strongly with us. *Hellawell v. Eastwood* was a decision between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather v. Fraser*, which was decided in 1856, and has been acted upon in *Bayly v. Shorebrook* (L. R. 5 Eq. 72) by the Court of Queen's Bench in *Longbottom v. Berry*, and in Ireland in *Re Dawson* (J. L. R. 2 Eq. 222). These cases are too recent to have been themselves much acted upon, but they show that *Mather v. Fraser* has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather v. Fraser*. It is of great importance that the law as to what is the security of the mortgage should be settled; and without going so far as to say that a decision only sixteen years old should be upheld, right or wrong, on the principle that *communis error facit jus*, we feel that it should not be reversed unless we clearly see that it is wrong. As already said, we are rather inclined to think that, if it were *res integra*, we should find the same way — p. 340

Mather v. Fraser, followed.

Chios r. Barnes (1877) 16 L. J. Q. B. 479, 36 L. T. 693.—Q. B. 2; and *Armstrong*, in re Moore and Robinson's Bankrupt Co., Ex parte (1880) 49 L. J. Bk. 60, 14 Ch. D. 379, 42 L. T. 149, 28 W. R. 924.—BACON, C.

Mather v. Fraser, approved.

Yates, in re Batchelor r. Yates (1888) 57 L. J. Ch. 697, 38 Ch. D. 112, 59 L. T. 47; 36 W. R. 668.—CA. COTTON, LINDLEY and BOWEN, L.J.

Longbottom v. Berry (1869) 39 L. J. Q. B. 37, L. R. 6 Q. B. 128; 22 L. T. 383; 10 B. & S. 862.—Q. B., followed.

Holland v. Hodgson (1872) 41 L. J. C. P. 148, L. R. 7 C. P. 328, 26 L. T. 709, 20 W. R. 990.—EX CH.

Longbottom v. Berry, approved and followed. *Sheffield and South Yorkshire Permanent Benefit Building Society v. Harrison* (1884) 54 L. J. Q. B. 15, 15 Q. B. D. 368, 51 L. T. 649, 33 W. R. 141.—CA. BRETTE, M.R., COTTON and LINDLEY, L.J.

BRETTE, M.R.—In the consideration of law the machines are part of the land, and those belts were fixed to the machines and were part of the land: for everything which is a necessary part of the machine is part of the land, and passes under the mortgage, and no registration is required. I think that *Longbottom v. Berry* is right. The judgment of Field, J. (in the Court below) is inconsistent with it; he evidently thought it wrong. It is, however, a decision which must be followed. The learned judge seems to think that the decision in *Longbottom v. Berry* proceeded on the admitted facts in

that case. I decline to follow that view. I think that a principle of law was laid down which must be observed in subsequent cases.—p. 361

Sanders v. Davis (1885) 51 L. J. Q. B. 376; 15 Q. B. D. 218, 33 W. R. 635.—POLLOCK, B. and MANISTY, J., and *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.* (1891) 61 L. J. Ch. 227, [1892] 1 Ch. 115; 66 L. T. 108, 40 W. R. 280.—NORTH, J., followed.

Gough v. Wood (1891) 63 L. J. Q. B. 564; [1891] 1 Q. B. 713, 9 H. 509, 74 L. T. 237, 12 W. R. 469.—CA. LINDLEY, KATLAND SMITH, L.J.

Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co. and *Gough v. Wood, explained.*

Huddersfield Banking Co. v. Lister (1895) 64 L. J. Ch. 523, [1895] 1 Ch. 273, 12 L. T. 331; 72 L. T. 703, 43 W. R. 367.—CA. LINDLEY, LOPES and KAY, L.J.

LINDLEY, L.J.—Those cases turned on the view, rightly or wrongly—I do not pause to consider—that now—that the chattels were unfixed, and properly unfixed on the implied authority given by the mortgagees. It is impossible to say that these loans were unfixed by the implied authority given by the mortgagees. . . . *Gough v. Wood* really does not apply to the case at all.—p. 327

Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co. and *Gough v. Wood, discussed.*

Hobson v. Gorrings (1896) 66 L. J. Ch. 114; [1897] 1 Ch. 182; 75 L. T. 610, 45 W. R. 356.—CA. RUSSELL, C.J., LINDLEY and SMITH, L.J., SMITH, L.J. (for the Court).—There can be no doubt upon a mortgage in fee of the land, that as between the mortgagee and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land whether placed there before or after the mortgage. If North, J., in the passage in his judgment which has been referred to in *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, meant to hold otherwise, in our opinion he was in error; but we doubt if he intended so to hold. The case of *Gough v. Wood & Co.*, decided in this Court, in no way assists the plaintiff, and has no application to the present case. That case was decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures. For additional confirmation of the ratio decidendi of this case what was said by Lindley, L.J. and by Kay, L.J. in *Huddersfield Banking Co. v. Lister* may be referred to.

Gough v. Wood, distinguished.

Hobson v. Gorrings, followed. *Reynolds v. Ashby* (1902) 72 L. J. K. B. 31, [1903] 1 K. B. 87, 87 L. T. 610; 51 W. R. 405.—CA.

Holland v. Hodgson (1872) 41 L. J. C. P. 146, L. R. 7 C. P. 328; 26 L. T. 709, 20 W. R. 990.—EX CH., explained.

Wood v. Hewett (1846) 8 Q. B. 913; 15 L. J. Q. B. 247; 10 Jur. 890.—Q. B., and *Lancaster v. Eve* (1859) 5 C. B. (N.S.) 717, 28 L. J. C. P. 235; 5 Jur. (N.S.) 683, 7

W. R. 200.—O.P., *discussed and distinguished*
 Johnson v. Goringe (1896) 66 L. J. Ch. 114,
 [1897] 1 Ch. 182, 75 L. T. 610, 45 W. R. 356
 —O.A. RUSSELL, C.J., LINDLEY and SMITH, L.JJ.
 See judgment

Holland v. Hodgson, *applied*.
 Monti v. Barnes (1900) 70 L. J. K. B. 225;
 [1901] 1 K. B. 205, 83 L. T. 619, 49 W. R. 147.
 —O.A. SMITH, M.R., COLLINS and STIRLING, L.JJ.

D'Eyncourt v. Gregory (1866) 36 L. J. Ch.
 107; L. J. 3 Eq. 882, 15 W. R. 186.
 —M.R., *followed*
 Norton v. Dashwood (1896) 65 L. J. Ch. 737;
 [1896] 2 Ch. 497, 75 L. T. 205, 44 W. R. 680.
 —CHITTY, J.

D'Eyncourt v. Gregory, *distinguished*.
 Jhill (Viscount) v. Bullock (1897) 66 L. J. Ch.
 705; [1897] 2 Ch. 182, 77 L. T. 240, 46 W. R.
 84.—O.A. LINDLEY, LOPES and CHITTY, L.JJ.
 LINDLEY, L.J.—The case that comes nearest to
 this one is *D'Eyncourt v. Gregory*, the case
 about tapestry, where Lord Romilly, in con-
 struing a will, held that certain unfixed articles
 passed with the house, because, as he says, they
 were strictly and properly part of the architec-
 tural design of the hall and staircase and put in
 as such, as distinguished from mere ornaments.
 Can anybody say that these birds, which were
 while they were there, were put there as part
 of the architectural design of the room? See what
 that means. Suppose a bird gets moth-eaten, if
 it is a fixture it cannot be taken out, but must
 be left to rot and be eaten up by maggots. That
 cannot be.—p. 707.

D'Eyncourt v. Gregory, *disapproved by*
 RIGBY, L.J.
 Norton v. Dashwood, *explained and dis-*
tinguished.
 De Falbe, In re, Ward v. Taylor (1901) 70
 L. J. Ch. 286; [1901] 1 Ch. 529, 84 L. T. 273;
 49 W. R. 455.—O.A. RIGBY, WILLIAMS and
 STIRLING, L.JJ., *reversing* BYRNE, J., *affirmed*,
non Leigh v. Taylor (1902) 71 L. J. Ch. 272,
 [1902] A. C. 157, 86 L. T. 239, 50 W. R. 623.
 —H.L. (2.) LORDS HALSBURY, L.C., MACNAGHTEN,
 SHAND, DRAMPTON, ROBERTSON and LINDLEY.

Leigh v. Taylor, *discussed*.
 Reynolds v. Ashby (1902) *supra*, col. 1148).

Fitzherbert v. Shaw (1789) 1 II. Black 258,
considered.
 Dean v. Allalloy (1799) 3 Esp. 11, *questioned*.
 Elwes v. Maw (1802) 3 East 38, 6 R. R. 528.
 LORD ELLENBOROUGH, C.J. (for the Court).—
 The *Nisi Prius* case of *Dean v. Allalloy* is a
 case of the erection and removal by the tenant
 of two sheds, called *Dutch barns*, which were, I
 will assume, unquestionably fixtures. . . . Lord
 Kenyon there uniformly mentions the *benefit of*
trade, as if it were a building subservient to some
 purposes of trade; and never mentions agricul-
 ture, for the purposes of which it was erected. He
 certainly seems, however, to have thought that
 buildings erected by tenants for the purposes of
 farming were, or rather ought to be, governed by
 the same rules which had been so long judiciously
 holden to apply in the case of buildings for the
 purposes of trade. But the case of buildings for

trade has been always put and recognised as a
bonum, allowed, exception from the general rule
which obtains as to other buildings, and the
 circumstance of its being so treated and con-
 sidered establishes the existence of the general
 rule to which it is considered as an exception.—
 p. 56.

Elwes v. Maw, *discussed*.
 Wake v. Hall (1883) 52 L. J. Q. B. 494; 8
 App. Cas. 195, 48 L. T. 834; 31 W. R. 585.
 —H.L. (2.); and Mears v. Callender (1901) *infra*.
 Penton v. Robert (1801) 4 Esp. 33; 2 East
 88; 6 R. R. 376, *not followed*.
 Weston v. Woodcock (1840) 7 M. & W. 14;
 10 L. J. Ex. 183.—EX., *followed*.
 Leader v. Homewood (1858) 5 C. B. (N.S.) 516,
 27 L. J. C. P. 3161, 4 Jui. (N.S.) 1002.—C.P.

Penton v. Robert, *discussed*.
 Weston v. Woodcock, *commented on*
 Barff v. Probyn (1895) 64 L. J. Q. B. 557; 73
 L. T. 118.

CHARLES, J. held that where the tenant of a
 public-house held over because the incoming
 tenant refused to pay him an agreed sum for
 fixtures, and on his landlord's bringing action
 removed the fixtures, no inference of an existing
 tenancy could be drawn and that the tenant was
 a trespasser when he removed the fixtures.]

Penton v. Robert, *followed*.
 Whitehead v. Bennett (1858) 27 L. J. Ch.
 174; 6 W. R. 351.—V.-C., *referred to*.
 Mears v. Callender (1901) 70 L. J. Ch. 621;
 [1901] 2 Ch. 388; 84 L. T. 618, 49 W. R. 384;
 53 J. P. 615.

COZENS-HARDY, J.—I am not satisfied that Lord
 Ellenborough [in *Elwes v. Maw*] dissented from
 Lord Kenyon's view [in *Penton v. Robert*], so far
 as market gardeners were concerned. If, however,
 there be any difference between Lord Kenyon
 and Lord Ellenborough, I prefer the view that
 glass-houses erected by a nurseryman for the
 purpose of carrying on his trade may be removed.
 The dicta of Lord Bramwell in *Wake v. Hall* (8
 App. Cas. 210) support this view. Moreover, the
 whole tendency of the Courts in recent years, has
 been to enlarge the rights of tenants in respect
 of fixtures. Nor do I consider that there is any-
 thing in the judgment of Kindersley, V.-C. in
Whitehead v. Bennett which ought to lead me to
 a contrary conclusion.

London and Westminster Loan and Discount
 Co. v. Drake (1859) 6 C. B. (N.S.) 798, 28
 L. J. C. P. 297, 5 Jur. (N.S.) 1407, 7 W. R.
 611.—O.P., *approved and followed*.
 Saint v. Pilley (1875) 44 L. J. Ex. 33; L. R.
 10 Ex. 187; 33 L. T. 93, 23 W. R. 753.—EX.

Dumergue v. Rumsey (1862) 10 W. R. 844.—
 EX., *reversed*, (1863) 2 H. & C. 777, 33 L. J. Ex.
 88; 10 Jur. (N.S.) 155, 9 L. T. 775, 12 W. R.
 205.—EX. CH.

Metropolitan Counties Insurance Society v.
 Brown (1859) 26 Beav. 454; 28 L. J. Ch.
 581; 5 Jur. (N.S.) 378, 7 W. R. 303.—
 M.R., *distinguished*.
 Richards, In re, Astbury, Ex parte, Lloyd's
 Banking Co., Ex parte (1869) 38 L. J. Ch. 9;
 L. R. 4 Ch. 630, 20 L. T. 997; 17 W. R. 997.—
 GIFFARD, L.J.

FRAUD, MISREPRESENTATION, AND UNDUE INFLUENCE.

1. WHAT AMOUNTS TO
2. FRAUDULENT CONVEYANCES
3. EFFECT OF
4. PRACTICE

I. WHAT AMOUNTS TO

Humphreys v. Pratt (1881) 5 Bligh (N.S.) 154, 2 Dow & C. 288—H L (IR), *considered*.
Collins v. Evans (or **Evans v. Collins**) (1844) 5 Q. B. 804; 13 L. J. Q. B. 180, D & M. 669; 8 Jur. 345—EX CH.

Evans v. Edmunds (1853) 13 C. B. 777, 1 C. L. R. 653; 22 L. J. C. P. 211; 17 Jur. 883; 1 W. R. 412—G P, *considered*.
Hart v. Swaine (1877) 7 Ch. D. 42—PRY, J.; and **Johiffe v. Baker** (1889) 52 L. J. Q. B. 609; 11 Q. B. D. 255; 48 L. T. Q. B. 66, 32 W. R. 59; 47 J. P. 678.—V WILLIAMS AND CAVE, JJ.

Evans v. Edmunds and Collins v. Evans (*supra*), *referred to*.
Derry v. Peck (1880) 58 L. J. Ch. 864, 14 App. Cas. 337; 61 L. T. 265, 53 W. R. 53; 1 Meg. 292—H L (E).

Harris v. Kemble (1827) 1 Sim. 111, 5 L. J. (N.S.) Ch. 141, *reversed*, (1829) 2 Dow & C. 468, 5 Bligh (N.S.) 730, 7 L. J. (O.S.) Ch. 79.—H L (E).

Harris v. Kemble (*supra*, in H L), *distinguished*.
Rawlin v. Wickham (1858) 3 De G. & J. 304, 28 L. J. Ch. 188, 5 Jun. (N.S.) 278, 7 W. R. 145.—L J.

Traill v. Baring (1864) 1 De G. J. & S. 818; 33 L. J. Ch. 521, 10 Jur. (N.S.) 377; 12 W. R. 678.—L J., *distinguished*.

Scottish Petroleum Co., in re, Wallace's Case (1883) 23 Ch. D. 413, 49 L. T. 848; 31 W. R. 846—C.A. BAGGALLAY, LINDLEY AND FRY, L.JJ.
LINDLEY, L.J.—At the time of this allotment, however, there was a material change in the body of directors. The secretary, acting honestly and fairly, drew the attention of the allottees to the fact. Mr. Halliwell argued that this change made the contract void, and referred to **Traill v. Baring**. I think that case does not bear out his proposition, and goes no further than to show the contract to be voidable.

Small v. Attwood (1892) Youngs 407, *reversed*, *nom. Attwood v. Small* (1895) 6 Cl. & F. 232, 8 L. J. Ch. 115; 2 Jun. 300, 220, 246.—H L (E.).

Attwood v. Small, considered.
Central Railway Co. of Venezuela v. Kisch (1867) 36 L. J. Ch. 649; L. R. 2 H. L. 99, 121, 16 L. T. 500; 15 W. R. 821.—H L (E.).

Attwood v. Small, referred to.
Other v. Smurthwaite (1868) L. R. 5 Eq. 437, 442.—V C.

Attwood v. Small, considered and explained.
Redgrave v. Hurd (1881) 51 L. J. Ch. 113; 20 Ch. D. 1, 45 L. T. 485, 30 W. R. 251.—C.A. JESSEL, M.R., BAGGALLAY AND LUSH, L.JJ.; *reversing* FRY, J.

JESSEL, M.R.—In no way, as it appears to me, does the decision, or any of the grounds of decision,

in **Attwood v. Small** support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud, that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud.

Attwood v. Small, considered.
Roots v. Snelling (1883) 48 L. T. 216—POLLOCK, B.

Redgrave v. Hurd, commented on.
Smith v. Chadwick (1884) 53 L. J. Ch. 873; 9 App. Cas. 187, 50 L. T. 697; 32 W. R. 687; 48 J. P. 644—H L (E.).

Redgrave v. Hurd, applied and dictum questioned.
Smith v. Land and House Property Corporation (1884) 28 Ch. D. 7; 51 L. T. 718, 49 J. P. 182.—C.A. BAGGALLAY, BOWEN AND FRY, L.JJ.

Redgrave v. Hurd, dictum dissented from.
Hughes v. Twissell (1886) 55 L. J. Ch. 181, 54 L. T. 470, 31 W. R. 498.

NORTH, J.—It is said that if a thing is likely to be material towards inducing a man to enter into a contract, it is a presumption of law that it was material; and Mr. Clare referred to **Redgrave v. Hurd**, where the late Master of the Rolls is reported to have said (at p. 21).—"If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation." The next case is **Smith v. Chadwick** (20 Ch. D. 27), where, at p. 44, the M.R. says—"Again, on the question of the materiality of the statement, if the Court sees, on the face of it, that it is of such a nature as would induce a person to enter into the contract . . . the inference is, if he entered into the contract that he acted on the inducement so held out, and you want no evidence that he did so act." The same case came before the House of Lords (9 App. Cas. 187; 32 W. R. 687), and at p. 196 Lord Blackburn makes these remarks—"I think that, if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In **Redgrave v. Hurd**, the late Master of the Rolls is reported to have said, that it was an inference of law. If he really meant this, he retracts it in his observations in the present case." Then, again, in another case of **Smith v. Land and House Property Corporation** (28 Ch. D. 16), Bowen, L.J. says—"I cannot quite agree with the remark of the late Master of the Rolls in **Redgrave v. Hurd**—that, if a material representation calculated to induce a person to enter into a contract is made to him, it is an inference of law that he was induced by the representations to enter into it, and I think that probably his lordship hardly intended to go so far as that, though there may be strong reason for drawing

such an inference as an inference of fact." Now, looking at these cases as stating the law correctly, I come to the conclusion that it is not a presumption of law, but an important piece of evidence from which, if there is nothing else, the Court may draw the inference of fact that the plaintiff was induced by the statement to enter into the contract.

[It was pointed out during the argument that the words "of law" in the phrase "it is an inference of law," in the judgment in *Redgrave v. Hurd*, occur only in 20 Ch. D. 21, and not in any of the contemporaneous reports.]

Redgrave v. Hurd, discussed.

Newbidding v. Adam (1887) 56 L. J. Ch. 275; 84 Ch. D. 582; 55 L. T. 794, 35 W. R. 597.—C.A. COTTON, BOWEN and FRY, L.J.; affirmed, *nom. Adam v. Newbidding* (1888) 57 L. J. Ch. 1066; 13 App. Cas. 808, 39 L. T. 267; 37 W. R. 97.—H.L. (2). LORDS HALSBURY, L.C., WATSON, FITZGERALD and HERSCHELL.

BOWEN, L.J.—It is said that the injured party is entitled to be replaced in *status quo*. It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced in *status quo* with this limitation—that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine, and I think it is put in the neatest way in *Redgrave v. Hurd*. In that case there was a misrepresentation, but, though there was a suggestion of fraud in the pleadings, the C.A. thought that fraud was not so expressly pleaded as to enable the Court to treat the case as one of fraud, and that the relief given must depend on misrepresentation alone. The M.R., so treating it, says: "Before going into the details . . . belief that it was true." With great respect for the shadow and memory of that great name, I cannot help saying that this is not a perfect exposition of what the common law was, but, so far as the rule of equity goes, I must assume that the M.R. spoke with full knowledge of the equity authorities, and he treats the relief as being the giving back by the party who made the misrepresentation of the advantages he obtained by the contract. Now these advantages may be of two kinds. He may get an advantage in the shape of an actual benefit, as when he receives money, or he may also get an advantage if the party with whom he contracts assumes some burden in consideration of the contract. In such a case it seems to me that complete rescission would not be effected unless the misrepresenting party not only hands back the benefits which he has himself received—but also re-assumes the burden which under the contract the injured person has taken upon himself. Speaking only for myself, I should not like to lay down the proposition that a person is to be restored to the position which he held before the misrepresentation was made, nor that the person injured must be indemnified against loss which arises out of the contract, unless you place upon the words "out of the contract" the limited and special meaning which I have endeavoured to shadow forth. Loss arising out of the contract is a term which would be too wide. It would embrace damages at common

law, because damages at common law are only given upon the supposition that they are damages which would naturally and reasonably follow from the injury done. I think *Redgrave v. Hurd* shows that it would be too wide, because in that case the Court excluded from the relief which was given the damages which had been sustained by the plaintiff in removing his business, and other similar items. There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and taking back of the advantages. There is nothing in *Rawlinson v. Wickham* (3 De G. & J. 304, see post, "PARTNERSHIP") which carries the doctrine beyond that. In that case, one of three partners having retired, the remaining partners introduced the plaintiff into the firm, and he, under his contract with them, took upon himself to share with them the liabilities which otherwise they would have borne in their entirety. That was a burden which he took under the contract and in virtue of the contract. It seems to me, therefore, that upon this principle indemnity was rightly decreed as regards the liabilities of the new firm.

Redgrave v. Hurd, approved.

Aaron's Reefs v. Twiss (1896) 65 L. J. P. C. 54, [1896] A. C. 273, 74 L. T. 794.—H.L. (IR.). LORDS HALSBURY, L.C., WATSON, HERSCHELL, MACNAGHTEN, MORRIS and DAVEY.

Redgrave v. Hurd, applied.

Davis v. Ohlry (1898) 14 Times L. R. 260.—BARNES, J.

Newbidding v. Adam, discussed.

Whittington v. Seale-Hayne (1900) 82 L. T. 49.—FARWELL, J.

Baker v. Monk (1864) 4 De G. J. & S. 388; 10 Jur. (N.S.) 691, 10 L. T. 680, 12 W. R. 779.—L.J., affirming 33 Beav. 419.—M.R., principle adopted.

Slator v. Nolan (1876) Ir. R. 11 Eq. 367.—M.R.

Baker v. Monk and Clark v. Malpas (1862) 4 D. F. & J. 401; 31 Beav. 89, 8 Jur. (N.S.) 784, 10 W. R. 676.—L.J., principles applied.

Rees v. De Bernardy (1896) 65 L. J. Ch. 656; [1896] 2 Ch. 437; 74 L. T. 585.—ROMER, J.

Harrison v. Guest (1855) 6 De G. M. & G. 424; 25 L. J. Ch. 544, 2 Jur. (N.S.) 911; 4 W. R. 585.—L.C., affirmed, (1860) 8 H. L. Cas. 481, explained.

Denton v. Donner (1856) 23 Beav. 285. ROMILLY, M.R.—I do not understand the case of *Harrison v. Guest* to mean this—that the fact of an unprofessional person having no solicitor in the transaction, is a matter of no importance at all. . . . All that I understand the L.C. to mean is this—That where no peculiar relations of a fiduciary character exist between the vendor and the vendee, the fact of the seller not employing any solicitor does not shift the burden, and not that it is not a material circumstance to be regarded in the transaction that he had not a solicitor on his part who would be likely to explain the matter fully to him—p. 291.

Harrison v. Guest, distinguished.

Baker v. Monk (1864) (*supra*)

Harrison v. Guest, distinguished
 Rosher v. Williams (1875) 44 L. J. Ch. 419,
 L. R. 20 Eq. 215, 32 L. T. 387, 23 W. R. 561—
 v.-c.

Harrison v. Guest, distinguished
 Fry v. Lane (1888) 58 L. J. Ch. 113, 40 Ch. D.
 312, 60 L. T. 12, 47 W. R. 135—KAY, J.

**Glassen v. Odgen (1731)—H.L. (E), com-
 menced on**
 Young v. Peachy (1741) 2 Atk. 254
HARDWICKE, L.C.—In Glassen v. Odgen, before
King, L.C., that circumstance [viz. that it was a
recovery obtained by a father from his child]
was strongly insisted upon; but his lordship
refused to give relief, for he said it was a fair
bargain between a father and his child, and he
would not weigh in golden scales whether the
consideration was exactly equal or not. In March,
1731, there was an appeal to the H. L. from that
decree, upon the appeal the Lords laid great
weight upon that circumstance, that the convey-
ance was obtained by a father from his daughter
in distress and the decree of Lord King was
reversed—p. 258

Bainbridge v. Browne (1881) 50 L. J. Ch.
522, 18 Ch. D. 188, 44 L. T. 705; 29
W. R. 782—FRY, J., distinguished

De Witte v. Addison (1899) 80 L. T. 207—C.A.
LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.

Archer v. Hudson (1834) 7 Beav. 551, 13
L. J. Ch. 380, 8 Jur. 761—M.R.;
affirmed, (1846) 15 L. J. Ch. 211.—L.C.,
and Maitland v. Irving (1846) 15 Sim.
437; 16 L. J. Ch. 95—v.-c., held
inapplicable.

Blake v. Clark (1852) 22 L. J. Ch. 377; 15
Beav. 551.
ROMILLY, M.R.—Archer v. Hudson and Mait-
land v. Irving establish that in a transaction in
which all the parties gain an advantage at the
expense of the volunteer, it is the bounden duty
of the persons who gain that advantage to show
that the volunteer fully and completely under-
stood what he was about; but neither Archer v.
Hudson nor Maitland v. Irving were cases of a
purchase for valuable consideration, they were
cases in which the money had been already lent
to the original debtor by the creditor, who, find-
ing the security imperfect, gains a distinct and
manifest advantage from the silence and junction
in the security of the volunteer, who gains no
benefit.—p. 384

Archer v. Hudson, referred to.
 Powell v. Powell (1899) 69 L. J. Ch. 164;
 [1900] 1 Ch. 243, 82 L. T. 84.—FARWELL, J.

Rhodes v. Bate (1866) 35 L. J. Ch. 267; L. R.
1 Ch. 252; 12 Jur. (N.S.) 178, 13 L. T.
778; 14 W. R. 292—L.JJ., commented on
Mitchell v. Homfray (1881) 8 Q. B. D. 587; 50
L. J. Q. B. 460, 45 L. T. 694, 29 W. R. 558.—
C.A. SELBORNE, L.C., BRAMWELL and BAG-
GALLAY, L.JJ.

SELBORNE, L.C.—In Rhodes v. Bate it was
laid down in clear terms that, in order to uphold
a gift made to a person standing in a confidential
relation, the donor must have had competent
and independent advice in conferring it. This is
undoubtedly the rule, so long as the confidential
relation exists; but it is not laid down in Rhodes
v. Bate that advice of that kind is necessary

when the confidential relation has come to an end,
 and the donor is no longer subject to its influence
 —p. 591

Rhodes v. Bate, referred to
 Allon v. Skinner (1887) 56 L. J. Ch. 1052,
 36 Ch. D. 145, 37 L. T. 61, 36 W. R. 251.—C.A.
 LINDLEY and BOWEN, L.JJ.; COTTON, L.J., partly
 dissenting

Rhodes v. Bate, Liles v. Terry (1895) 65
L. J. Q. B. 34, [1895] 3 Q. B. 679, 73
L. T. 328, 14 W. R. 116.—C.A. BISHOP,
M. R., LOPES and KAY, L.JJ., and Moxon
v. Payne (1873) 43 L. J. Ch. 240, L. R. 8
Ch. 881—L.JJ., applied

Barron v. Willis (1900) 69 L. J. Ch. 532; [1900]
2 Ch. 121; 82 L. T. 729; 48 W. R. 579—C.A.
LINDLEY, M. R., RIGBY and COLLINS, L.JJ.;
affirmed in H.L. See infra

Rhodes v. Bate; Liles v. Terry and Holman
v. Loyne (1854) 4 De G. M. & G. 270; 23
L. J. Ch. 529, 18 Jur. 839; 2 W. R. 205.
 —L.C. and L.J., *dicta* applied.

Morgan v. Minett (1877) 6 Ch. D. 638, 36 L. T.
948; 25 W. R. 744—v.-c., considered
Wright v. Carter (1902) 80 L. T. 110.—KECK-
WICH, J.

Huguenin v. Baseley (1807) 14 Ves. 273;
9 R. R. 148, 276.—L.C., applied
Scholefield v. Templer (1859) 28 L. J. Ch. 452;
1 Johns. 155, 5 Jur. (N.S.) 619; 7 W. R. 563;
S. C. 4 De G. & J. 429, 7 W. R. 653; Totham v.
Portland (Duke) (1866) 1 De G. J. & S. 517; S. C.
(1869) 39 L. J. Ch. 259; L. R. 5 Ch. 40; 28 L. T.
847; 18 W. R. 235, and Lyon v. Istone (1868)
87 L. J. Ch. 674; L. R. 6 Eq. 655, 680—v.-c.

Huguenin v. Baseley, discussed
 Coutts v. Acworth (1869) 38 L. J. Ch. 691,
 L. R. 8 Eq. 558, 21 L. T. 224, 17 W. R. 1121—
 MALINS, v.-c.

Huguenin v. Baseley, referred to.
 Vane v. Vane (1873) 42 L. J. Ch. 299, L. R. 8
 Ch. 383, 28 L. T. 320, 21 W. R. 252—L.JJ.

Huguenin v. Baseley, discussed
 Hall v. Hall (1878) 42 L. J. Ch. 444; L. R. 8
 Ch. 480; 28 L. T. 839; 21 W. R. 373.—L.C. and
 L.JJ.

Huguenin v. Baseley, referred to.
 Allon v. Skinner (1887) 56 L. J. Ch. 1052;
 36 Ch. D. 145, 37 L. T. 61, 36 W. R. 251.—C.A.
 LINDLEY and BOWEN, L.JJ.; COTTON, L.J., partly
 dissenting

Huguenin v. Baseley, followed
 Morley v. Loughnan (1893) 62 L. J. Ch. 515;
 [1893] 1 Ch. 786; 3 R. 592, 68 L. T. 619.—
 WRIGHT, J.

Huguenin v. Baseley, applied.
 Barron v. Willis (1900) 69 L. J. Ch. 532;
 [1900] 2 Ch. 121; 82 L. T. 729, 48 W. R. 579—
 C.A. LINDLEY, M. R., RIGBY and COLLINS, L.JJ.;

affirmed in H.L. See infra.
Huguenin v. Baseley and Scholefield v.
Templer (supra), referred to
 McCallum, in re, McCallum v. McCallum
 (1900) 70 L. J. Ch. 206, [1901] 1 Ch. 143, 89
 L. T. 717; 49 W. R. 129—C.A.

Barron v Willis (1899) 68 L J Ch 604, [1899] 2 Ch. 578; 81 L T 321, 48 W R. 26.—**COZENS-HARDY, J.** *reversed on a conclusion of fact.* (1900) 69 L J Ch 582, [1900] 2 Ch 121, 82 L T 729; 48 W R. 579.—**C. A. LINDLEY, M.R., RIGBY and COLLINS, L.Js.** *affirmed, now Willis v Barron* (1902) 71 L J Ch 609; [1902] A C 271, 86 L T 805.—**H.L. (B)**

Simpson v Lamb (1857) 7 El & Bl 84; 36 L J Q. B. 121, 3 Jur. (NS) 412; 5 W R 227.—**Q. B. approved.**
Davis v. Freethy (1890) 59 L J Q. B. 318; 24 Q. B. D. 518.—**C.A. COLERIDGE, C.J., TESSER M.R. and FRY, L.J.**

Allard v Skinner (1887) 56 L J Ch 1052; 36 Ch. D. 115, 57 L T. 61, 35 W R 251.—**C.A. LINDLEY and BOWEN, L.Js.**, *COITON, L.J.* *partly dissenting, adopted.*
Powell v Powell (1899) 69 L J Ch 134, [1900] 1 Ch. 218; 82 L T. 81.—**FARWELL, J.**

Allard v Skinner, applied
Wilton v Osborne (1901) 70 L J K. B. 507, [1901] 2 K B 110, 84 L T 694.—**RIDLEY, J.**

King v Hamlet (1831) 4 Sim. 223.—**V.-C.** *reversed*, 2 Myl. & K. 156; Coop t Brough 281, 9 L T (NS) Ch 243.—**C.** *the latter decision affirmed*, 3 Cl. & F. 218, 9 Bligh (NS) 575.—**H.L. (B)**

King v Hamlet, discussed
Talbot v Stanforth (1861) 1 J & H 500, 7 Jur. (NS) 961, 5 L T. 47, 9 W R. 827.—**V.-C.**

King v Hamlet, discussed
O'Booke v Bolingbroke (1877) 2 App Cas 811, 828, 26 W R 239.—**H.L. (B)**

Webster v Cook 36 L J Ch. 753, 15 W R. 140.—**M.R.** *reversed*, (1867) 36 L J Ch 755 L R 2 Ch. 542; 16 L T. 82; 15 W R. 1001.—**L.C.**

Gowland v De Faria (1811) 17 Ves 20, 11 R R 9, **Henden v Rosher** (1824) 1 M'Clell & Y 89; and **Potts v Curtis** (1832) 1 Younge 513, *explained.*
Aldborough (Earl) v Trye (1840) West 221, 7 Cl & F. 436.—**H.L. (B).** *See judgments*

Aldborough (Earl) v Trye, referred to.
Poster v Roberts (1861) 30 L J Ch 668, 29 Beav 467, 7 Jur. (NS) 400, 1 L T 760, 9 W R 605.—**M.R.**; and **Talbot v Stanforth** (1861) 1 J & H. 484; 7 Jur (NS) 961; 5 L T. 471; 9 W R. 827.—**WOOD, V.-C.**

Aldborough (Earl) v Trye, observed upon
Judd v. Green (1876) 45 L J Ch 108; 33 L T. 597.

BACON, V.-C.—Upon grounds of public policy it may be right that a needy, improvident youth who desires to raise money upon his expectancy for the purpose of discharging debts contracted in his nonage, or to furnish him with the means of indulging in luxury and extravagances, ought to be protected against the sordid and corrupt practices of persons who seek to make a profit out of such a man's inexperience, but this principle must be, as it always has been, applied with caution, and it has never yet been held that an expectant heir was incompetent to deal with his

interests for substantial purposes, or that the persons dealing with him could have their transactions impeached unless there was something so morally wrong as to make it necessary to discontinue their dealings upon grounds of public policy. It may be thought that some of the older cases went too far, and of this opinion was Lord Brougham, who in **Lord Aldborough v Trye** not only expressed doubts about the rule supposed to be deduced from **Gowland v. De Faria** (17 Ves 20), but observes that if any such rule was universally applicable, it would render an expectant heir unable to sell or deal with his expectancies at all

Aldborough (Earl) v Trye, discussed.
Nant-y-Gloe Ironworks Co v. Tynlon (1876) 35 L T. 125.—**BACON, V.-C.**, and **Fry & Lane** (1888) 58 L J Ch 113, 10 Ch. D 812, 60 L T. 12, 37 W R 135.—**KAY, J.**

Edwards v Burt (1852) 2 De G M & G 55, *referred to*
Foster v. Roberts (1861) (*supra*).

Edwards v Burt, commented on
Willoughby v. Bridgecock (1865) 11 Jur (NS) 524; 12 L T 173, 13 W R 515.—**V.-C.** *affirmed* 11 Jur (NS) 706, 13 L T. 141, 13 W R 1056.—**L.JJ.**

STUART, V.-C.—The rule [in **Edwards v. Burt**] had been reduced to an absurdity, for it had been said, that it was impossible to purchase a reversionary interest with safety, except under a sale by auction. That was, in short, the result of the decision in **Edwards v. Burt**—a result opposed to the understanding of every lawyer and man of common sense, and it was not to be wondered at that Lord St Leonards, in his 14th edition of **Vendors and Purchasers**, at p. 279, should say, after expressing his dissatisfaction with the rule, that that decision was much to be regretted.—p. 525.

2 FRAUDULENT CONVEYANCES.

French v French, 1 Jur. (NS) 840.—**V.-C** *reversed*, (1855) 25 L J Ch. 612, 6 De G M. & G 95, 2 Jur. (NS) 169; 4 W R. 139.—**L.C.**

Wood v Dixie (1845) 7 Q. B. 892, 9 Jur. 796, *approved*
Darvill v Terry (1861) 30 L J Ex. 355, 6 H & N 807.—**EX**

Wood v Dixie, commented on
Lynch v Copinger (1866) 14 W. R. 863.—**C.R. (IR)**

MONAHAN, C.J.—We cannot distinguish this case from **Wood v Dixie**. In that case, it might have been argued, as was done here, that notice to the grantee brings him within the statute. We think it is inferable from those cases that that view of the case was taken into consideration and decided upon. The words "intention to defeat" in Lord Denman's judgment in **Wood v Dixie** refer, we think, to the intention of both parties.—pp 863, 864. **KEOGH and O'HAGAN, JJ.** *concur.*

Wood v Dixie, explained and distinguished.
Moloney, In re (1887) 21 L R Ir. 27.—**C.A.**
SIR M. MORRIS—I do not quarrel with the decision in that case. It decides that it was a

wrong direction for the judge to give the jury, that the mere attempt to defeat one particular creditor, where money passed, and everything was *bona fide*, made the conveyance of the property void under the statute of Elizabeth. The decision is only that on the facts of the case the direction was bad. Why? Because the statute does not say that the deed shall be avoided when it constitutes a fraud that would defeat the creditors. But that implies that it is a fraud, and that it would defeat creditors. The Court only laid down in that case, as I understand it, that the mere defeating of a creditor was not sufficient to warrant such a direction by the judge, although it might afford good evidence for the jury to act on. But now, even taking that distinction, which goes to the very marrow of *Wood v. Dine*—a case which I think has often been cited to support propositions which it does not support—is there not here a parting with the £25 10s. for no good consideration at all? In *Wood v. Dine* there was a good consideration. . . . The £25 10s. was parted with for no consideration, and the £117 has followed suit with the £25 10s.—pp. 59, 51

Bethell v Stanhope (1599) Cro. Eliz. 810, and **Shears v Rogers** (1832) 3 B. & Ad. 362. 1 L. J. K. B. 89, *applied*

Mount, in 16, Kingston Cotton Mills Co. v. Mount (1899) 68 L. J. Ch. 390, [1899] 1 Ch. 831, 80 L. T. 406; 47 W. R. 506.—**STIRLING**, J.

Atkinson v Smith (1838) 1 Jur. (N.S.) 963.—V.-C., *reversed*, 3 De G. & J. 186, 28 L. J. Ch. 2, 4 Jur. (N.S.) 1160; 7 W. R. 42.—**L.J.**

Chamley v Dunsany (Lord) (1807) 2 Sch. & Lef. 690, 714.—**H.L.** (IR). See **Berwick Corporation v Murray** (1856) 26 L. J. Ch. 201, 208, 3 Jur. (N.S.) 1; 5 W. R. 208.—**L.C.**

Spencer v Slater (1878) 48 L. J. Q. B. 204; 4 Q. B. 13; 39 L. T. 424, 27 W. R. 134.—**Q. B.**, *distinguished*

Boklen v. London and Westminster Loan and Discount Co. (1879), 5 Ex. D. 47; 12 L. T. 56, 28 W. R. 154.—**EX. D.**

FOLLOCK, B.—The case before us is not like that of *Spencer v. Slater*, for there is this great distinction, that here the primary object was a transfer for purposes of sale as a going concern, and not for the purpose of carrying on the business (p. 51). . . . In *Spencer v. Slater* there was special circumstances. In the first place the deed contained not merely the ordinary resulting trusts as to the surplus which would be found in every deed, but a resulting trust, under which, at the expiration of twelve months, the debtor might apply to the trustees to be paid the dividends of creditors who neglected or refused to assent to or execute the deed, and then if the creditors did not within seven days assent or execute, the money was to be paid to the debtor. This was clearly much beyond the ordinary resulting trust, and then again, as I have already mentioned in that case, the primary trust was to carry on the business; here the principal object is to sell the business; and it is subsidiary to that object that power should be given to carry it on till the sale. In that case, too, there was a very special and general indemnity. It is quite right that trustees should be indemnified in certain cases, such, for instance, as their having to endorse bills of exchange, and

that is what is found in this case. The indemnity in *Spencer v. Slater* went very much further, and, from all circumstances of that case taken together, the Court came to the conclusion that they ought to draw the inference that the assignment was intended to defeat creditors, and was therefore void under the statute of Elizabeth. The circumstances here are, as I have pointed out, very different, and would not warrant us in arriving at the same conclusion—p. 52.

Spencer v Slater, commented on **Alton v Harrison** (1869) 38 L. J. Ch. 609; L. R. 4 Ch. 622, 21 L. T. 292, 17 W. R. 1094.—**L. J.**; and **Boldero v. London, &c. Discount Co.**, *followed*

Maskeyne v. Smith, Palmer, claimant (1902) 71 L. J. K. B. 476; [1902] 2 K. B. 158; 86 L. T. 832, 9 Manson 139.—**ALVERSTON, C.J.**, **DARLING** and **CHARNELL, JJ.**

ALVERSTON, C.J.—It is contended that the deed is void under 13 Eliz. c. 5, as tending to defeat and delay the execution creditors, because upon the face of it it reserves certain benefits for the debtor himself. In support of this contention *Spencer v. Slater* was cited, where the Court had to consider the effect of the statute 13 Eliz. c. 5 upon the validity of a deed which had been made in order to prevent an execution. That case cannot be regarded as laying down any general principle apart from its particular facts. It was not so considered in *Boldero v. London, &c. Discount Co.* It was decided without reference to *Alton v Harrison*, and is difficult to reconcile with that case and many others, if it decides that any benefit reserved to the debtor makes the deed void. The question is, is the deed a *bona fide* deed of arrangement, or is it a mere cloak to cover a very different transaction? If it is *bona fide*, then it is a good deed and not void within the statute of Elizabeth. Many composition deeds provide that the debtor's business may be carried on by him, and receive some ultimate benefit to the debtor. We are asked to say that all such deeds are bad on the face of them as against creditors who do not assent. I am not prepared to do so. *Alton v. Harrison* was recognised in *Boldero v. London, &c. Discount Co.*, and the result is that the mere omission of the execution creditors from this deed, although intentional, does not invalidate the deed—p. 478.

Jones v. Whittaker (1841) 1 Long & T. 1r. Ex. R. 141, *disapproved and not followed*

Doc d. Newman v. Rusham (1852) 17 Q. B. 723; 21 L. J. Q. B. 139; 16 Jur. 359.—**Q. B.** **CAMPBELL, C.J.**, who delivered the judgment of the Court—p. 730.

[*Jones v. Whittaker* is treated as overruled by *Wood, V.-C.*, in *Leura v. Rees* (1866) 3 K. & J. 132.]

Thompson v. Webster (1859) 4 Drew 628, 632, 7 W. R. 596, 5 Jur. (N.S.) 668.—**V.-C.** *affirmed*, 28 L. J. Ch. 700, 7 W. R. 648.—**L.J.**, *approved*

Doc d. Newman v. Rusham (1852) 17 Q. B. 723; 21 L. J. Q. B. 139. 16 Jur. 359.—**Q. B.**; and **Dolphin v. Aylward** (1870) 1, R. & H. L. 486, 500, 39 L. T. 696, 19 W. R. 49.—**H. L.** (IR), *applied*.

Godfrey v. Poole (1884) 57 L. J. P. C. 78; 18 App. Cas. 497; 68 L. T. 685; 37 W. R. 307.—**P.C.**

Thompson v Webster, *followed*

Tatley, In re, Jeffery, Ex parte (1891) 75 L. T. 166; 3 Manson 226, *affirmed* in G.A. on the facts

Prodgers v Langham (1668) Sud 133, *conceded*

Halifax Joint Stock Banking Co v Gledhill (1890) 60 L. J. Ch. 181, [1891] 1 Ch. 31, 63 L. T. 623, 39 W. R. 104

KAY, J.—The actual decision in *Prodgers v Langham* was that a lease for the benefit of a daughter, if she married with her father's consent, being voluntarily, would be void against a subsequent purchaser for value by virtue of the 27 Eliz. c. 14, but although so void it might be made effectual against such purchaser by a subsequent marriage of the daughter upon the faith of it. This seems to have proceeded upon the ground that the subsequent consideration of the marriage related back as though the settlement had been made upon the marriage. *George v. Milbanke* (9 Ves. 190) was a contest between the creditor of an appointor—who in his lifetime had exercised a general power of appointment over a fund in favour of a volunteer—and a purchaser after his death from the volunteer of £500, part of the appointed fund. By the equitable rule the exercise of the power made the appointed fund assets to pay debts of the appointor. Lord Eldon after much consideration held that the purchaser of the £500 had the better equity. There was no question under either 18 Eliz. c. 5 or 27 Eliz. c. 4, and Lord Eldon, treating *Prodgers v Langham* as a binding authority, and saying that there had been frequent decisions according to that case, points out that the purchaser there had the legal estate, which looks as though he regarded it as a decision under the equitable doctrine that the Court shall not take the legal estate from an innocent purchaser. In *Payne v Mortimer* (4 De G. & J. 447), Turner, L.J. in his judgment says this: "It was not denied by creditors of the settlor." This seems to be a clear recognition by Turner, L.J. that sect. 6 of 18 Eliz. c. 5 does protect a purchaser for value without notice of the interest devised under a settlement which the statute would make void against creditors as to other persons claiming under it.

Sprett v Willows (1865) 3 D. J. & S. 293, 84 L. J. Ch. 866, 11 Jur. (N.S.) 70, 11 L. T. 614, 13 W. R. 329—L.C. *dicta* questioned.

Freeman v. Pope (1870) L. R. 5 Ch. 538, 39 L. J. Ch. 689; 23 L. T. 208, 18 W. R. 906—L.C. and T.J.; *affirming* (1869) 39 L. J. Ch. 118, 18 W. R. 906, 21 L. T. 816—V.C.

HATHLELEY, L.C.—The Vice-Chancellor seems to have felt himself very much pressed by the case of *Sprett v Willows* and the dicta of Lord Westbury in that case. The first of those dicta is (3 D. J. & S. 802) "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." The Vice-Chancellor seems to have thought himself bound by this expression of opinion, and to have set aside the settlement upon that ground alone. It

is clear, however, that this expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of the case before him, where the settlor was guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large—p. 543.

GIFFARD, L.J.—In this case I quite agree with the Vice-Chancellor in thinking that if the propositions laid down in *Sprett v Willows* are taken as abstract propositions, they go too far and beyond what the law is, but if they are taken in connection with the facts of that case, then undoubtedly there is abundantly enough to support the decision; for there was a voluntary settlement by a man who at its date was solvent, but immediately afterwards realised the rest of his property and demanded himself of everything. Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so I do not think the Vice-Chancellor need have felt any difficulty about the case of *Sprett v Willows*, but he seems to have considered that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so—p. 544.

Barling v. Bishopp, 29 Beav. 417, 6 Jur. (N.S.) 812; 8 W. R. 631, *considered and distinguished*

Wise, In re, Mercer, Ex parte (1888) 55 L. J. Q. B. 558, 17 Q. B. D. 290, 54 L. T. 720—CAVE and GRANTHAM, JJ., *affirmed* in C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Northcliffe v Warburton, 3 Jur. (N.S.) 353, 6 L. T. 182, 10 W. R. 463—V.C. *reversed*, (1862) 4 De G. & J. 449; 31 L. J. Ch. 777, 10 W. R. 635—L.C.

Jones v. Croucher (1822) 1 Sim. & St. 315, and Voyle v. Hughes (1854) 23 L. J. Ch. 238, 2 Sim. & Giff. 18, 2 Eq. R. 42, 18 Jur. 341; 2 W. R. 113—V.C. See 56 & 57 Vict. c. 21.

Doe d. Otley v. Manning (1807) 9 East 59, 9 R. R. 503. See 56 & 57 Vict. c. 21, s. 2.

3 EFFECT OF

Flower v Lloyd (1879) 10 Ch. D. 327; 36 L. T. 613, 27 W. R. 496—G.A., *conceded* on

Abouloff v Oppenheimer (1882) 10 Q. B. D. 295, 62 L. J. Q. B. 1, 7; 47 L. T. 326, 328, 31 W. R. 57—C.A. COLLIERIDGE, C.J., BAGGALLAY and BRETT, L.JJ.

BRETT, L.J.—With one exception, none of the authorities cited before us in the least militate against our decision. They all seem to show that the fraud of a party to a suit is an extrinsic and collateral act which will vitiate the judgment. The exception is to be found in the doubts expressed by James, L.J., with the assent of Thesiger, L.J., in *Flower v Lloyd*. It seems to me that the fraud alleged in that action was probably fraud on the part of certain servants of the party, and not fraud brought home to the party himself, moreover, it was, as I understand fraud committed, not before the Court itself at the trial of the action, but previously to the only being brought to a hearing before the Court. It is to be taken that the doubts of James and Thesiger, L.JJ. related to a fraud of a party to the action committed before the Court itself for

the purpose of deceiving the Court, I cannot, after having heard the pre-ent argument, agree with the doubts expressed by them. These doubts are not binding, and no decision as to the effect of fraud was pronounced by these lords justices in *Flower v Lloyd*—p 807

Exton v Scott (1833) 6 Sim 31—v-c, explained

Clucknell v Janson (1879) 11 Ch. D 1, 48 L. J. Ch 168, 40 L. T. 640, 27 W. R. 851

FRY, J.—“There is one other observation which I ought to make before parting with this part of the case [i.e., fraud and voidance of the mortgage], viz., that *Exton v Scott* appears to me not to be an authority governing the present case, for the reason pointed out by Mr. Cookson. There the grantor was not insolvent when he executed the deed, and he remained in a state of solvency for twelve years afterwards. The Vice-Chancellor, therefore, held that the statute 13 Eliz. c. 5 did not apply—p 11 [Affirmed on appeal.]

Clarke v. Dickson (1858) E. B. & E. 148, 27 L. J. Q. B. 225, 4 Jur. (N.S.) 715—Q.B., distinguished

Heal v. Tattersall (1871) 41 L. J. Ex. 4, L. R. 7 Ex. 7, 25 L. T. 681, 20 W. R. 115—EX.

Clarke v. Dickson, approved

Urquhart v. Macpherson (1878) 8 App. Cas. 881—P

SIR MONTAGUE SMITH (for J. C.)—Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is, or may be, injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be re-issued to his former state. If authority were wanted in support of a principle so common as to that to which their lordships have adverted, it may be found in the case which is referred to in the judgment of the Court below (*Clarke v. Dickson*). In that case, Crompton, J. says—“When once it is settled, before the contract,—p 838

Onions v. Cohen (1865) 2 H. & M. 354, 361, 34 L. J. Ch. 338, 11 Jur. (N.S.) 198, 12 L. T. 15—v-c, dictum disapproved

Panama and South Pacific Telegraph Co. v. Indanubler and Telegraph Works Co. (1875) 32 L. T. 238, affirmed 45 L. J. Ch. 121; L. R. 10 Ch. 515, 32 L. T. 517, 23 W. R. 583—L.J.

MALINS, V.-C., expressed his disapproval of the dictum of Wood, V.-C. in *Onions v. Cohen*, that “except in the case of *Gauvin v. Stone* (14 Ves. 129), there is no instance of a contract being delivered up to be cancelled, unless there was fraud in obtaining the contract itself.”

Haslock v. Fergusson (1837) 7 A. & E. 86; 2 N. & P. 289; 6 L. J. K. B. 247; 1 Jur. 689—K.B., approved

Pearson v. Seligman (1883) 48 L. T. 812, 31 W. R. 780—C.A. BAGGALLAY, COTTON and BOWEN, L.J.

Clough v. L. & N. W. Ry. (1871) 41 L. J. Ex. 17, L. R. 7 Ex. 267, 25 L. T. 708, 20 W. R. 189—EX. CH., referred to

Scarfe v. Jardine (1882) 51 L. J. Q. B. 612, 7 App. Cas. 345; 47 L. T. 258, 30 W. R. 893—H.L. (E.). **JAMES R. YOUNG** (1884) 63 L. J. Ch. 793; 27 Ch. D. 652; 51 L. T. 75, 32 W. R. 981—

NORTH, J., and **Allcard v. Skinner** (1887) 56 L. J. Ch. 1052, 35 Ch. D. 145, 57 L. T. 61, 36 W. R. 251—C.A. **LINDLEY** and **BOWEN, L.J.**, **COTTON, L.J.**, partly dissenting.

Clough v. L. & N. W. Ry., followed.

Murray, In re. Dickson v. Murray (1887) 57 L. T. 223—STIRLING, J.

Clough v. L. & N. W. Ry., Smith v. Kay

(1859) 7 H. L. C. 750, 759, 30 L. J. Ch. 15—H.L. (E.). **PULSFORD v. Richards** (1853) 22 L. J. Ch. 559, 562, 17 Den. 87, 17 Jur. 865, 1 W. R. 295—M.R., and **Moorehouse v. Woolfe** (1882) 4 Q. B. 371—KAY, J., referred to

Gordon v. Street (1899) 69 L. J. Q. B. 15; [1899] 2 Q. B. 611; 81 L. T. 237, 48 W. R. 158—C.A. **SMITH, RIGBY** and **WILLIAMS, L.J.**

Clough v. L. & N. W. Ry., followed

Levin v. O'Keefe (1900) [1900] 2 Ir. R. 628—Q.B.D.

Clough v. L. & N. W. Ry., referred to.

Wilton v. Osborn (1901) 70 L. J. K. B. 507, [1901] 2 K. B. 116; 84 L. T. 694—RIDLEY, J.

4 FRACTION.

MacKay v. Douglas (1872) 41 L. J. Ch. 539, L. R. 14 Eq. 106; 26 L. T. 721; 20 W. R. 652—v-c, approved and followed

Batterworth, In re. Russell, Ex parte (1882) 19 Ch. D. 588, 51 L. J. Ch. 521, 46 L. T. 113; 30 W. R. 584—C.A. **JESSEL, M.R.**, **BAGGALLAY** and **LINDLEY, L.J.**

JESSEL, M.R.—“The principle of *MacKay v. Douglas* and that line of cases is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: ‘If I succeed in business, I make a fortune for myself. If I fail I leave my creditors unpaid. They will bear the loss.’ That is the very thing which the statute of Elizabeth was meant to prevent. The object of the settlor was to put his property out of the reach of his future creditors. He contemplated engaging in this new trade, and he wanted to preserve his property from his future creditors. That cannot be done by a voluntary settlement. That is, to my mind, a clear and satisfactory principle (p. 598). . . [In the present case] his object was to make himself safe against that eventuality [non-success of the business], and, if that was his object, then I think the principle of *MacKay v. Douglas* applies, and that the deed was void also under the statute of Elizabeth—p. 599

Deere v. Guest (1896) 1 My. & C. 516, 6 L. J. Ch. 69—L.C., corrected.

Perks v. Great Wycombe Ry. (1862) 8 Hoff. 662, 8 Jur. (N.S.) 1051, 7 L. T. 150, 10 W. R. 788.

STUART, V.-C.—I have already said in the course of the argument that there is a great mistake in the marginal epitome of that case, and that there is not one word in Lord Cottenham’s judgment to justify so extraordinary a proposition as that this Court will not interfere against a possession fraudulently taken, whether the works are constructed or not. Looking at Lord Cottenham’s judgment the grounds of it appear perfectly plain. The case of *Deere v. Guest* was decided on demurrer, and the only

question was whether, on the allegations in the bill, there was enough to show that the plaintiff would be entitled, on his case stated, to relief in a Court of equity; and Lord Cottonham thought not, because what was claimed by the defendants was simply a right of way, and the case stated by the bill was a state of mere trespass, and upon that ground, on demurrer, he affirmed the judgment of the V-C of England by which the demurrer was allowed.

Deere v. Guest, commented on

Gibson v. Richardson (1874) L. R. 9 Ch. 221; 43 L. J. Ch. 740; 30 L. T. 142; 22 W. R. 337.—G.A.

SALDORN, L.C.—The other class of cases is that exemplified by *Deere v. Guest*, which, when rightly considered, amounted to neither more nor less than an action of ejectment brought in the Court of Chancery without any equitable circumstances to induce that Court to assume jurisdiction. [His lordship having stated the facts, continued.] In that state of circumstances Lord Cottonham thought—and in my judgment was quite right in thinking—that there was no equity to interfere, and that the case was a simple attempt to transfer the jurisdiction in ejectment from law to equity.—p. 225

Pasley v. Freeman (1789) 3 Term Rep. 51;

1 R. R. 634, *quod* cited.

Evans v. Bicknell (1801) 6 Ves. 174; 5 R. R. 215.

ELDON, L.C.—It is almost impossible at this day to say anything having a tendency to shake it [the above case], but I know Grose, J. very lately held the same opinion as he did at the time of the judgment. The doctrine laid down in that case is in practice and experience most dangerous.—p. 186.

Pasley v. Freeman, approved

Evans v. Bicknell, disapproved.

Clifford v. Brooks (1808) 13 Ves. 131

ERSKINE, L.C.—With regard to *Pasley v. Freeman*, a considerable difference of opinion prevails; and some of the most correct judgments appear to me to have been surprised. My opinion upon this species of action does not concur with that of Lord Eldon as expressed in the case of *Evans v. Bicknell*, which opinion, against that action, I know his lordship constantly held in the Court of Common Pleas. The mistake of those who invade the principle of that action, consists in this. The proposition is not, that, if a man asked, whether a third person may be trusted, answers, "you may trust him, he is a very honest man, and worthy of trust," an action will lie, if he proves otherwise. There must be the knowledge at the time. That is the sound principle; that the defendant knowing that person to be dishonest, insolvent, and unworthy of trust, made the representation, and that is the subject of an action, or of a bill in equity, where it is necessary and fit, that equity should interpose the concurrent jurisdiction. . . . That case of *Pasley v. Freeman*, therefore, stands upon the clearest principles of jurisprudence.—p. 182.

Pasley v. Freeman and Hayercraft v. Greasy

(1801) 2 East 92, 6 R. R. 380, *applied*

Collins v. Evans (1841) 5 Q. B. 820.—EX. CH.

Evans v. Bicknell (*supra*), *approved*.

Allen v. Knight (1846) 15 L. J. Ch. 480; 5 Hare 272—WIGRAM, V.-C.

Pasley v. Freeman and Evans v. Bicknell, *discussed and applied*

Ramshire v. Bolton (1869) 38 L. J. Ch. 594, L. R. 8 Eq. 294, 21 L. T. 51, 17 W. R. 986.—V.-C.

Evans v. Bicknell and Ramshire v. Bolton, *referred to*.

Hill v. Lane (1870) 40 L. J. Ch. 41, L. R. 11 Eq. 215, 23 L. T. 547, 19 W. R. 194.—V.-C.

Evans v. Bicknell, explained

Northern Counties of England Fire Insurance Co. v. Whipp (1884) 53 L. J. Ch. 629, 26 Ch. D. 482, 51 L. T. 806, 32 W. R. 626.—C.A.

Pasley v. Freeman; Chandelor v. Lopus

(1580) Cro. Jac. 4; 1 Dyer 75, a; *Hayercraft v. Greasy* (*supra*); *Foster v. Charles* (1890) 6 Bing. 396, 7 Bing. 105; 4 M. & P. 61, 741, 8 L. J. (O.S.) C. P. 118; 31 R. R. 446, *Moore v. Heyworth* (1841) 10 M. & W. 147, 157; 10 L. J. Ex. 177, and *Edgington v. Fitzmaurice* (1885) 55 L. J. Ch. 650, 29 Ch. D. 459, 53 L. T. 869, 33 W. R. 911, 50 J. P. 52.—C.A. COTTON, BOWEN and FRY, L.J., *referred to*.
Derry v. Peek (1880) 58 L. J. Ch. 864, 14 App. Cas. 337, 61 L. T. 265, 38 W. R. 33; 1 Meg. 292, 54 J. P. 148.

LORD HERSHELL.—I think the authorities establish the following propositions. First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. . . . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial.

Pasley v. Freeman, dicta adopted.

Allen v. Flood (1897) 67 L. J. Q. B. 119, [1898] A. C. 1, 77 L. T. 717; 46 W. R. 258.—H.L. (E.).

Taylor v. Ashton (1843) 12 L. J. Ex. 363;

11 M. & W. 401; 7 Jur. 975.—EX., *considered*.

Eastwood v. Bain (1856) 28 L. J. Ex. 74; 3 H. & N. 788, 7 W. R. 90.—EX., and *Derry v. Peek* (1880) (*supra*)

Thom v. Bigland (1858) 8 Ex. 725; 23 L. J.

Ex. 243, 1 W. R. 290.—EX., *corrected*.
Liverpool Adolph Loan Association v. Fairhurst (1854) 9 Ex. 422, n., 8 C. 3 C. L. R. 512; 23 L. J. R. 163; 18 Jur. 191, 2 W. R. 233.

[*Note by Reporter.*—There is an unfortunate misprint in the judgment of Parke, B., at p. 751, four lines from the bottom, of the improper substitution of "or" for "and".]—p. 426.

Richardson v. Silvester (1873) 43 L. J. Q. B.

1; L. R. 9 Q. B. 34; 29 L. T. 395, 22 W. R. 74.—Q.B., *distinguished*.

Ajello v. Worsley (1898) 67 L. J. Ch. 172, [1898] 1 Ch. 274; 77 L. T. 788, 46 W. R. 245.—STIRLING, J.

Chessman v Exall (1861) 20 L J Ex 209, 6 Ex 341, *applied*.
Bridle v Bond (1865) 34 L J Q B 137; 6 B. & S. 225, 11 Jur. (N.S.) 425; 12 L T 178.
 13 W. R. 661.—Q B

Bridgman v Green (1755) 2 Ves Sen 627, *applied*

Huguenin v Basilev (1807) [*ante*, col 1156]; **Lyon v Home** (1868) 37 L J Ch 674; L R 6 Eq. 655, 680.—V. C. **Conlwas v Swan** (1871) 19 W. R. 486; **Vane v Vane** (1873).—L.J. [*ante*, col 1156]; and **Moxon v Payne** (1873) 43 L J Ch. 240; L R 8 Ch 881, 886.—L.J.

Bridgman v Green, *distinguished*
McCallum, In re, **McCallum v McCallum** (1900) 70 L J Ch 206. [1901] 1 Ch. 143; 83 L T 717, 49 W R 120.—CA. **RIGBY, L.J.** *dissenting*.

Bridgman v Green, *adopted*
Turnbull v Daval (1902) 71 L J P C 84, [1902] A C 429; 87 L T 154.—P. C.

FRIENDLY SOCIETY.

Peat v Fowler (1886) 35 L J Q B 271; 33 W. R. 365.—GROVE and STEPHEN, JJ. *See* Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8.

Newbold Friendly Society v Barlow (1893) 62 L J M C 124; [1893] 2 Q B 123, 6 R 435; 68 L T 708, 41 W R 543; 67 J P. 656.—COLERIDGE, C.J., and CAVE, J. *See* Friendly Societies Act, 1896, s. 62

Vernon v Watson (1891) 60 L J Q B 472; [1891] 2 Q B 288, 64 L T 728, 59 W R 520; 66 J P. 85.—CA. **HALESBURY, L.C.**, **ESHER, M.R.** and **FRY, L.J.** *See* Friendly Societies Act, 1896, s. 87.

Lloyd v Learing (1892) 6 Ves 778.—KLDON, L.C. *dissuade*.
Clough v Ratcliffe (1847) 16 L J Ch. 476; 1 De G. & Sm. 164; 11 Jur. 648.—KNIGHT BRUCE, V. C.

Clough v Ratcliffe, *referred to*.
Hodges v Wale (1853) 2 W. R. 65.—WOOD, V. C.

Clough v Ratcliffe, *held overruled*.
Hull v McFarlane (1857) 2 C B. (N.S.) 796; 27 L J C P 41; 5 Jur. (N.S.) 1262.—C.P.
WILLES, J.—I think that case has been overruled in a recent case, where the L.J.J. held that a Court of equity may entertain a suit merely to declare a will valid.—p. 803

Watts v Kent JJ. (1866) 35 L J M C 190, 14 L T 448; S. C. *note*. **Reg. v. Lamberde**, L R 1 Q B. 388; 14 W R. 680, *overruled*.
Callaghan v. Dolliven (or *Dolwin*) (1869) 38 L J M C 110; L R 4 C P. 288; 21 L T 827, 17 W R. 738.—M SMITH, J. (for the Court)

Prentice v London (1875) 41 L J O P 353, L R 10 C P 679, 33 L T 251.—C.P.; and **Willis v Wells** (1892) 61 L J Q B. 606, [1892] 2 Q B 225, 67 L T 316; 41 W. R. 64, 56 J. P. 775.—GHANTHAM and CHARLES, JJ. *approved*.

Palliser v Dale (1897) 66 L J Q B 286; [1897] 1 Q B 257, 76 L T 11, 45 W R 291.

—C A
ESHER, M.R.—Before the passing of the Friendly Societies Act, 1895, it was held in **Willis v Wells**, following the decisions in **Prentice v London** and **Morvay v Glover** (1810) 19 L J. Ex. 20, 4 Ex. 430, 14 J P. 81.—IX And *see* "BUILDING SOCIETY," under earlier Acts, that under sect. 22 of the Friendly Societies Act, 1875, where a dispute arose between a person who had been a member of a registered society and the society, as to whether the society had a right to expel him, which they had assumed to do, the dispute was not one which had to be decided by virtue of the section in the manner directed by the rules of the society, and that the jurisdiction of the High Court was not ousted. For the reasons given in those cases I am of opinion that they were rightly decided. . . Those decisions really come to this—that if a society chooses to expel a member, it is estopped from afterwards saying that he is a member, and therefore bound by the rules. . . The decisions are equally applicable under the later Act (Friendly Societies Act, 1895 (58 & 59 Vict. c. 25), s. 10), and the plaintiff cannot be shut out from his right to have the dispute adjudicated upon by the High Court.—p. 239
LOPES, L.J. to the same effect.

And see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68

Whitmore v Smith (1860) 29 L J. Ex. 402; 5 H & N 824.—XX, *reversed*, (1861) 31 L J Ex 107, 7 H. & N. 509, 8 Jur. (N.S.) 614, 6 L T. 618, 10 W. R. 253.—XX. CH

Braddick v Thompson (1807) 8 East 844; 15 R R. 781, and **Whitmore v Smith**, *dissuade and applied*

Thorburn v Barnes (1867) 34 L J C P 184; L R 4 C P. 884, 16 L T. 10, 15 W. R. 623.—C.P.

Whitmore v Smith and Thorburn v Barnes, *applied*
Reg. v. Grant (1849) 19 L J M C. 59, 11 Q B. 43; 4 New Sess Cas 13; 13 Jur. 1026.—Q B. *distinguished*.
Bache v Dillingham (1893) [1894] 1 Q B. 107; 63 L J M C 1, 9 R 79, 60 L T. 648; 42 W R. 217; 58 J. P. 181.—C.A.; *reversing* 62 L J M C 117; 69 L T 322, 37 J P. 778.

POLLOCK, D. and **KENNEDY, J.**
ESHER, M.R.—The Divisional Court have treated the matter as a case within the judgment in **Reg. v. Grant**. I think the Court misconstrued the decision in that case, for the jurisdiction of the arbitrators thus depended upon a condition precedent which must have existed before they could enter upon the arbitration so as to decide it. The justices were therefore right in inquiring into those preceding facts, in order to determine whether they existed, so as to give them jurisdiction or not. That is not the case here. There is no such preliminary fact to be inquired into.—p. 111.

LOPES and RAY, T.J., to the same effect
See Friendly Societies Act, 1896 (59 & 60 Vict. c. 26), s. 68.

Yeates v. Roberts (1855) 3 Drew 170, 1 Jur (N.S.) 319—KINDERSLEY, V.-C. *affirmed*, (1855) 7 De G. M. & G. 227, 3 W R 461—TURNER and KNIGHT BRUCE, L.JJ

Atkins, In re, Edmonds, Ex parte (1882) 51 L. J. Ch. 496; 46 L. T. 240; 30 W R 132.—BACON, C.J., *approved*.

Official Receiver, Ex parte, Miller, In re (1898) 62 L. J. Q. B. 324, [1898] 1 Q. B. 327, 4 R 256, 68 L. T. 367, 41 W. R. 243, 10 Mourll 21; 67 J. P. 469.—O A. ESHER, M.R., LINDLEY and A. L. SMITH, L.JJ.

Att.-Gen. v. Abdy (1862) 32 L. J. Ex. 9; 1 H. & C. 268, 8 Jur. (N.S.) 798, 6 L. T. 756.—R., *discussed*.

Phillips' Insurance, In re (1883) 52 L. J. Ch. 441, 28 Ch. D. 235, 48 L. T. 81; 81 W. R. 511.—O A. JESSUP, M.R., SIR J. HANSEN and LINDLEY, L.J.

Att.-Gen. v. Abdy and Phillips' Insurance, In re, *discussed*
Caddick v. Highton (*post*)

Ashby v. Costin (1888) 57 L. J. Q. B. 491, 21 Q. B. D. 401, 59 L. T. 224, 87 W. R. 140, 53 J. P. 69—CAVE and GRANTHAM, JJ., *commented on*.

Davies, In re, Davies v. Davies (1892) 61 L. J. Ch. 535; [1892] 3 Ch. 63, 67 L. T. 548; 41 W. R. 128.—NORTH, J.

Ashby v. Costin, *referred to*

Bennett v. Slater (1898) 68 L. J. Q. B. 45, [1899] 1 Q. B. 45; 79 L. T. 324; 47 W. R. 82.—O A. A. L. SMITH, RIGBY and COLLINS, L.JJ; *reversing* 67 L. J. Q. B. 328, [1898] 1 Q. B. 469.—MATHEW, J.

RIGBY, L.J.—I think that the case which was cited—*Ashby v. Costin*—almost amounts to an authority, because there, according to the rules of the society, the committee claimed a right to exercise a discretion as to the payment of the amount of a death allowance unless the person, who was a member of the society, should bequeath it by will.—p. 48

Bennett v. Slater, *applied* And see *post*

Caddick v. Highton (1899) 68 L. J. Q. B. 281; [1901] 2 Ch. 476, n, 80 L. T. 627, 47 W. R. 668; 16 Times L. R. 182.—PHILLIMORE, J.

Caddick v. Highton, *followed*.

Redman, In re, Warton v. Redman (1901) 70 L. J. Ch. 669; [1901] 2 Ch. 471; 85 L. T. 18, 65 J. P. 636.—KEREWICH, J.

Caddick v. Highton and Redman, In re, Warton v. Redman, *overruled*.

Bennett v. Slater (*supra*), *explained*.

Griffin, In re, Griffin v. Griffin (1901) 71 L. J. Ch. 112, [1902] 1 Ch. 133, 86 L. T. 38, 50 W. R. 260.—O A. V. WILLIAMS, ROMER and COLLENS-HARDY, L.JJ

Wilmot v. Grace (1892) 61 L. J. Q. B. 498, [1892] 1 Q. B. 812, 66 L. T. 287, 40 W. R.

350, 56 J. P. 392—CAVE and WRIGHT, JJ
See Friendly Societies Act, 1896, s. 80

Phillipsen v. Hale (1890) 43 L. T. 507, 45 J. P. 59.—DENMAN and LINDLEY, JJ.
See Societies' Borrowing Powers Act, 1898 (61 & 62 Vict. c. 15)

GAME.

Sutton v. Moody (1897) 1 Ld. Raym. 250, *commented on*.

Blades v. Higgs (1865) 11 H. L. Cas. 621, 20 C. B. (N.S.) 214, 34 L. J. C. P. 286, 11 Jur. (N.S.) 701; 12 L. T. 615; 13 W. R. 927

LORD CHELMSFORD.—As animals *feræ naturæ* when killed or reduced into possession by the owner of land where they are found, or by his authority, become instantly his property, does the unauthorised act of a trespasser by the very fact of killing them, convert them at once to the use of the owner of the land? To this question Lord Holt, according to the case which he puts in *Sutton v. Moody*, would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him. . . But I cannot so easily discover the principle upon which he proceeds when he said, that "if A starts a hare on the ground of B, and hunts it into the ground of C and kills it there, the property is in A, the hunter, but A is liable to an action of trespass for hunting in the grounds as well of B, as of C". . . It would appear to me to be more in accordance with principle, to hold that, if the trespasser deprived the owner of the land where the game was started, of his right to claim the property, by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner, and not for himself. But the first proposition started by Lord Holt, with respect to game started and killed on the land of the same owner, is free from all difficulty, and is sufficient to dispose of the present question. The case of *Sutton v. Moody* has always been regarded as an authority on this point, and as far as I can ascertain, has never been questioned. It was recognised in *Churchward v. Studdy* (14 East 210), in *Grashaw v. Ewart* (11 Ex. 328, 1 H. & N. 560; 7 H. L. Cas. 331); by Martin, B. in *Rigg v. Lord Lowdale* (11 Ex. 654); and in this last case when before the Court of Error (1 H. & N. 923). Coleridge, J. said, "The grouse shot" (*i.e.*, shot by the defendant, a wrongdoer) "on the land of the plaintiff, belonged to him according to all the authorities"—p. 639.

Blades v. Higgs.

See

Reg. v. Roe (1870) 22 L. T. 414, 415, 11 Cox C. C. 554; Reg. v. Townley (1871) 40 L. J. M. C. 144, 1 R. 1 C. C. 316, 317, 24 L. T. 517; 19 W. R. 72; 12 Cox C. C. 59.—C.C.B., Brew v. Haren (1874) 1 R. 9 C. L. 29.—EX., *affirmed*, 1 R. 11 C. L. 198.—EX. CH.—Reg. v. Petch (1878) 38 L. T. 788.—C.C.B., Elwes v. Briggs Gas Co. (1886) 55 L. J. Ch. 734; 33 Ch. D. 562, 568, 55 L. T. 831, 85 W. R. 192.—CHITTY, J.; Brady v. Warren [1900] 2 Ir. R. 682, 613.—Q.B.D.; Threlkeld v. Smith (1901) 70 L. J. K. B. 921; [1901] 2 K. B. 581, 85 L. T. 275; 50 W. R. 158.—RIDLEY and BIGHAM, JJ.

Hannam v Mockett (1824) 2 B & C 931, 4 D & R 518, 2 L J (OS) K B 188, *quoted*.
Read v Edwards (1864) 17 C B. (NS) 245, 34 L J C P 81, 11 L T 311, 6 N R 48—C P

Beardmore v Meakin (1885) L J Notes of Cases (1884) 8, *applied*.
Stanton v Brown (1900) 69 L J Q B 301, [1900] 1 Q B 671, 48 W R 333, 64 J P 326.—CHANNELL and BUCKNILL, JJ

Birkbeck v. Paget (1862) 31 Beav 403, *referred to*.
Farier v Nelson (1887) 54 L J Q B 385, 15 Q B D 258, 52 L T 786, 38 W R 800, 49 J P 725.—POLLOCK, B and DAY, J

Smith v Hunt (1885) 51 L T. 422, 16 Cox C C 51, 50 J P 279—MATHEW and SMITH, JJ, *considered*.
Anderson v Vicar (1900) 69 L J Q B 713, [1900] 2 Q B 287, 88 L T 15, 48 W R 699.—C A WILLIAMS and ROMER, JJ.; **SMITH, LJ** *dictating*, *affirming* 68 L J Q B 970, [1899] 2 Q B 436, 81 L T 358—WRIGHT, J.
A L SMITH, LJ—In my judgment the Act [Ground Game Act, 1881] was passed throughout in the interests of tenants, and of tenants alone, and can only be brought into play in cases where a landlord and an agricultural tenant both exist, and then interests with regard to the ground game are antagonistic. That was the view of the Act taken by Mathew, J and myself in *Smith v Hunt*.—p 717.

WILLIAMS, LJ—The statute provided that the occupier should always have the right given by sect. 1 to kill and take ground game, and that that statutory right should be inseparable from the occupation of the land. It is quite true that the right is given subject to limitations and conditions, and I quite agree that these limitations and conditions are wholly inapplicable to the case of a landowner occupying his own land and retaining the right of shooting. It is for that reason that I think that *Smith v Hunt* was absolutely correctly decided. . . But where a landlord in occupation of his own land has parted with the right of shooting I cannot see that the conditions are inapplicable. In such a case it seems to me that the landlord occupier is entitled to the statutory right to kill game, and that the conditions are not only not applicable, but are proper.—p 718

Gundry v Feltham (1786) 1 Term Rep. 334; 1 R R. 215, *discussed*.
Paul v Summerhayes (1878) 48 L J M C 38, 4 Q B D 9, 27 W R. 215, 39 L T 574; 14 Cox C C 292—Q B D.

Carrington v. Taylor (1809) 11 East 571; 2 Camp. 258, 11 R R. 270, *principle applied*.
Ibbotson v Pext (1865) 84 L J. Ex 118, 3 H. & C 644, 11 Jur. (NS.) 894, 12 L T 313, 13 W R 691.—EX.

Carrington v Taylor, overruled.
Keeble v Hickeringill (1706) 11 East 574, n, 11 R R 273, n., *commented on*.
Allen v Flood (1897) 67 L J Q B 119, [1898]

A C 1, 77 L T. 717; 16 W R 258; 62 J P. 395—H L (K) LORDS WATSON, HERSCHILL, DAVEY, MACNAGHTEN, SHAND, DAVEY and JAMES. LORDS HATSBURY, G., ASHBOURNE and MORRIS, *dissenting*.

LORD HERSCHILL—It (*Keeble v Hickeringill*) is, however, treated in their opinions by the majority of the learned judges as establishing the wide and far-reaching proposition that every man has a right to pursue his trade or calling without molestation or obstruction, and that anyone who by any act, though it be not otherwise unlawful, molests or obstructs him is guilty of a wrong unless he can show lawful justification or excuse for so doing. The case of *Keeble v Hickeringill* was decided about two centuries ago, but I cannot find that it has ever been treated, unless it be quite recently, as establishing the broad general proposition alleged. . . *Carrington v Taylor* was also relied on by the respondents. It is, I believe, the only case which has been expressly based on *Keeble v Hickeringill*. The plaintiff there possessed an ancient decoy, and the defendant sought his livelihood by shooting wild fowl from a boat on the water, for which boat with small arms, he had a licence from the Admiralty for fishing and coasting along the shores of Essex. The decoy was near a salt creek where the tide ebbs and flows. The only proof of disturbance of the decoy by the defendant was that, being in his boat shooting wild fowl in a part of the open creek, he had fired his fowling-piece, first within a quarter of a mile of the decoy and afterwards within 200 yards of it, and had killed several wildgeese. The judge left these facts to the jury as evidence of a wilful disturbance of the plaintiff's decoy by the defendant. The jury returned a verdict for 40s. damages, and the Court, on the motion for a new trial, refused to disturb the verdict. They gave no reasons for their judgment. Unless a decoy possesses some peculiar privileges in the eye of the law, I confess myself quite unable to understand why the defendant was liable to an action or was not within his rights in shooting the wild fowl at the place he did for the purpose of gaining a livelihood, which is stated to have been his object. In any case the decision affords no support to the contention now under consideration.

Clarke v Crowder (1869) 88 L J. M. C. 118; 1 R. & C P. 688; 17 W R 827.—Q F, *followed*.
Turner v Morgan (1876) 44 L J. M. C. 161, 1 R 10 C P 587, 33 L T. 172; 28 W R 656.—Q F

Clarke v. Crowder and Turner v Morgan, commented on.
Lloyd v Lloyd (1835) 14 Q. B. D. 725, 58 L T. 636; 33 W R 457, 15 Cox C C. 767; 49 J P. 630—MATHEW and SMITH, JJ.
SMITH, J—In *Turner v Morgan* there was no search, but Brett, J is reported to have repeated what he said in the former case (*Clarke v Crowder*). But it was not necessary in this last-mentioned case to decide whether the seisure and detainer must be in a highway, for there was no finding of game on the appellant, and consequently no legal seizure and detainer at all. The game was found in the possession of some one else, and none of the matters required to give jurisdiction existed. I think that if Brett, J.

and had the effect of such a decision—namely, but the statute would be rendered nugatory in the way I have pointed out [by making it possible for a man who has been scatched to evade the statute by afterwards throwing the game over a hedge, or into a ditch by the side of the highway]—present to his mind, he would not have used the expressions he is reported to have used.—p. 729

GAMING AND WAGERING.

LAWFUL AND UNLAWFUL GAMES

Rex v. Rogier (1823) 1 B. & C. 272, 2 D. & R. 481; 25 R. R. 393.—Q. B., and **Applegarth v. Colley** (1842) 10 M. & W. 723, 12 L. J. Ex. 34; 7 Jur. 18.—EX., *dicta* adopted.

Jenks v. Turpin (1880) 53 L. J. M. C. 161, 13 J. B. 11, 505, 50 L. T. 808; 15 Cox C. C. 486, 19 J. P. 20.—HAWKINS and SMITH, JJ.

Jenks v. Turpin, *followed*.

Fairclough v. Whitmore (1895) 64 L. J. Ch. 86; 13 R. 402, 72 L. T. 351, 43 W. R. 121.—TIRLING, J.

WAGERS.

Sharp v. Taylor (1848) 2 Ph. 801.—L.C., *considered*.

Johnson v. Lansley (1852) 12 C. B. 168, *applied*.

Beeston v. Beeston (1875) 45 L. J. Ex. 230, 1 Ex. D. 13, 24 W. R. 96.

Johnson v. Lansley and Beeston v. Beeston (1875) 45 L. J. Ex. 230; 1 Ex. D. 13, 33 L. T. 700, 24 W. R. 96.—EX. D., *disapproved*.

Higginson v. Simpson (1877) 2 C. P. D. 76; 46 L. J. C. P. 192, 36 L. T. 17; 25 W. R. 303.—J. P. D.

DENMAN, J. (for the Court).—In the case of *Beeston v. Beeston*, which was most relied upon, the Court only held that the plaintiff could recover on a cheque given by defendant to the plaintiff for the amount of moneys received by the defendant for winnings on bets made by the defendant with third persons, as agent for the plaintiff. This was held not to be the case of an action upon a contract by way of wagering, but of one brought upon a cheque, given for money received by the defendant for which he was liable to account to the plaintiff. *Johnson v. Lansley* (12 C. B. 168), was a similar case, and is no authority for the plaintiff in the present case, who sues upon the contract itself.—p. 79.

Sharp v. Taylor, *dicta* disapproved.

Tenant v. Elliott (1797) 1 Bos. & P. 2, 4 R. R. 526, *disapproved*.

Sykes v. Beeston (1879) 11 Ch. D. 170, 48 L. J. Ch. 322, 40 L. T. 218, 27 W. R. 461.—M. R.

JESSEL, M. R.—I must say, speaking with some hesitation, as I always do, when differing from any judgment of Lord Cottenham's, that that reasoning, to my mind, is inconclusive and unsatisfactory. The notion that because a transaction

which is illegal is closed, that therefore a Court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle but to authority—to authority in the well-known case of highwaymen where a robbery had been committed, and one highwayman unsuccessfully sued the other for a division of the proceeds of the robbery. So in the case he puts of one of two partners engaged in merchant trade. As I read it, he meant the trade of smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transactions? I should say certainly not. It is not sufficient to say that the transaction is concluded as a reason for the interference of the Court. If that were the reason, it would be lending the aid of the Court to assert the rights of the parties in carrying out and completing an illegal contract. If the partnership is for the purpose of smuggling, that is an illegal contract, and the Court cannot maintain it, and the Court will not lend its aid at all to it. That reasoning, then, of Lord Cottenham is not sufficient, and I should have answered the question—not as Lord Cottenham does, in the affirmative—but in the negative. I do not say that this observation at all affects the authority of *Sharp v. Taylor* as it stands, but I think it does affect very much the *dicta* which I have read from the judgment, and that is the reason I have read them. It is no part of the duty of a Court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other.—p. 194

Sharp v. Taylor; Johnson v. Lansley (*supra*); **Beeston v. Beeston** (*supra*), and **Tenant v. Elliott** (1797) 1 Bos. & P. 2, 4 R. R. 526, *approved*.

Beyer v. Adams (1857) 26 L. J. Ch. 841; 3 Jur. (N.S.) 709; 5 W. R. 795.—V. C., *overruled*.

Budge v. Savage (1885) 15 Q. B. D. 363, 54 L. J. Q. B. 164, 53 L. T. 120, 33 W. R. 891, 49 J. P. 725.—C. A.

BRETT, M. R.—The case of *Beyer v. Adams* is the only one in favour of the argument which has been urged on behalf of the defendant, and the time has now come when, unless some distinction (which I do not see) can be found between it and the other authorities to which I have referred, that case can no longer stand. In my opinion the decision there was a wrong one, and must be overruled. Its doctrine was well challenged by the case of *Beeston v. Beeston*. In that case, which is to be found much more fully reported in 33 L. T. 700, Amplett, B. cites *Sharp v. Taylor*, and shows that what was held in *Beyer v. Adams* was inconsistent with what Lord Cottenham decided in *Sharp v. Taylor*, so that *Beyer v. Adams* was really overruled before it was decided, and it has never since been acted on or followed.—p. 366

BAGGALLAY and BOWEN, L.JJ. to the same effect.

Beeston v. Beeston, *referred to*.

Cohen v. Kittell (1889) 58 L. J. Q. B. 241; 22 Q. B. D. 680; 60 L. T. 952, 37 W. R. 400, 53 J. P. 459.—Q. B. D.

Tatum v Reeve (1892) 62 L. J. Q. B. 30, [1893] 1 Q. B. 44, 67 L. T. 683, 11 W. R. 174, 57 J. P. 113, 5 R. 83.—COLLIERIDGE, C.J. and WILLS, J., *approved*.
Maday v Mayor (1900) 70 J. J. Q. B. 145. [1901] 1 Q. B. 11, 83 L. T. 394, 49 W. R. 54, 64 J. P. 740.—C.A. SMITH, M.R., COLLINS and STIRLING, J.

Tatum v Reeve and De Mattos v Benjamin (1894) 68 L. J. Q. B. 248; 10 R. 103, 70 L. T. 560, 42 W. R. 284.—Q.B. *referred to*.
O'Sullivan v Thomas (1895) 64 L. J. Q. B. 398, [1895] 1 Q. B. 698, 72 L. T. 285, 43 W. R. 269; 15 R. 253, 59 J. P. 131.—WILLS and WRIGHT, J.

O'Sullivan v Thomas, *approved and followed*.
Burge v Ashley (1900) 69 L. J. Q. B. 538; [1900] 1 Q. B. 714, 82 L. T. 518; 48 W. R. 438.—C.A. A. L. SMITH, COLLINS and ROMER, J.

Eltham v Kingsman (1818) 1 B. & Ald. 683, *questioned*.
Marrat v Braden (1837) 2 M. & W. 369; M. & H. 96, 6 L. J. Ex. 118; 1 Jur. 242.
 ALDERSON, B.—I certainly have grave doubts whether the analogy suggested in *Eltham v Kingsman* is a sound one; it appears to me that the authority of a stakeholder is not countermandable.—p. 378.

Hastelow v Jackson (1828) 8 R. & O. 221, 2 M. & Ry. 209, 6 L. J. (O.S.) K. B. 318, *disapproved*.
Mearns v Hellings (1845) 11 M. & W. 711; 15 L. J. Ex. 168.
 ALDERSON, B.—[I accede to the authority of that case, although I think it a very strong decision. It does not convince me, it overcomes me.—p. 712.]
POLLACK, C.B.—With respect to the case of *Hastelow v Jackson*, I forbear saying anything upon it at present, it is binding upon us until reversed in a Court of error. If the same question arose before me, I should certainly advise a bill of exceptions.—p. 713.

Hastelow v Jackson, *approved*.
Hampden v Walsh (1876) 46 L. J. Q. B. 238; 1 Q. B. D. 189, 88 L. T. 862, 24 W. R. 607.—Q.B.D.

Hastelow v Jackson and Hodson v Terrill (1883) 1 C. & M. 797; 3 Tyr. 598; 1 D. P. C. 264, 2 L. J. Ex. 282.—EX., *applied*.
Barclay v Pearson (1893) 62 L. J. Ch. 686; [1893] 2 Ch. 154, 3 R. 388, 68 L. T. 709; 42 W. R. 74.—STIRLING, J.

Hampden v Walsh, *approved*.
Duggle v Higgs (1877) 46 L. J. Ex. 721; 2 Ex. D. 422; 87 L. T. 27; 25 W. R. 777.—C.A.

Batty v Marriott (1848) 5 C. B. 818, 17 L. J. Q. P. 215, 12 Jur. 462.—C.F., *commented on*.
Baton v Newman (1876) 1 C. P. D. 573; 25 W. R. 85.—C.A.
Duggle v Higgs, 25 W. R. 607; *reversed*, (1877) 46 L. J. Ex. 721, 2 Ex. D. 422; 87 L. T. 27; 25 W. R. 777.—C.A.

Batty v Marriott, *overruled*.
Baton v Newman (1876) 1 C. P. D. 573; 25 W. R. 85.—C.A., *referred to*.
Duggle v Higgs (1877) 2 Ex. D. 422, 46 L. J. Ex. 721; 87 L. T. 27; 25 W. R. 777.—C.A. CAIRNS, L.C.—There is no authority in favour of the view of the defendant except *Batty v Marriott*, and if that authority is to be followed it cannot be denied it is a very strong authority for the defendant. What the Court had in their minds in that case was the question whether the game was a lawful or an unlawful game, and having come to the conclusion that it was a lawful game, they were of opinion that there was nothing in the case which was struck at by the Act of Parliament, and that the Act was only intended to strike at unlawful games. That view seems to me to be erroneous, and I think the Court overlooked the first part of the section, which applies to all contracts, lawful or unlawful, by way of gaming or wagering. When *Baton v Newman* came before this Court, although there was a certain degree of difference between that case and *Batty v Marriott*, yet it is obvious that *Batty v Marriott* did not meet with approval. I cannot follow that case.—p. 127.

Batty v Marriott, *held approved*.
Duggle v Higgs, *approved*.
Trumble v Hild (1879) 5 App. Cas. 342, 40 L. J. P. C. 40; 42 L. T. 103; 28 W. L. 479.—P.C. SIR MONTAGUE SMITH (for J. C.).—The meaning of this proviso (exempting from the enactment "any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise") has been considered in several cases in the English Courts. In *Batty v Marriott*, where an agreement analogous to the present was made and money deposited to abate the event of a foot-race, it was held that, a foot-race being a legal pastime, the agreement was within the proviso. This decision did not meet with entire acquiescence when it was brought before the Courts in subsequent cases. It is unnecessary to refer to those cases, because the decision itself has been distinctly overruled by the Court of Appeal in the recent case of *Duggle v Higgs*. In that case the agreement related to a walking match, and was to the same effect as that in the present action. It was decided that an agreement of this kind, being a contract of wager, was not an agreement to subscribe or contribute for or towards any prize or sum of money within the true meaning of the proviso, which it was held applied to subscriptions and contributions other than wagers. It is not disputed by the two judges forming the majority in the Court below, that this decision was directly in point; but their own opinions not agreeing with it, they declined to follow its authority. Their lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound until a contrary determination has been arrived at by the House of Lords. Their lordships think that in colonies, where a like enactment has been passed by the Legislature, the colonial Courts should also govern themselves by it. The judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from

their own previous decision in a case of *Hogan v. Curtis* (5 Sup. Court Rep. 292), but they might well have yielded to the high authority of the Court of Appeal which decided the case of *Diggle v. Higgs*, as the English Court which decided *Batty v. Marriot* would have felt bound to do if a similar case had again come before it. Their lordships would not have felt themselves justified in advising her Majesty to depart from the decision in *Diggle v. Higgs* unless they entertained a clear opinion that the construction it has given to the proviso in question was wrong, and had not settled the law; since in their view it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same. Their lordships, however, do not dissent from, nor do they desire to express any doubt as to the correctness of that decision, which, it may be assumed, has settled the vexed question of construction of a not very intelligible enactment. *Diggle v. Higgs* also decided that the statute does not preclude the party who has revoked the authority given to the stakeholder from recovering the money he has deposited; the Court of Appeal agreeing with a previous decision to the same effect of the Court of Queen's Bench in *Hampden v. Walsh* (1 Q. B. D. 189)—p. 344.

Diggle v. Higgs, applied

Harclay v. Pearson (1893) 62 L. J. Ch. 636; [1893] 2 Ch. 154; 3 R. 388, 68 L. T. 709, 42 W. R. 71.—STIRLING, J.

Diggle v. Higgs, followed

Shoolbred v. Roberts (1899) 68 L. J. Q. B. 998; [1899] 2 Q. B. 560, 81 L. T. 822; 6 Manson 397.—PILLIMORE, J., *concedo*, (1900) 69 L. J. Q. B. 800, [1900] 2 Q. B. 497; 83 L. T. 37, 7 Manson 388.—C.A. SMITH, WILLIAMS, and HOMER, L.JJ.

Lacausade v. White (1798) 7 Term Rep. 535, 2 Esp. 629, *disapproved*.

Aubert v. Walsh (1810) 3 Taunt. 277; 12 R. R. 651.—C.P.

MANFIELD, C.J. (for the Court).—I must take notice of one case, a very strong one, *Lacausade v. White*, where the Court said that it was more consonant to policy that money paid on an illegal contract might be recovered back, than that it should be retained. That was a strong case certainly in favour of the present defendant; but this doctrine is directly contrary to what Lord Kenyon, C.J. said afterwards in *Hinson v. Hancock* (8 T. R. 675), where he seems to have entirely forgotten *Lacausade v. White*. Lord Kenyon there says, "There is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *parties criminæ*, an action has been maintained to recover it back again." Now this is directly contrary to *Lacausade v. White*, and he afterwards says that *Hinson v. Hancock* is very different from that case, which he says "was the case of a stake recovered from a stakeholder before it had been paid over." But here he certainly mistook *Lacausade v. White* entirely, for there is no stakeholder in the case, nor anything like it, and in 1 East 96 (*Vandegh v. Hewitt*), it was said by Lord Kenyon that the rule had been settled in all times that where both parties were

in pari delicto, potior est conditio possidentis. I mention these cases to show that the authority of *Lacausade v. White* is very much shaken, and cannot be relied on, and that we do not decide on the authority of that case.—p. 283.

Manning v. Purcell (1855) 7 De G. M. & G. 55; 21 L. J. Ch. 522. 3 Eq. R. 387; 3 W. R. 273.—L.J., *followed*.

Strachan v. Universal Stock Exchange (1895) 64 L. J. Q. B. 728; [1895] 2 Q. B. 329, 78 L. T. 6, 43 W. R. 611; 14 R. 467, 58 J. P. 549.—C.A. (*affirmed, infra, distinguished*).

Strachan v. Universal Stock Exchange (1895) 65 L. J. Q. B. 178; [1895] 2 Q. B. 697, 78 L. T. 492, 44 W. R. 90; 59 J. P. 789.—C.A. BISHOP, M.R., KAY and SMITH, L.JJ.

BISHOP, M.R.—Cave J. held that the plaintiff was entitled to recover the securities, but not the money. The defendants appealed to this Court, and this Court held that the judgment of Cave J. as regards the securities was right. Now the plaintiff appeals as regards the money deposit.

It seems to me that the judgment I am about to accede to must go this length, that if a person making bets with another is so foolish as to deposit money with the other party to abide the result of the bets, once the bets are decided he can never recover the money, whatever may have been the event of the wager. The party who holds the money can keep it, even though he has in fact lost the wager. That, upon the true construction of the statute, appears to me to be the result of the Gaming Act, 1845. . . I am fortified in this view by what was said by James, L.J. in *Manning v. Purcell*. . . Upon the ground that the provisions of the statute apply, I am obliged to decide that the plaintiff is not entitled to succeed in his action as regards the money deposited with the defendant.—p. 180.

GAMBLING IN STOCKS.

Grizewood v. Blane (1851) 11 C. B. 538; 21 L. J. C. P. 46.—C.P., *applied*.
Thacker v. Hardy (1878) 48 L. J. Q. B. 289; 4 Q. B. D. 685; 39 L. T. 595; 27 W. R. 158.—C.A.

Thacker v. Hardy, approved.
Forget v. Ostiguy (1895) 64 L. J. P. C. 62; [1895] A. C. 318, 11 R. 474, 72 L. T. 899; 43 W. R. 590.—P.C. LORDS HERSHELL, L.C., WATSON, HOBHOUSE, MACNAGHTEN, STAN and DAVEY and SIR R. COUGH.

Strachan v. Universal Stock Exchange (1895) 64 L. J. Q. B. 728; [1895] 2 Q. B. 329, 78 L. T. 6, 43 W. R. 611; 14 R. 467; 59 J. P. 549.—C.A. BISHOP, M.R., SMITH and RIGBY, L.JJ., *affirmed, nom. Universal Stock Exchange v. Strachan* (1896) 65 L. J. Q. B. 429, [1896] A. C. 166; 74 L. T. 468; 44 W. R. 497; 60 J. P. 468.—H.L. (K) LORDS HALSBURY, L.C., HERSHELL, MACNAGHTEN and MORRIS.

Universal Stock Exchange v. Strachan, applied.

Crommie, In re, Wand, Ex parte (1898) 67 L. J. Q. B. 620; [1898] 2 Q. B. 383, 78 L. T. 483; 46 W. R. 679; 5 Manson 80.—C.A. SMITH, CHITTY and WILLIAMS, L.JJ.

Universal Stock Exchange Co. v Strachan,
applied.

Gieve, in re, Trustee, Ex parte (1899) 68 L. J. Q. B. 509. [1899] 1 Q. B. 794; 80 L. T. 138. 47 W. R. 441, 6 Manxan 196—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.

STATUTORY OFFENCES

Doggett v Catterns, 17 C. B. (N.S.) 669, 34 L. J. Q. B. 46, 11 L. T. 422—C.P.; *reversed*. (1865) 19 C. B. (N.S.) 765, 34 L. J. Q. B. 169. 11 Ju. (N.S.) 243; 13 W. R. 390, 12 L. T. 355—EX CH.

Doggett v Catterns (1865) 19 C. B. (N.S.) 765, 34 L. J. Q. B. 159. 11 Ju. (N.S.) 243. 12 L. T. 355. 13 W. R. 390—EX CH.
Clark v Hagne (1860) 2 El. & El. 281. 29 L. J. M. O. 105. 6 Ju. (N.S.) 273. 2 L. T. 85. 8 W. R. 368. 8 Cox C. C. 324—Q.B.
Morley v Greenhalgh (1868) 3 B. & S. 374. 32 L. J. M. C. 93; 9 Jur. (N.S.) 748. 7 L. T. 624. 11 W. R. 263—Q.B. and **Oyney v Brady** (1862) 12 Ir. C. L. R. 577, *distinguished*.
Eastwood v Miller (1874) 43 L. J. M. C. 139; 18 Q. B. 440; 30 L. T. 716, 22 W. R. 799.—Q.B.

Doggett v Catterns, distinguished
Eastwood v Miller, approved
Haigh v Sheffield Corporation (1874) 44 L. J. M. C. 17; 18 Q. B. 102, 31 L. T. 536, 23 W. R. 547—Q.B.

Doggett v Catterns, distinguished.
Liddell v Lofthouse (1896) 65 L. J. M. C. 64, [1896] 1 Q. B. 295. 74 L. T. 139, 44 W. R. 819, 18 Cox C. C. 249, 60 J. P. 264.—C.A. LINDLEY and KAY, J.

LINDLEY, J.—When that case comes to be examined it will be found that it did not turn on sect. 34 at all, but on sects 4 and 5. Those sections deal with persons who use the occupiers of 'a place,' and the decision of the Court there was that the place in question—a space under a tree in Hyde Park—was not capable of occupation. No doubt some of the judges in that case seem to express a doubt whether that could be 'a place' within the meaning of the Act, but, when understood, the case does not present any difficulty.

Doggett v Catterns; Eastwood v Miller; Liddell v Lofthouse; Shaw v Morley (1868) 37 L. J. M. C. 105, L. R. 3 Ex. 137; 19 L. T. 15, 16 W. R. 763, 11 Cox C. C. 128—EX., and **Bows v Fenwick** (1874) 18 L. J. M. C. 107; L. R. 9 C. P. 339, 30 L. T. 524, 22 W. R. 804.—C.P., *applied*

Thwaites v Coulthwaite (1896) 65 L. J. Ch. 238; [1896] 1 Ch. 496, 74 L. T. 164, 44 W. R. 295, 60 J. P. 218.—GUTHRY, J.

Doggett v Catterns; Eastwood v Miller; Liddell v Lofthouse; Shaw v Morley, and Bows v Fenwick, considered.

Hawke v Dunn (1897) 66 L. J. Q. B. 364; [1897] 1 Q. B. 579, 76 L. T. 355, 45 W. R. 329, 18 Cox C. C. 543; 61 J. P. 292.—HAWKINS, J. (for self, CAVE, WILLS, WRIGHT and KENNEDY, JJ.; *overruled* in H.L. (*infra*).

Eastwood v. Miller and Haigh v Sheffield Corporation (1874) 41 L. J. M. C. 17, L. R. 10 Q. B. 102, 31 L. T. 536, 23 W. R. 547—Q.B., *overruled*.

Powell v Kempton Park Racecourse Co. (1899) 68 L. J. Q. B. 392, [1899] A. C. 143; 80 L. T. 538; 47 W. R. 585, 63 J. P. 269, 19 Cox C. C. 265—H. T. (2) See extract, *infra*, cols 1181, 1182.

Thwaites v Coulthwaite (*supra*), *explained and held inapplicable*

Saffery v Mayer (1900) 70 L. J. Q. B. 115; [1901] 1 Q. B. 11, 83 L. T. 391, 49 W. R. 51. 64 J. P. 740—C.A. SMITH, M.R., COLLINS and STIRLING, L.JJ.

[The question in *Saffery v Mayer* was whether a person who had advanced money to another for the purpose of making bets on their joint account, which money was lost on bets, was, by reason of the Gaming Act, 1892, prevented from maintaining an action against the other for half the amount lost.]

SMITH, M.R.—All that case [*Thwaites v Coulthwaite*] decided was that the plaintiff was entitled to an account of the profits of the partnership business, and it does not in my opinion in any way touch the question raised in the present case.

Snow v Hill (1885) 54 L. J. M. C. 95; 14 Q. B. D. 688. 52 L. T. 859, 33 W. R. 475. 15 Cox C. C. 737. 40 J. P. 410—COLBRIDGE, C.J. and SMITH, J., *followed*.
Whitehurst v Fincher (1890) 62 L. T. 133, 64 J. P. 565, 17 Cox C. C. 70—FRY, L.J. and MATHEW, J.

Snow v Hill and Whitehurst v Fincher, distinguished

Hornaby v Raggett (1891) 61 L. J. M. C. 24; [1892] 1 Q. B. 20, 65 L. T. 21; 40 W. L. 111, 56 J. P. 135, 17 Cox C. C. 428—MATHEW and SMITH, JJ.

MATHEW, J.—It was urged that the decision in *Whitehurst v Fincher* was an authority in favour of the respondent in the present case, but in that case all that was found against the respondent, who was charged with using a room for the purpose of betting, was that three times he went to a public-house and made bets. Under such circumstances the Court was unable to come to the conclusion that the room was used for the purpose of betting within the Act, for if it had been intended to make all betting in public-houses illegal, the Act would have contained an express provision to that effect.

Snow v Hill and Whitehurst v Fincher, distinguished.

Hornaby v Raggett, referred to.

Liddell v Lofthouse (1896) 65 L. J. M. C. 64; [1896] 1 Q. B. 295. 44 W. R. 819, 74 L. T. 139, 18 Cox C. C. 249, 60 J. P. 264—C.A. LINDLEY and KAY, L.Js.

LINDLEY, J.—The only other case which is really material is *Whitehurst v Fincher*, in which it was held that the bar of a public-house was not a 'place' within the meaning of sect. 3. I confess that I felt some difficulty with regard to that case, but our attention has been drawn to what Mathew, J., who was one of the judges deciding it, said about it in *Hornaby v Raggett* (*vide supra*). . . . *Snow v Hill* is no authority for the respondent, since in that case the person charged did not use any definite spot, but merely

walked about a field, in which racing was taking place, betting with people whom he met.

[In *Liddell v. Lofthouse* the question was whether a piece of ground bounded by a boarding and by stays supporting the boarding, was a "place" within sect 3.]

Snow v. Hill; Whitehurst v. Fincher, and

Hornaby v. Raggett, considered

Hawke v. Dunn (1897) 66 L. J. Q. B. 364, [1897] 1 Q. B. 579; 76 L. T. 855, 45 W. R. 359; 18 Cox C. C. 543, 61 J. P. 292.—*HAWKINS, J.* (for self, GAVE, WILLS, WRIGHT and KENNEDY, JJ.); *overruled in H.L. (infra)*

Powell v. Kempton Park Racecourse Co.

(1897) 66 L. J. Q. B. 601, [1897] 2 Q. B. 242, 77 L. T. 2; 46 W. R. 8, 61 J. P. 548; 18 Cox C. C. 561.—*C.A. HEBER, M.R., LINDLEY, LOPES and SMITH, J.J., CHITTY and RIGBY, L.J.J. dissenting (affirmed in H.L. (infra), commented on.)*

Hawke v. Dunn (1897) 66 L. J. Q. B. 364,

[1897] 1 Q. B. 579; 76 L. T. 856; 46 W. R. 859; 18 Cox C. C. 543; 61 J. P. 292, *approved*

Reg. v. Humphreys (1896) 67 L. J. Q. B. 534, [1896] 1 Q. B. 876, 75 L. T. 360; 46 W. R. 548, 52 J. P. 409.—*C.C.R.*

Hawke v. Dunn, overruled

Powell v. Kempton Park Racecourse Co. (1899) 68 L. J. Q. B. 392; [1899] A. C. 143, 80 L. T. 598, 47 W. R. 586, 63 J. P. 260, 19 Cox C. C. 265.—*H.L. (E.). LORDS MALESBURY, L.C., WATSON, HERSHELL, ASHBOURNE, MACNAGHTEN, MORRIS, SHAND and JAMES, LORDS ROXBOROUGH and DAVY, dissenting*

KALSBURY, J.C.—As the case of *Hawke v. Dunn* is said to have given rise to this litigation, I wish to examine the grounds of that decision. I am unable to accept the reasoning in that case, nor do I think it consistent with the previous authorities or with itself. In the first place I find that reliance is placed upon the fact that the bookmakers who bet are professional bookmakers. I know of no canon of construction which can introduce such words into an Act of Parliament, and certainly there are no such words here. I cannot doubt that if the prohibited thing is done, whatever that prohibited thing is, by a person who does it for the first time in his life, he is just as amenable to the law as though he had been for many years in the practice of it. Let a man open a house for such a purpose, and though he never in fact made a bet or received a deposit, though the proof might be difficult, yet the offence, if proved, would be consummated. While at the end of the judgment I find those words "The law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal." But what the legislature has forbidden, and what it has pronounced to be illegal, is the use by those who make a trade and business of betting of any place for the purpose of betting with persons resorting thereto. I will not again refer to the fallacious employment of the word "use"; what I at present insist upon is the selecting of such persons indicated by the words as if the Act of Parliament had made any difference between different classes of persons, and as if professional bettors were in any different position from any other members of the public. In another part of the judgment I find the learned judge saying

"In my opinion, to limit the meaning of the words 'other place' to some other place *quodam generis* with a house or office would have the effect of defeating, not of forwarding, the object of the legislature, and I cannot imagine that, with the desire to suppress that kind of betting mentioned in the preamble, it was in contemplation to afford it a sort of sanctuary in a betting ring or in any other place not *quodam generis* with a house or office." The mischief rectified in the preamble is the opening of places called betting houses or offices, and the receiving money in advance by the owners or occupants of such houses or offices, or by other persons acting on their behalf, and the learned judge makes his meaning clear when he begins by saying that "one of the practices deemed to be objectionable and injurious was that which is known as ready-money betting—namely, that the person making the bet deposits with the bookmaker the money which he was disposed to adventure." This is again inserted by construction words which are not there—the words of the statute are "owners or occupants of such houses or offices." I certainly should have thought that if this case were to be argued upon the preamble alone, there was not much room for doubt, with the actual enacting words, however, I have myself endeavoured to deal —p. 400

LORD JAMES—I would say that I think it must be taken that the judgment of the C. A. in the present case overruled the decisions in *Eastwood v. Miller*, *Haigh v. Shelfield Corporation*, and *Hawke v. Dunn*—p. 416.

Powell v. Kempton Park Racecourse Co.,

followed

Brown v. Patch (1899) 68 L. J. Q. B. 588; [1899] 1 Q. B. 892, 80 L. T. 716, 47 W. R. 623; 63 J. P. 421.—*DARLING and CHANNELL, J.J., applied Stoddart v. Hawke (infra, col 1181).*

Powell v. Kempton Park Racecourse Co.,

distinguished

Belton v. Busby (1899) 68 L. J. Q. B. 859, [1899] 2 Q. B. 380, 81 L. T. 196, 47 W. R. 636, 63 J. P. 709—*Q.B.D., followed* *Tromans v. Hodgkinson* (1902) 72 L. J. K. B. 21; [1903] 1 K. B. 30, 87 L. T. 549, 51 W. R. 286, 67 J. P. 30.—*ALVERSTONE, C.J., WILLS and CHANNELL, J.J.*

Powell v. Kempton Park Racecourse Co.,

applied

Belton v. Busby and Tromans v. Hodgkinson,

approved

Rev. v. Deaville (1903) 72 L. J. K. B. 272; [1903] 1 K. B. 468, 88 L. T. 82, 67 J. P. 82—*C.C.R.*

Bond v. Plumb (1893) [1894] 1 Q. B. 169;

10 R. 44, 70 L. T. 405; 42 W. R. 232, 17 Cox C. C. 749, 58 J. P. 168.—*COLORIDGE, C.J. and COLLINS, J., distinguished*

Reg. v. Winton (1894) 64 L. J. M. C. 74,

[1895] 1 Q. B. 227; 15 R. 102; 72 L. T. 29, 18 Cox C. C. 70.—*C.C.R.* *RUSSELL, C.J., FOLLOCK, B., HAWKINS, LAWRENCE and WRIGHT, J.J.*

Cox v. Andrews (1883) 53 L. J. M. C. 34;

12 Q. B. D. 126, 32 W. R. 289, 48 J. P. 247—*Q.B.D., and Davis v. Stevenson*

(1890) 60 L. J. M. C. 78, 24 Q. B. D. 529; 62 L. T. 486; 38 W. R. 492, 17 Cox C. C. 78; 54 J. P. 565—*Q.B.D., considered*

Stoddart v. Hawke (1901) 71 L. J. K. B. 133,

[1902] 1 K. B. 353, 85 L. T. 687, 50 W. R. 93; 66 J. P. 68.—Q. B. D.

Caminada (or Reg.) v. Hulton (1891) 60 L. J. M. C. 116, 61 L. T. 572, 39 W. R. 540; 17 Cos. C. C. 307; 55 J. P. 727.—DAY and LAYMAN, JJ., *followed*.
Stoddart v. Sagar (1895) 64 L. J. M. C. 284, [1895] 2 Q. B. 474; 15 R. 579, 73 L. T. 215, 44 W. R. 287; 18 Cos. C. C. 165, 59 J. P. 598.—POLLOCK, B. and WRIGHT, J.

Caminada v. Hulton and Stoddart v. Sagar, *followed*.
Hall v. Cox (1898) 68 L. J. Q. B. 167; [1899] 1 Q. B. 198, 79 L. T. 653, 47 W. R. 161.—C.A. SMITH, HIGBY and COLLINS, L.J.

Caminada v. Hulton, Stoddart v. Sagar; and Reg. v. Hobbs (1898) 67 L. J. Q. B. 928, [1898] 2 Q. B. 617, 79 L. T. 190, 47 W. R. 79, 62 J. P. 551.—C.C.R., *disapproved*.

Hart v. Hay, Nibbet & Co. (1900) 87 Sc. L. R. 652, *approved*.

Reg. v. Stoddart (1900) 70 L. J. Q. B. 189, [1901] 1 K. B. 177, 83 L. T. 538, 49 W. R. 173; 61 J. P. 774.—C.C.R. ALVERSTONE, C.J., WILLS, WRIGHT, KENNEDY and PHILLIMORE, JJ.
LORD ALVERSTONE, C.J.—It was contended that the decision in *Stoddart v. Sagar* is an authority against the view we are now taking, but I do not so regard it. I agree that it would have been possible for the alderman to have drawn the same conclusion of fact as was found in this case. But that the Court did not draw that conclusion is clear from the judgment of my brother Wright, who said: "No doubt it is possible that under certain circumstances such a competition as this may be a betting transaction, for a case can be suggested where the facts might be so found as to show that it was for instance," and then, although it is quite true that he quotes the words of the section, it is plain he did not feel himself justified, on the facts stated, in drawing the conclusion which *Channell, J.* has drawn in the case before us. I read that judgment of Wright, J. as reserving for further consideration the point which has arisen in this case. As regards *Reg. v. Hobbs*, I agree that there are expressions of great authority of the late J.A.C.J., to which our attention has been called, as to whether in that particular case the contingency might be said to depend on the result of horse races. There is, however, a broad distinction between that case and the present, and I cannot help thinking that that must have weighed with the Court. There was there no promise by the defendant to pay any money to anybody. No money was paid to the defendant in the proper sense of the word. He was the custodian of the money, because if he had made away with it he would have been guilty of improper conduct. But he was only the custodian of the money that other people subscribed. *Caminada v. Hulton*, which was referred to in *Stoddart v. Sagar*, may, I think, clearly be distinguished, for the reasons which have been given by more than one member of the Court in the course of the argument. [It had been pointed out that as the competitor in that case got a book, it could not be said that he paid his money only in consideration of the defendant's promise to pay him the prize.]—p. 193.

Caminada v. Hulton, *distinguished*.
Hall v. McWilliam (1901) 85 L. T. 289, 85 J. P. 742.—RIDLEY and BIGHAM, JJ.

Reg. v. Stoddart, *followed*.
Stoddart v. Argus Printing Co. (1901) 70 L. J. K. B. 711, [1901] 2 K. B. 170; 85 L. T. 110; 49 W. R. 668, 65 J. P. 691.—PHILLIMORE and BRUCE, JJ., *disapproved*.
Hawke v. Mackenzie (Nos. 1 & 2) (1902) 71 L. J. K. B. 565, [1902] 2 K. B. 225; 87 L. T. 127.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Stoddart v. Hawke (1901) 71 L. J. K. B. 183, [1902] 1 K. B. 353, 85 L. T. 687, 50 W. R. 93; 66 J. P. 68.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ., *followed*.

Mackenzie v. Hawke (1902) 71 L. J. K. B. 561, [1902] 2 K. B. 216; 87 L. T. 122.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Stoddart v. Hawke, *affirmed*.
Lennox v. Stoddart, Davis v. Stoddart (1902) 71 L. J. K. B. 747, [1902] 2 K. B. 21, 66 J. P. 469.—C.A. WILLIAMS, ROMER and MATHEW, L.JJ., *affirming* 50 W. R. 397.—DARLING, J.
LORD ALVERSTONE, C.J.—After considering *Reg. v. Stoddart* I do not think that sect 7 [of the Betting Act, 1853] should be so limited in its effect as it was held to be in *Stoddart v. Argus Printing Co.* The wording of the enactment is incompatible with such a limitation, and it would serve no useful purpose so to limit its operation, the evil of advertising places used as a means for receiving money for betting purposes being as great as that of advertising places used for betting with persons resorting thereto.—p. 568.

GAS AND GASWORKS.

Smith, In re, Mason, Ex parte (1892) [1893] 1 Q. B. 823; 5 R. 47; 67 L. T. 596; 41 W. R. 159; 57 J. P. 72, 9 Morrell 804.—WILLIAMS, J., *principle applied*.

Peterson v. Gas Light and Coke Co. (1896) 65 L. J. Ch. 709, [1896] 2 Ch. 476; 74 L. T. 640; 45 W. R. 89, 60 J. P. 582.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

Peterson v. Gas Light and Coke Co., *considered*.
Marriage, Neave & Co., In re, North of England Trustee Debenture and Assets Corporation v. Marriage, Neave & Co. (1896) 65 L. J. Ch. 839, [1896] 2 Ch. 663, 75 L. T. 169, 45 W. R. 42.—C.A.

Gas Light and Coke Co. v. South Metropolitan Gas Co. (1888) 68 L. T. 809; 56 W. R. 455.—C.A., *reversed*, (1889) 62 L. J. Ch. 123, 62 L. T. 126, 54 J. P. 573.—H. L. (2).

Imperial Gas Light and Coke Co. v. West London Junction Gas Co. (1866) 16 L. T. 66; 14 W. R. 1019.—v. c., *affirmed*, (1867) 66 L. J. Ch. 862, n; 68 L. T. 900, n; W. N. (1868), 1.—LORD CAIRNS and BOLT, L.J.

Gas Light and Coke Co. v. Mead (1876) 45 L. J. M. C. 71, 83 L. T. 729.—Q. B. D., *affirmed*.
Gas Light and Coke Co. v. Cannon Brewery Co. (1903) 72 L. J. K. B. 308, [1903] 1 K. B. 593; 88 L. T. 314, 51 W. R. 566; 87 J. P. 192.—C.A.

Imperial Gas Light and Coke Co. v. West

London Junction Gas Co., distinguished
Gas Light and Coke Co. v. South Metropolitan
Gas Co. (1889) 62 L. J. Ch. 123, 52 L. T. 126,
54 J. P. 373—H. L. (E.) LORDS HALSBURY, L. C.,
PITCHEAD and HARBOROUGH.

Held that upon the true construction of sect. 6 of the Metropolitan Gas Act, 1860, a gas company is prohibited from furnishing to a customer a supply of gas for the purpose of consumption by him within a district assigned to another company, notwithstanding that the meter through which the supply passes is on a part of the customer's property which is within the district; and distinguished above case on the grounds that there the supply to the customer, the G. W. Ry., was furnished under a contract entered into prior to the Act of 1860, and therefore protected by sect. 51 of the Act, that the question whether the railway would violate the Act if it supplied gas to a hotel built and demised by it had not been decided in that case, and that all that had been decided was that in the circumstances there was no ground for an injunction.

Commercial Gas Co. v. Scott (1875) 44 L. J.

M. C. 171, L. R. 10 Q. B. 400; 32 L. T. 765, 23 W. R. 871—Q. B., *considered*.

Dudley Gas Light Co. v. Warmington (1881)
50 L. J. M. C. 69; 14 L. T. 475; 29 W. R. 680;
45 J. P. 649—GROVE and LINDLEY, JJ.

Dudley Gas Light Co. v. Warmington, distinguished

Leamington Irons Gas Co. v. Davis (1886) 56
L. J. M. C. 14; 18 Q. B. D. 107, 55 L. T. 734,
35 W. R. 121, 51 J. P. 360.

STERNEN, J.—*Dudley Gas Co. v. Warmington* decides that where there is no special provision in the special Act, then the mode of keeping accounts is to be changed in accordance with the provisions of the Act of 1871; but as in the present instance there is such a special provision in the special Act, the case is distinguishable.—p. 16.
SMITH, J. to the same effect.

GIFT.**Reed v Blades (1813) 5 Taunt 212 and Irons**

v. Smallpiece (1819) 2 B. & Ad. 551; 21
R. R. 305, distinguished.
Reeves v. Capper (1838) 6 Scott 877; 5 Bing.
(N.C.) 186; 2 Jui. 1067—C.P.

Irons v. Smallpieces, abated upon

Lunn v. Thornton (1815) 1 C. B. 379, 14 L. J.
C. P. 161, 9 Jur. 850—C.P.

Irons v. Smallpieces, quoted.

Ward v. Audland (1817) 16 M. & W. 862.
PARKER, B.—In *Irons v. Smallpieces*, it was held that the verbal gift of a chattel, without actual delivery, does not pass the property to the donee, Abbott, C.J. saying, "By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." That is not correct.—p. 870.

Irons v. Smallpieces, adopted.

Showers v. Pilch (1840) 4 Ex. 478, S. C. nov.
Sharr v. Pilch, 19 L. J. Ex. 118.—EX.

O.C.

Irons v. Smallpieces and Sharr v. Pilch,

distinguished
Winter v. Winter (1861) 4 L. T. 639, 9 W. R.
747—Q.B.

CROMPTON, J.—Although *Irons v. Smallpieces* and *Sharr v. Pilch* have not been overruled, the subsequent cases, to speak familiarly, have hit them hard.—p. 640.

Irons v. Smallpieces, adopted.

Boune v. Frobrooks (1865) 18 C. B. (N.S.) 515;
34 L. J. C. P. 164, 11 Jui. (N.S.) 202.—C.P.

Irons v. Smallpiece and Flowers' Case, Noy

67, discussed
Douglas v. Douglas (1849) 22 L. T. 127.—EX.
KELLY, C.B.—I do not think that we are called upon, at present, to say whether we should overrule the case of *Irons v. Smallpieces*, or whether a gift, not made by deed, and unaccompanied by transfer, is invalid in point of law. Whenever that question shall come before me, I feel bound to say I shall require a much higher authority than the note of an editor (we 2 M. & G. 373, n.), however learned or eminent, to induce me to overrule a decision of Lord Tenterden and his brethren in the Court of Queen's Bench. With regard to the text books which have been cited, they are founded upon cases to which they expressly refer, which contain nothing whatever to support the proposition in the form in which it is laid down. They only give the example of the case in Noy (*Flowers' Case*), which is quoted as showing that personal property may pass by way of gift without delivery. But it is not said how the gift was made.—p. 129.
And see judgment of MARTIN, B.

Irons v. Smallpieces, not followed.

Danby v. Tucker, Harcourt, In re (1843) 31
W. R. 578.

POWLOCK, B.—The modern law on the subject is founded on Lord Tenterden's judgment in *Irons v. Smallpieces*. I can only say that case has been before the Courts on the Common Law side of Westminster Hall for a great many years, and I cannot myself acquiesce in the view of the law there laid down. I am not bound by that decision, because *Parker, B.*, afterwards Lord Wensleydale, in the case of *Ward v. Audland*, not merely dissented from that proposition, but distinctly expressed his opinion that it was not law. That was so clearly, also, the opinion of so eminent a judge as Maule, J., in the case of *Lunn v. Thornton* (1 C. B. 379), that I think I may take it now that the true view of the law is this.—The question to be determined is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive and act upon such a gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a Court of Common Law; and, of course, the same result would follow in a Court of Equity.—p. 580.

Irons v. Smallpieces, followed.

Danby v. Tucker, Harcourt, In re, and
Ridgway, In re, Ridgway, Ex parte

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there was an appeal, but the appellant confined his appeal to that part of the order which restrained him from dealing with the customers of the old firm. The C. A. dissolved that part of the injunction of which the appellant complained. . . . The case is chiefly important for present purposes in so far as it discloses the view taken by the learned judges who on that occasion constituted the C. A. on the point now under consideration. In *Barrett v. Pearson*, to which I shall have occasion to refer immediately, Cotton, L.J. stated that the decision in *Labouchere v. Dawson* was doubted in *Leggatt v. Barrett* by James, L.J. and himself. This is no doubt correct so far as Cotton, L.J. is concerned, but I am unable to find any very clear indication that this was the view of James, L.J. . . . The impression produced upon my mind by the whole of the judgment is that the learned judge had not arrived at the conclusion that *Labouchere v. Dawson* was wrong. Brist, L.J. expressed a decided approval of that decision. . . . The next case in which the matter was brought under consideration of the C. A. was that of *Walker v. Mottram*. . . . Of the L.J. who then constituted the Court, Baggallay, L.J. expressed a strong doubt as to the correctness of the decision in *Labouchere v. Dawson*. He said that it appeared to him, as at present advised, that it went far beyond what any of the previous decisions would have sanctioned. Lush and Lindley, L.J.J., the other members of the Court, said that the rule laid down in *Labouchere v. Dawson* had, it was believed, been recognised and acted upon in practice, and, whatever else might be said of it, the rule was in accordance with the general opinion of what was fair and right, and was easily applied in practice. In *Pedison v. Pearson* the question came again before the C. A. The facts were there less favourable to the plaintiff than in *Labouchere v. Dawson*, and Baggallay and Lindley, L.J.J. both considered that, even if *Labouchere v. Dawson* was rightly decided, the case then before them was not governed by it. Baggallay and Cotton, L.J., however, distinctly rested their judgments on the ground that the decision in *Labouchere v. Dawson* was wrong, and ought to be overruled. Lindley, L.J., on the other hand, was of opinion that it was rightly decided. The reason of Baggallay, L.J., for dissenting from *Labouchere v. Dawson*, so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher Court, and, as he thought, without sufficient reason. Even assuming that the decision in *Labouchere v. Dawson* went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shown that it was in conflict with the principles involved in those earlier decisions. Cotton, L.J., examined the earlier decisions, and arrived at the conclusion that Lord Eldon was against the notion that the vendor of the goodwill of a business was, in the absence of express contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the goodwill. The learned L.J. pointed out that Lord Romilly rested his decision in *Labouchere v. Dawson* on the principle that a man could not derogate from his grant. "But," he said, "it is admitted that a person who has sold the goodwill of his business may set up

a similar business next door, and say that he is the person who carried on the old business; yet such proceedings manifestly tend to prevent the old customer from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'goodwill' as would give a right to such an injunction as has been granted in the present case." I propose now to examine the other authorities. I may state at once, however, that I can find nothing in them inconsistent with the decision in *Labouchere v. Dawson*. It no doubt went beyond them, inasmuch as it dealt with a question not determined by them, but this seems to me to be no demerit, nor to afford any indication that it was wrong. The earliest case which has any bearing upon the point is that of *Crutwell v. Lyc*, before Lord Eldon. . . . The importance of the case consists in the definition which Lord Eldon gave of the goodwill there sold. He said, "The goodwill which has been the subject of the sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect was prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage, I should, in imposing it, carry the effect of my injunction to a much greater length than any decision has authorised, or imagination even suggested." These observations were much relied on by Cotton, L.J., in *Pearson v. Pearson*. If the language of Lord Eldon is to be taken as an exhaustive definition of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition. "Goodwill," I apprehend," said Wood, V.-C. in *Churton v. Douglas*, "must mean every advantage, every possible advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The learned V.-C. pointed out in this connection that it would be absurd to say that when a large wholesale business is conducted, the public are mindful whether it is carried on in Fleet Street or the Strand. The question what is meant by "goodwill" is, no doubt, a critical one. Sir George Jessel, discussing in *Ginesi v. Cooper* the language of Wood, V.-C. which I have just quoted, said, "Attracting customers to the business is a matter connected with the carrying on of it. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill." He pointed out that, in the case before him, the connection had been formed by years of work. The members of the firm knew where to sell the stone; and he asks, "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?" The present M.R. took much the same view as to what constitutes the goodwill of a business. I cannot myself doubt that they were right. It

is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals, and are not attached by custom to any other establishment. What obligations, then, does the sale of the goodwill of a business impose upon the vendor? I do not think they would necessarily be the same under all circumstances. I think it must be treated as settled that whenever the goodwill of a business is sold the vendor does not by reason only of that sale, come under a restriction not to carry on a competing business. This is really the strong point in the position of those who maintain that *Labouchere v. Dawson* was wrongly decided. Cotton, L.J. says [see quotation, *supra*, col. 1189]. I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line and yet to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm, in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the goodwill and an endeavour to destroy it. If a person who has previously been partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are doing already. It is true that those who were former customers of the firm to which he belonged, may, of their own accord turn for their custom to him, but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm, he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired to take that which constitutes the goodwill away from the persons to whom it has been sold, and to restore it to himself. It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business; but this, in many cases, appears to me of little importance, and of small practical advantage, if canvassing the customers of the old firm were allowed without restraint. I do not think that in cases where an injunction was granted in terms employed in *Labouchere v. Dawson* there would be any real difficulty in drawing the line and determining whether there had been a breach of it or not.—pp. 3—8.

Trego v. Hunt, applied.
Pearson v. Pearson, distinguished and considered.

Jennings, J. (1898) 67 L. J. Ch. 190, [1898] 1 Ch. 878; 77 L. T. 788; 16 W. R. 344.

STIRLING, J.—In point of decision neither of these cases governs that before me [viz., the case of a sale by one of two partners of all his interest in the assets to the other, goodwill not being expressly mentioned]. *Gray v. Smith* (post, col. 2051), does not, for it related to the use of a trade name and not to the canvassing of customers. It is, however, an authority in favour of the defendant to this extent, that it decides that a contract for the sale of assets generally does not always confer on a purchaser the same rights as one in which goodwill is specifically mentioned. Another again does *Pearson v. Pearson*, for all the learned judges relied on the terms of the clause, no equivalent to which is found in the agreement with which I have to deal. It appears, however, to be an authority in favour of the plaintiff in so far as it contains expressions of opinion by the majority of the Court, that under a clause not substantially differing from the agreement before me the defendant was not entitled to canvass customers, while the third (Cotton, L.J.) apparently was not of this opinion—p. 195.

Trego v. Hunt, considered.

West London Synchroite & Inland Revenue Commissioners (1898) 67 L. J. Q. B. 950, [1898] 2 Q. B. 507; 79 L. T. 289; 47 W. R. 125—C.A.

Trego v. Hunt, Pearson v. Pearson, J.

Helleley (1861) 31 L. J. Ch. 179; 2 D. G. J. & S. 446, 11 L. T. 581, 13 W. R. 220—L.J.; *affirmed* 34 Beav. 63, 10 Jur. (N.S.) 1041—M.R.; *Turner v. Major* (1862) 3 Grif. 142, 8 Jur. (N.S.) 909, 5 L. T. 600, 10 W. R. 243—V.C., and *Taylor v. Neate* (1888) 57 L. J. Ch. 1041, 39 Ch. D. 538, 37 W. R. 190—CHITTY, J., referred to.

Jennings v. Jennings, considered and followed.

Hammond v. Douglas (1800) 5 Ves. 530, *held overruled.*

Lewis v. Langdon (1835) 4 L. J. Ch. 258; 7 Sim. 421, *explained.*

Webster v. Webster (1791) 3 Swans. 490, n; 10 R. R. 258, *distinguished.*

David and Matthews, L.J. (1899) 68 L. J. Ch. 185; [1899] 1 Ch. 878, 80 L. T. 75, 47 W. R. 313. ROMER, J.—And while referring to that case [*Jennings v. Jennings*], I desire to add a few observations on the point mentioned by Stirling, J. which occasioned him some doubt. In cases of sale of a business by the Court for the purpose of winding-up a partnership, it has been the practice to provide by the particulars of sale that the sale would not prevent the persons previously interested in the business, or their representatives, from carrying on a like business. But that provision is invited whether the dissolution of partnership occurs by death of a partner or in the lifetime of all the partners. The reason of its insertion is to prevent a purchaser being misled into supposing that he is buying, or that the vendors are going to sell to him, anything beyond what would be implied by the law by an assignment of the goodwill of

the business. *See the observations of Turner and Knight Bruce, L.J., in *Johnson v. Hilleley* [31 L. J. Ch. 179]. The provision is not intended to give any right to the partners or their representatives as to appropriate to themselves the benefit of the goodwill which has to be sold. It merely points out, so as to prevent any mistake or misunderstanding, that the sale of goodwill of a business does not itself prevent vendors from carrying on a like business; but the provision does not provide, and is not intended to provide, that the like business may be carried on by the vendors in a manner incompatible with their position as vendors (p. 187). With regard to *Pearson v. Pearson*, also referred to by Stirling, J. in *Jennings v. Jennings*. I think it is clear that the parties must have intended that the defendant should be authorised to carry on business in the same way as any stranger might do; and certainly that was the view which was taken by the O.A., and upon which its decision was based—p. 188.

Trego v. Hunt, followed

Pearson v. Pearson, explained

Gillingham v. Haddock (1900) 69 L. J. Ch. 527, [1900] 2 Ch. 242, 82 L. T. 791, 61 J. P. 617.

OSGERS-HARDY, J.—It has been argued with great force by the defendant's counsel that in *Pearson v. Pearson* there were two points decided, and that the present case comes within the second point which was not dealt with or overruled in the House of Lords [in *Trego v. Hunt*]. The point is this: It is argued that there is an express proviso here that the sale of the goodwill is not to prevent either partner from starting a similar business in the neighbourhood after the expiration of the partnership. The first observation which arises is that, if that last proviso were omitted, would there have been anything to prevent either partner from starting a similar business at the expiration of the partnership? Certainly not *Trego v. Hunt*, which decided that you could not solicit the customers, also decided that it was too late to hold that the vendor of the goodwill could not carry on the same business in the same neighbourhood. I think, therefore, that the proviso really does not do anything more than express that which would have been implied if it had not been expressed. Then it is argued that that is inconsistent with *Pearson v. Pearson*. . . . On the construction of those two clauses [of the agreement in that case] all three

Trego v. Hunt, See

Bevan v. Webb (1901) 70 L. J. Ch. 536, [1901] 2 Ch. 59, 81 L. T. 609, 49 W. R. 548.—C.A.

Hall v. Barrows (1869) 32 L. J. Ch. 348, 11 W. R. 525, 8 L. T. 227.—M.R.; *reversed*, (1883) 1 De G. J. & S. 150, 33 L. J. Ch. 204; 10 Jar (N.S.) 55, 9 L. T. 561, 12 W. R. 322.—L.C.

Hall v. Barrows, 4 De G. J. & S. 150, 33 L. J. Ch. 204, *followed*

Hall v. Hall (1855) 20 Beav. 139.—M.R., *commented on*

Stewart v. Gladstone (1878) 47 L. J. Ch. 423, 38 L. T. 557; 26 W. R. 667.—PRY, J., *reversed on this point*, (1879) 10 Ch. D. 626, 40 L. T. 115, 27 W. R. 512.—C.A. JESSUP, M.R., JAMES and BRAMWELL, L.J.

Hall v. Barrows, applied

Hall v. Hall and Burfield v. Rouch (1862)

31 Beav. 241.—M.R., *not followed*

Reynolds v. Bullock (1878) 47 L. J. Ch. 773; 39 L. T. 443, 26 W. R. 678.—HALL, V.C.

Hall v. Barrows, See

Singer Manufacturing Co. v. Loog (1882) 52 L. J. Ch. 181, 8 App. Cas. 15, 33, 48 L. T. 3; 31 W. R. 323.—H. L. (Ch.); *Goodfellow v. Prince* (1887) 56 L. J. Ch. 543, 35 Ch. D. 9, 13, 68 L. T. 617; 35 W. R. 488.—C.A.; *Borthwick v. The Evening Post* (1888) 57 L. J. Q. B. 408; 37 Ch. D. 440, 453, 58 L. T. 252, 36 W. R. 434.—C.A.

Hall v. Barrows, applied

Page v. Ratcliffe (1897) 76 L. T. 63.—C.A. LINDEY, SMITH and RIGBY, L.J.

Stewart v. Gladstone (supra, in C.A.), applied

Hunter v. Dowling (1895) 64 L. J. Ch. 713, [1895] 2 Ch. 223; 13 L. 474, 72 L. T. 653, 43 W. R. 619.—NORTH, J.

HACKNEY CARRIAGE.

And see "MASTER AND SERVANT."

Case v. Storey (1869) 38 L. J. M. C. 113; 1 L. R. 4 Ex. 319, 20 L. T. 618; 17 W. R. 802.—EX. *commented on*.

Clarke v. Stanford (1871) 40 L. J. M. C. 151, 1 L. R. 6 Q. B. 357, 24 L. T. 389, 19 W. R. 846.—Q.B., *followed*.

which HOUSE, J., took in *Smith and Haddock*. In re (68 L. J. Ch. 185; [1899] 1 Ch. 378). seems to me to be the right explanation of *Pearson v. Pearson*. I am only following *Trego v. Hunt*, and am doing nothing inconsistent with *Pearson v. Pearson*, which was not overruled upon that point—p. 520.

A cab does not become any other than a hackney carriage though plying for hire in a railway station. I do not wish to throw any doubt upon the decision of the Court of Queen's Bench; but, if the matter were new it might be worth while to consider whether a hackney carriage might

not be a stage carriage if passengers were carried at separate fares, and so brought by implication within the either part of sect. 4 of the Act.—
P. 484

MONTAGUE SMITH, J.—I rest my judgment entirely upon *Clarke v Stamford*—p. 485

Case v. Storey, Clarke v. Stamford, and Skinner v. Usher (1872) 41 L. J. M. C. 158, L. R. 7 Q. B. 423, 26 L. T. 430, 20 W. R. 659.—Q. B., referred to
Kippins, Ex parte (1896) 66 L. J. Q. B. 95; [1897] 1 Q. B. 1, 75 L. T. 421, 45 W. R. 188; 18 Cox C. C. 439, 60 J. P. 791.—GRANTHAM and WRIGHT, JJ

Rogers v. Macnamara (1853) 14 C. B. 27, 23 L. J. C. P. 1, 2 C. L. R. 589, 17 Jur. 1166, 2 W. R. 19.—C. P., followed
Norris v. Birch (1895) 64 L. J. M. C. 91; [1895] 1 Q. B. 639, 15 R. 222, 72 L. T. 491, 48 W. R. 271, 18 Cox C. C. 123.—LAWRANCE and KENNEDY, JJ

Curtis v. Embery (1872) 42 L. J. M. C. 89; L. R. 7 Ex. 369, 31 W. R. 143.—EX., followed and disapproved.

Jones v. Shout (1900) 69 L. J. Q. B. 473, 82 L. T. 197; 48 W. R. 231; 64 J. P. 247, 19 Cox C. C. 472.—CHANNELL and BUCKNILL, JJ

HUNDRED.

Pilford's Case, 10 Coke 115, questioned.
Jackson v. Calesworth (1785) 1 Term Rep. 71.
WILLES, J.—This point, on looking into the books, appears to have been determined. *Pilford's Case* is the only one which bears the other way, which Willes, L. C. J. seemed strongly inclined to overrule in *Witham v. Hill* (2 Wil. 91). It has been the constant usage to give costs in actions on the statute of hue and cry. And wherever damages are given, costs ought to follow of course.—p. 72.

HUSBAND AND WIFE.

1. MARRIAGE.
2. DIVORCE
3. SEPARATION DEBTS
4. WIFE'S PROPERTY
5. HUSBAND'S LIABILITIES
6. CURTESY
7. DOWER AND FREEBENCH.
8. PARAPHERNALIA.
9. GRANTS AND GIFTS.
10. ACTIONS BY AND AGAINST

1. MARRIAGE

Validity.

Dalrymple v. Dalrymple (1811) 2 Hag. Cons. 2, 54; discussed, Reg. v. Millis (1844) 11 Cl. & F. 534, 8 Jur. 717.—H. L. (IR.) (and see post).
Goodman's Trusts, In re (1881) 50 L. J. Ch. 425, 17 Ch. D. 266, 44 L. T. 527, 29 W. R. 586.—C.A. JAMES AND COTTON, L.J.J., LUSH, L.J.

discussing, Mackonochie v. Pannance (Lord) (post), Dysart Peerage Case (1881) 6 App. Cas. 420.—H. L. (SC). SEIBORNE, L.C., LORDS BLACKBURN and WATSON

Dysart Peerage Case, applied
The Lovat Peerage (1885) 10 App. Cas. 763.—H. L. (SC)

Reg. v. Millis (supra), applied
Morris v. Miller (1767) 4 Burr. 2057, 1 W. Bl. 632, and *Butt v. Barlow* (1779) Doug. 171, followed
Woolston v. Scott (1758) Buller N. P. 28, discussed

Catherwood v. Caslon (1841) 11 L. J. Ex. 334, 13 M. & W. 261, 8 Jur. 1076.—EX.

Reg. v. Millis; referred to, O'Connell v. Reg. (1844) 11 Cl. & F. 155, 370; 9 Jur. 25; 1 Cox C. C. 413.—H. L. (IR.); disapproved, Reg. v. Manwaring (1856) 26 L. J. M. C. 10, 2 Ju. (N.S.) 1236, Deans & B. C. C. 132, 7 Cox C. C. 195.—WILLES, J.

Reg. v. Millis, discussed.
Att.-Gen. v. Winslow (Denn) (1860) 30 L. J. Ch. 529, 8 H. L. Cas. 369, 6 Jur. (N.S.) 833, 2 L. T. 578, 8 W. R. 477.—H. L. (B.)

CAMPBELL, L.C.—In the celebrated case of *Reg. v. Millis*, which was an appeal from a judgment holding that by the common law of England a valid marriage could not be contracted without the presence of a priest canonically ordained, the question having been put that the judgment be reversed there was an equality of votes of the judges who were present and took part in the decision. Thereupon the House affirmed the judgment, deciding that by the common law of England a valid marriage could not be contracted without the presence of a priest canonically ordained. I by no means concurred in that decision, thinking that the common law of England accorded with the canon law upon this subject which prevailed over the whole of the Western Church till the Council of Trent, and that a valid marriage might be contracted by the sole assent of the contracting parties, as Lord Stowell had often laid down, and for fifty years had been considered clear law in Westminster Hall. But subsequently, when presiding as C.J. of the Court of Q. B., I several times, with the approbation of my brother judges, ruled that the question as to the validity of such marriages was settled by the decision of the H. L. in *Reg. v. Millis*, and if this question were again to be mooted in this House upon an appeal I conceive that this House would be bound to decide that such a marriage was always null and void, although every peer present should be of opinion that *Reg. v. Millis* was improperly decided, and that in England, till Lord Hale's Act, the presence of a priest was as little necessary for making a binding marriage contract, as a binding contract of hiring and service.—p. 531

Reg. v. Millis; discussed and held binding, *Beamish v. Beamish* (1861) 9 H. L. Cas. 274, 8 Jur. (N.S.) 770; 5 L. T. 97, 11 H. C. L. R. 511.—H. L. (IR.), reversing 6 Ir. C. L. R. 142.—EX. CH., see judgments at length, referred to, *Yelverton v. Longworth* (1864) 4 Macq. H. L. 746.—H. L. (SC.) (post, col. 1199); *Mackonochie v. Pannance* (Lord) (1881) 60 L. J. Q. B. 611; 6

App. Cas 443, 44 L T 479, 29 W. R. 633, 45 J. P. 584.—H. L. (E)

Catherwood v. Cason (*supra*) and **Reg. v. Mills**, *followed*

Callling v. Callling (1896) 65 L. J. P. 59, [1896] 1 P. 116, 71 L. T. 252

JEUNE, P. (in the absence of any argument *contra*) said: The judgment of Paiko, B. in *Catherwood v. Cason* satisfies me that the effect of the decision in *Reg. v. Mills* is that a ceremony of marriage solemnised under such circumstances (*vide*, in 1884, according to the rites of the Church of England on board a Queen's ship, then lying off Limasol in the island of Cyprus, and in the presence of the captain), in the presence of a clergyman of the Church of England, is a valid marriage at common law.—p. 59

Reg. v. Mills and Beamish v. Beamish (*supra*), *applied*, London Tramways Co. v. L. C. C. (1898) 67 L. J. Q. B. 559, [1898] A. C. 375; 78 L. T. 361, 46 W. R. 609, 62 J. P. 673.—H. L. (E); *considered*, Lightbody v. West (1902) 87 L. T. 138; 50 W. R. 194; 18 Times L. R. 526.—JEUNE, P.

Reg. v. Mills, *distinguished*.

De Wilton, In re, De Wilton v. Montefiore (1900) 69 L. J. Ch. 717, [1900] 2 Ch. 481, 83 L. T. 70, 48 W. R. 645.—STIRLING, J. *See* "INTERNATIONAL LAW" (*post*, col. 1367).

Rex v. Twynning (Inhabitants) (1819) 2 B. & Ald. 886, 20 R. R. 480, *questioned*.

Rex v. Harborne (Inhabitants) (1835) 2 A. & E. 510, 4 L. J. M. C. 49, 4 N. & M. 341, 1 H. & W. 36.

DENMAN, C.J.—The only circumstance raising any doubt in my mind is *Rex v. Twynning*. But

what evidence is admissible, and what inference may fairly be drawn from it.—p. 54.

LITTLEDALE and WILLIAMS, JJ. to the same effect

Rex v. Twynning (Inhabitants), *explained*, Lapsley v. Grierson (1848) 1 H. L. Cas. 198.—H. L. (80). COTTENHAM L.C., LORDS CAMPBELL and BROUGHAM, *dissenting*, Phoenix's Trusts, In re (1870) 39 L. J. Ch. 316, L. R. 5 Ch. 139, 22 L. T. 111; 18 W. R. 303.—GIFFARD, L.J.

Cunningham v. Cunningham (The Bal-bongie Case) (1811) 2 Dow. 482, 14 R. R. 180; and **Lapsley v. Grierson**, *considered and distinguished*.

Campbell v. Campbell (The Breadalbane Case) (1867) L. R. 1 H. L. (Sc.) 182.

CHELMSFORD, L.C.—Whether a marriage actually took place during the lifetime of C. L., or the cohabitation of the parties was merely an adulterous intercourse without any marriage ceremony, the appellant contends that, beginning in an illicit connection, the presumption of subsequent marriage from the continuance of it altogether ceases, and that nothing short of proof of actual marriage, or of such a total change in the character of the cohabitation as will amount to habit and repute of a marriage, will be sufficient to establish the respondent's title. . . . A great number of cases were cited in support of this proposition of the appellant, but those mainly relied upon were *Cunningham v. Cunningham* and *Lapsley v. Grierson*. . . . Upon the facts of the case [*Cunningham v. Cunningham*] Lord Eldon's remarks are pointed and pertinent, but were clearly not intended for general application. His lordship said: "When the cohabitation of a man and woman was not known to have been in its origin illicit, presumption was that it was lawful. But where it was

(N.S.) 202.—P.C.; Lyle v. Ellwood (1874) 44 L. J. Ch. 164, L. R. 19 Eq. 98; 23 W. R. 157 —HALL, v. C., De Thoren v. Att-Gen (1876) 1 App. Cas. 686 —H L (E.). Ainsbury v. Vainale (or Sambourne) (1881) 50 L. J. P. C. 28; 6 App. Cas. 304, 44 L. T. 805.—P.C.

Cunningham v. Cunningham (*supra*), and Campbell v. Campbell (*supra*), referred to Dymit Pearce Case (1881) 6 App. Cas. 489 —H L (SC.) (*supra*, col. 1196)

Campbell v. Campbell, referred to Halliday v. Phillips (1889) 58 L. J. Q. B. 40; 23 Q. B. D. 48; 37 W. R. 776, 53 J. P. 627 —C.A., affirmed, H. L. (u) See *supra*, col. 949.

Piers v. Piers (1849) 2 H. L. Cas. 331. 13 Jur. 569 —H L (IR.), principle applied, Collins v. Bishop (1878) 48 L. J. Ch. 32 —MALINS, v. C., Ainsbury v. Vainale (*supra*); Landisale Pearce (1885) 10 App. Cas. 692 —H L (SC.). LORDS SELBORNE, BLACKBURN, WATSON, BRAMWELL and FRYGIERALD.

Yelverton v. Longworth (1864) 4 Macq. H. L. 746, 10 Jur. (N.S.) 1209, 11 L. T. 118; 13 W. R. 285.—H L (SC.). LORDS WENSLEYDALE, CHELMSFORD and KINGSDOWN, WESTBURY, L.C. *disallowed*; referred to, Dymit Pearce Case (1881) 6 App. Cas. 489 —H L (SC.) (*supra*, col. 1196); Cooper v. Cooper (1888) 13 App. Cas. 88; 50 L. T. 1 —H L (SC.). HALSBURY, L.C., LORDS WATSON and MACNAGHTEN.

De Thoren v. Att-Gen. (*supra*); applied, Ainsbury v. Vainale (*supra*); Ditcham v. Wollall (1880) 49 L. J. C. P. 688; 5 C. P. D. 410, 43 L. T. 286, 29 W. R. 59, 44 J. P. 799 —C.P.D.

Boett v. Att-Gen. (1886) 55 L. J. P. 57, 11 P. D. 128; 56 L. T. 924, 50 J. P. 824. —HANNEN, v. C., distinguished.

Walter v. Walter (1890) 59 L. J. P. 87; 15 F. D. 152, 63 L. T. 250, 54 J. P. 681.

HANNEN, v. C.—I there held that a colonial law prohibiting the marriage of the guilty party so long as the other remained unmarried did not operate as a bar to re-marriage where the guilty party had acquired a domicile in this country. The distinction between that case and the present is, that there the incapacity to re-marry imposed by the colonial law only attached to the guilty party. It was, therefore, penal in its character, and, as such, was inoperative out of the jurisdiction under which it was initiated. A case to a similar effect, and based on the same principle, was cited from an American report—Poussard v. Johnson, 2 Blackford 81.—p. 90.

Doe d. Fleming v. Fleming (1827) 4 Bing. 266, 12 Moore 500; 5 L. J. (O.S.) C. P. 139, 39 R. B. 562.—C.P., applied, Lyle v. Ellwood (*supra*).

Legitimacy of Children.

Goodright v. Moss (1777) Cowper 561; overruled on, Berkeley Pearce Case (1811) 4 Campb. 407, 14 R. B. 783, referred to, Inghis v. Inghis and Allen (1807) 16 L. T. 775; 15 W. R. 1093 —*per J. WILDER*, Nottingham Union v. Tomkinson (1847, col. 1201); Haines v. Guthrie (1884) 53 L. J. Q. B. 521; 13 Q. B. D. 818, 51 L. T. 645; 83 W. R. 99; 48 J. P. 756.—DIV. CT., affirmed, C.A.

Goodright v. Moss, followed.

Murray v. Milner (1879) 12 Ch. D. 845; 48 L. J. Ch. 775, 41 L. T. 218, 37 W. R. 881. *SVY. J.*—It has been argued that the will is not capable of being looked at as a declaration by the deceased father of the claimant, because it is said you must either admit the marriage before you can show that there is any relationship between the declarant and the claimant, or you must deny the existence of the relationship, and then it would be the declaration of a mere stranger. In my judgment that argument cannot prevail. It would lead to great difficulty. As long ago as *Goodright v. Moss*, decided by Lord Mansfield in 1777, it was determined that general declarations are good evidence after the death of a parent to prove that a child was born before marriage. In that case the Court of Q. B. applied the rule, and Lord Mansfield pointed out that declarations of parents in their lifetime were admissible, and said, "I have known advice given to a father and mother to make attested declarations in writing, under their hand, of the precise time of the birth of the bastard child, and the subsequent marriage, to prevent controversy in the family touching the inheritance. If the credit of such declarations is impeached it must be left to the jury to judge of," clearly holding that such declarations are admissible.—p. 849.

Cope v. Cope (1833) 5 Car. & P. 604; 1 M. & Rob. 269, explained, Reg. v. Mansfield (Inhabitants) (1841) 10 L. J. M. C. 97; 1 Q. B. 444, 1 G. & D. 7, 6 Jur. 605.—Q. B.; Turner, In re, Glenister v. Harding (1885) 29 Ch. D. 185, 53 L. T. 528.—CHITTY, J.

Reg. v. Mansfield (Inhabitants) *disallowed*, Hawes v. Dreager (*post*).

Banbury Pearce Case (1811) 1 Sim. & S. 153; 24 R. R. 159, Head v. Head (1823) Turn. & R. 138, 1 Sim. & S. 150, 1 L. J. (O.S.) Ch. 105; 24 R. R. 1.—L.C. and v. C., Bury v. Phillpot (1834) 3 L. J. Ch. 119; 2 Myl. & K. 349; 39 R. R. 221.—M.R.; Clarke v. Maynard (1822) 6 Mudd. 304; and Box v. Luffs (1807) 8 East. 193; 9 R. R. 406, *disallowed*.

Goodright v. Saul (1791) 4 Term Rep. 356, 2 R. R. 409, *approved*. Morris v. Davies (1837) 5 Cl. & P. 169; 1 Jur. 811 —H L (E.). GOTTINGHAM, L.C. and LORD LYNCHBURST.

Morris v. Davies; applied, Piers v. Piers (1849) 2 H. L. Cas. 331 —H L (IR.) (*supra*, col. 1199); The Aylesford Pearce (*post*); Burnaby v. Baillie (*post*).

Banbury Pearce Case, Goodright v. Saul and Morris v. Davies, *disallowed*.

Bury v. Phillpot, distinguished.

Hawes v. Dreager (1883) 62 L. J. Ch. 449; 23 Ch. D. 178; 43 L. T. 618, 31 W. R. 576.—KAY, J.

Dyke v. Williams (1862) 31 L. J. P. 157, 2 Sw. & Tr. 491, 6 L. T. 726.—SIR C. CRISWELL, followed.

Banbury Pearce Case and Hitchens v. Hardley (1871) 40 L. J. Mat. 70; 1 L. J. 2 P. 241; 25 L. T. 103.—LORD PENZANCE, referred to.

Perton, In re, Pearson v. Att-Gen (1885) 53 L. T. 707.—CHITTY, J.

Morris v Dawes (*supra*), *discussed*, Gurney v Gurney (1848) 32 L. J. Ch. 456, 1 H. & M. 413; 9 Jur. (N.S.) 514, 8 L. T. 380; 11 W. R. 659—WOOD, V.-C., *principles applied*, The Aylesford Peasage (*post*), *explained*, Bosville v. Att.-Gen. (1887) 56 L. J. P. 97, 12 P. D. 177, 67 L. T. 88, 36 W. R. 79.—COLLIERIDGE, C.J. and BUTT, J.

Gurney v Gurney, *disapproved*
Cooke v. Cooke (1865) 34 L. J. Ch. 459, 4 De G. J. & S. 704, 11 Jur. (N.S.) 533, 12 L. T. 408, 13 W. R. 697.—WESTBURY, L.C.

Plowes v Bossey (1862) 31 L. J. Ch. 681, 2 Dr. & Sm. 145, 8 Jur. (N.S.) 352, 7 L. T. 306, 10 W. R. 332—KINDERSLEY, V.-C., *report corrected*.

Atchley v. Sprigg (1864) 33 L. J. Ch. 315, 3 N. L. 360; 10 Jur. (N.S.) 144, 10 L. T. 16, 12 W. R. 364.—KINDERSLEY, V.-C.

Rex v Sourton (1836) 5 A. & E. 180, 5 L. J. M. C. 100, 6 N. & M. 575; 2 H. & W. 100—K. B., *discussed*.

Atchley v. Sprigg, *explained*.
The Aylesford Peasage (1885) 11 App. Cas 1—H.L. (N.). EARL OF SELBORNE, LORDS BLACKBURN, DRAMWELL and FITZGERALD.

R's Trusts, In re (1870) 39 L. J. Ch. 192; S. C. *nom* Rideout's Trusts, In re, L. R. 10 Eq. 41.—JAMES, V.-C., *considered*.

Yearwood's Trusts, In re (1877) 5 Ch. D. 545; 46 L. J. Ch. 478; 23 W. R. 461
HALL, V.-C.—I am of opinion that I cannot treat the decision in *Rideout's Trusts, In re*, as beating the construction which Mr Pearson has contended for. A very important question is raised here, and looking at that case—the arguments, dates, and the affidavits which were read—the learned judge did not, as I conceive he would have done in express terms if the old rule had prevailed, exclude those affidavits, but his judgment was clearly to the effect that the law did not exclude a great portion of the evidence of the husband, and, therefore, though I cannot say that the decision in that case altered the law in that respect, yet the learned judge seems to have considered that the law may have been altered. though, having regard to the old rule, he did not act upon the alteration further than this—that he treated the evidence as admissible, but not to be acted upon unless corroborated by other evidence.—p. 547.

Rex v Sourton (*supra*), *Rideout's Trusts, In re*, and *Yearwood's Trusts, In re*, *discussed*.

Nottingham Union v Tomkinson (1879) 48 L. J. M. C. 171; 4 U. P. D. 343; 28 W. R. 151—GROVE and LOPES, JJ.

Nottingham Union v Tomkinson, *followed*.
Walker, In re, Jackson, In re (1885) 53 L. T. 860; 34 W. R. 95—KAY, J.

Bosville v. Att.-Gen. (*supra*), *referred to*.
Walker, In re, Jackson, In re, *followed*.
Bainaby v. Baillie (1889) 58 L. J. Ch. 812, 42 Ch. D. 282; 61 L. T. 434, 38 W. R. 125.—NORTH, J.

But for Nullity

Lewis (f. c. Hayward) v. Hayward (1866) 35 L. J. Mat. 105, 15 L. T. 299—H. L. (H.) CHELMSFORD, L.C. and LORD CHANWORTH, *reversing*, S. C. *nom* X. (f. c. Y.) v. Y., 34 L. J. Mat. 81, 4 Sw. & T. 115.—SIR J. WILDE, *distinguished*.

Cuno v. Cuno (1874) L. R. 2 Sc. App. 800, 29 L. T. 316—SELBORNE, L.C., LORDS CHELMSFORD, COLONAY and CAIRNS. *And see post*.

Guest v Shipley (1820) 2 Hag. Cons 321—SIR W. SCOTT; Briggs v Morgan (1820) 2 Hag. Cons 328—SIR W. SCOTT; and Norton v Seton (1820) 3 Phill 147—SIR J. NICHOLL, *discussed*.

B. v M. (1852) 33 L. J. Mat. 205, 2 Roberts Eccl. 580—SIR J. DODSON, *affirmed*, P.C. KNIGHT BRUCE and TURNER, L.J., SIR E. RYAN and SIR J. PATTESON. *And see post*.

Norton v Seton, *commented on*.
A. v A. sued as B (1837) 19 L. R. 1 408—C.A. ASHBURNKE, L.C., MORRIS, C.J., FITZGERALD and BARRY, L.J.

B. v M. (*supra*), Pollard v. Wybourn (1828) 1 Hag. 725—DR LUSHINGTON, Sparrow v Harrison (1811) 3 Curt 16—DR LUSHINGTON, and Castleden v Castleden (1861) 31 L. J. Mat. 103, 9 H. L. Cas. 186; 4 Macq. H. L. 169; 5 L. T. 161—H. L. (H.) CAMPBELL, L.C., LORDS CHELMSFORD and KINGSDOWN, *affirming*, S. C. *nom* Hall (f. c. Castleden) v Castleden (1860) 29 L. J. Mat. 81; 1 Sw. & T. 805, 6 Jur. (N.S.) 348, 1 L. T. 489, *discussed*.
M (f. c. D.) v. D. (1885) 54 L. J. P. 68; 10 P. D. 75; 33 W. R. 657—HANSEN, J.

Castleden v Castleden, *referred to*.
G. v M. (1885) 10 App. Cas 171; 53 L. T. 898—H. L. (SC.) SELBORNE, L.C., LORDS WATSON, DRAMWELL and FITZGERALD.

Castleden v Castleden and U. (f. c. J.) v J. (1867) 37 L. J. Mat. 7, 1 L. R. 1 P. 460, 16 W. R. 518—LORD PINZANG, *referred to*.
Tavernor (f. c. Ditchfield) v Ditchfield (1866) 35 L. J. Mat. 51, 1 L. R. 1 P. 127, 12 Jan. (N.S.) 678, 14 L. T. 227—LORD PINZANG.

Cuno v Cuno (*supra*); Durham v Durham; Hunter v Edney; Cannon v Smalley (1885) 10 P. D. 80—HANSEN, J. *discussed*.
B (otherwise A) v. B. (1891) 27 L. R. Ir 587—WARREN, J.

Field's Marriage Annuling Bill (1848) 2 H. L. Cas 48—EARL OF DEVON, *with concurrence* of COTTENHAM, L.C., LORDS LYNDHURST and DENMAN, and Scott v. Sebright (1886) 56 L. J. P. 11; 12 P. D. 21, 57 L. T. 421; 35 W. R. 238.—BUTT, J., *distinguished*.

Cooper (f. c. Crane) v. Crane (1891) 61 L. J. P. 85, [1891] P. 369; 40 W. R. 127—COLLINS, J.

Atchinson v Baker (1797) 2 Penke's N. P. C. 103, *affirmed*.
Lawrence v Twentiman, 1 Roll. Abr 450, pl. 10, *questioned*.
Hall v Wright (1839) 29 L. J. Q. B. 43, 1 L. R. 1 43, 6 Jur. (N.S.) 193; 1 L. T.

220, 8 W R 160—EX. CH.; *reversing*, (1858)
27 L. J. Q. B. 345, 5 Jur (N.S.) 62—Q. B.

MARTIN, B.—As to *Laurence v. Ticeanton*, except it be explicable in the manner suggested by Lord Campbell, in his judgment in this case, namely, that time was not of the essence of the contract, or that the law relating to holding intercourse with persons affected by the plague (see 1 Jac. 1. c. 41) made the performance of the contract illegal, I cannot agree with it. It is, no doubt, referred to in several books of authority, but, unless explained as above, it seems contrary to the rule of law [that when a person by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his conduct].—p. 60.

The majority of the Ex. Ch. agreed with MARTIN, B.

Jactitation of Marriage

Hawke (Lord) v. Corri (1820) 2 Hagg Cons 280, *discovered and followed*
Thompson v. Roulke (1802) 62 L. J. P. 46; [1893] P. 70, 1 R. 501, 67 L. T. 788—C. A.
LINDLEY, BOWEN and A. L. SMITH, L.J.s

Hawke (Lord) v. Corri, *discovered*.
Cowley v. Cowley (1900) 69 L. J. P. 59, 121; [1900] P. 118, 805, 83 L. T. 218, 49 W. R. 19, 16 Times L. R. 563—C. A., *affirmed* (post).

COLLINS, L.J. (for self, ALVERSTONE, M.R. and RIGBY, J.J.)—Peers weigh, no doubt, plaintiffs' suits for jactitation as often as other persons' yet, if the right have claimed existed, they had a much simpler remedy. Indeed *Hawke (Lord) v. Corri* is a good illustration of this. There, in a suit brought by Lord Hawke for jactitation of marriage, the opponent called himself Lady Hawke, she set up a case of marriage which she, however, abandoned, and rested her defence on the fact that Lord Hawke had at one time consented to her bearing the title. This was held by Sir W. Scott to negative malice on her part, and the suit failed. The experienced counsel, arguing for Lord Hawke before Sir W. Scott, are reported to have said, in excusing their client for proceeding after his former conduct to the lady (p. 284). "A suit of jactitation was the only remedy by which the party could protect himself, and his family, from such an assumption of a false relation to himself and to them." This is more than negative evidence.—p. 124.

Fendall v. Goldsmid (1877) 46 L. J. P. 70; 2 P. D. 263.—SIR J. HANNEN, *discovered*.
Davies v. Lowndes (1835) 4 L. J. C. P. 214; 1 Bing. N. C. 597—C.P.; and **Du Boulay v. Du Boulay** (1869) 38 L. J. P. C. 35; 1 R. 2 P. C. 430, 6 Moore P. C. (N.S.) 31, 17 W. R. 394.—P.C., *approved*.

Cowley (Earl) v. Cowley (Countess) (1901) 70 L. J. P. 59; [1901] A. C. 459, 85 L. T. 284; 50 W. R. 81, 17 Times L. R. 725.—H. L. (S.). HALSBURY, L.C., LORDS MACNAGHTEN, JAMES OF HEREFORD, BRAMPTON and LINDLEY: *affirming* S. C., *supra*.

LORD LINDLEY.—In 1897 the Countess Cowley obtained a divorce from her husband; but, although the divorce dissolved her marriage, it did not determine her life estate in the peerage which she had already acquired. There is no principle of common law, nor is there anything in

the Divorce Act, which produces any such result. *Fendall v. Goldsmid* goes far to show that so far as name is concerned the countess was entitled to continue after the divorce to use the name and style which she had previously acquired the right to use. Speaking generally, the law of this country allows any person to assume and use the name, provided its use is not calculated to deceive and to inflict pecuniary loss. The law on this subject will be found examined in a very instructive note from the pen of the late Mr. Walcy in 3 Dav. Conv. part I (2nd ed.), p. 283. The judgments of Tindal, C.J. in *Davies v. Lowndes* and of the P. C. delivered by Sir H. Phillimore in *Du Boulay v. Du Boulay* leave no doubt about it. Sir H. Phillimore, in *Du Boulay v. Du Boulay*, stated that, "In this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger." Then, after alluding to trade names, the judgment continues: "The mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which our law affords no redress"—p. 88.

Status of Wife

Reg. v. Leggatt (1832) 18 Q. B. 781; 8 C. 300. SANDILANDS, Ex parte, 21 L. J. Q. R. 342; 17 Jur 317.—Q. B.

Turner v. Turner (1851) 15 Jur 711—ROMILLY, M.R., *reversed*, (1852) 21 L. J. Ch 422, 2 De G. M. & G. 28—KNIGHT BRUCE and CRANWORTH, L.J.s.

Restitution of Conjugal Rights.

Wilson v. Wilson (1815) 14 L. J. Ch. 204; 14 Sim. 405; 9 Jur 148.—SHADWELL, v.-c., where all the previous cases are discussed; *affirmed*, (1848) 1 H. L. Cas. 538; 12 Jur. 467.—COTTEHAM, L.C.; *discovered*, S. C. (1854) 23 L. J. Ch. 697; 5 H. L. Cas. 40—CRANWORTH, L.C., LORDS BROUGHAM and ST. LEONARDS.

Wilson v. Wilson, explained

Mortimer v. Mortimer (1820) 2 Hagg 310.—SIR W. SCOTT, and HILL v. Turner (1787) 1 Atk 515.—HARDWICK, L.C., *discovered*.
Hunt v. Hunt (1861) 31 L. J. Ch. 161, 4 De G. F. & J. 221; 8 Jur (N.S.) 55; 5 L. T. 778; 10 W. R. 215.—WESTBURY, L.C., *reversing*, 31 Beav 89, 8 Jur. (N.S.) 48, 10 W. R. 101—ROMILLY, M.R. *And see post*, cols. 1205—1207.

Wilson v. Wilson; *applied*, Gibbs v. Harding (1870) 39 L. J. Ch. 374, L. R. 5 Ch. 336; 18 W. R. 361.—L.C. and J.J.; *discovered*, Hamilton v. Hector (1872) L. R. 13 Eq. 511; 25 L. T. 146 (post, col. 1242), Burchell v. Clark (1876) 45 L. J. C. P. 115, 2 C. P. D. 88, 35 L. T. 690, 25 W. R. 334.—C. A., Cahill v. Cahill (post, col. 1205).

Hunt v. Hunt (supra); *followed, but questioned*, Brown v. Brown (1868) 38 L. J. Ch. 153; 1 L. J. 7 Eq. 185; 19 L. T. 594; 17 W. R. 98—MALINS, v.-c., *followed*, Marshall v. Marshall (1879) 48 L. J. P. 49, 3 P. D. 19, 39 L. T. 640, 27 W. R. 399—HANNEN P.

Marshall v. Marshall (*supra*), *followed*

Brown v. Brown and Shelton (1874) 13 L. J. Mat. 17, L. R. 8 P. 202, 31 L. T. 272.—**SIR J. HANNEN, observed on** **Besant v. Wood** (1879) 12 Ch. D. 605, 10 L. T. 446.

JESSEL, M.R.—I now come to consider the only case that was cited by Mrs. Besant. That is **Brown v. Brown**. That case was very different as regards dates from this. Now, I must say that this case was decided before the learned judge had decided **Marshall v. Marshall**. He does not seem to have taken into consideration the fact that the wife had a complete answer to a suit for the restitution of conjugal rights—it had not then been decided that she had, and perhaps that is the reason he did not consider it. But he seems to have considered that the husband had so misconducted himself that he was not entitled to rely upon the agreement for separation, and that, therefore, the wife was also entitled to repudiate it. But with the greatest respect for the learned judge, the repudiation of the deed of separation means, I suppose, the right to return to cohabitation, and if so—if that must be the voluntary act of the wife—it does not appear to me possible that she can say that she is in dread, or that there is any danger. He seems to have omitted from his consideration the foundation of the law, which was the apprehension of danger on the part of the wife, as in **Marshall v. Marshall** she could not be in any danger at all.—p. 616. *And see post*, col. 1207.

Besant v. Wood; *discussed* **Hart v. Hart** (1881) 50 L. J. Ch. 697; 18 Ch. D. 670 (*post*, col. 1248); *referred to*, **Rose v. Rose** (1883) 32 L. J. P. 25, 8 P. D. 98—**C.A.** (*post*, col. 1238).

Hunt v. Hunt (*supra*) and **Besant v. Wood**, *commented on*

Cahill v. Cahill (1883) 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861—**H. L. (IR)**; *reversing*, **S. C. nom. Cahill v. Martin** (1881) 7 L. R. Ir. 361.—**C.A.**, which *affirmed* 5 L. R. Ir. 227—**V.C.**

SELBORNE, L.C.—**Hunt v. Hunt** is the only case in which an injunction has been granted at the suit of a wife to restrain a husband from carrying on his suit for restitution of conjugal rights, the husband having covenanted not to endeavour to compel the wife to cohabit with him by any legal proceedings. An appeal to this House from that decision was fully argued; and everything which fell from the law lords (except Lord Westbury), in an unusually strong House, was favourable to the appellant; and I myself know, from having argued the case. But Lord Westbury persuaded the House to put some question to the judges, and meanwhile the husband died, so that the case came to an end. Sir G. Jessel seems to have followed that authority in **Besant v. Wood** (p. 421). **Bateman v. Ross** (*Convent*) (*post*, col. 1240), **Wilson v. Wilson** (*supra*), **Vanitser v. I. vanitser** (*post*, col. 1242), and **Besant v. Wood**, were all cases of agreements for separation, all, except the last, founded on compromise of suits, and the last was treated by the late M.R. as virtually for the prevention of a suit, which, whether rightly or not, he regarded as the same thing. The late M.R. cannot have intended by the language which he used in **Besant v. Wood** to affirm the doctrine that the wife was to be regarded as a *feme sole* in such an

absolute sense as to give her an unqualified power to contract with her husband, on the occasion of such a compromise, concerning her real or personal estate, in a manner in which she could not contract for any consideration with any other person.—pp. 430, 431.

LORD BLACKBURN and **LORD FITZGERALD** to the same effect. **LORD WATSON** concurred.

Hunt v. Hunt, *followed*.

Marshall v. Marshall (*supra*) and **Besant v. Wood**, *approved*. *And see post*

Clark v. Clark (1885) 10 P. D. 188; 54 L. J. P. 57, 52 L. T. 234, 33 W. R. 405—**C.A.**

BOWEN, L.J.—The question came again before Sir G. Jessel in **Besant v. Wood**. I think that his reasoning cannot be shaken, that where a wife has power to sue her husband she must have power to compromise any such proceeding, or to bind herself to abstain from taking it. There is nothing in **Cahill v. Cahill** (*supra*) to destroy the authority of **Besant v. Wood**. So far as the decision in that case goes, there is only a warning against carrying the principle further. Until the H. L. declares the law to be otherwise, we must proceed on the view that a contract by a married woman not to sue for restitution of conjugal rights can be enforced against her.—p. 196. **FRY, L.J.** concurred.

BAGGALLAY, L.J. to the same effect.

Marshall v. Marshall, *followed*

Tress v. Tress (1887) 56 L. J. P. 93, 12 P. D. 128 (*post*, col. 1207).

Cahill v. Cahill (*supra*, col. 1205), *explained*.

Butler v. Butler (1885) 16 Q. B. D. 374, 55 L. J. Q. B. 55, 54 L. T. 591, 34 W. R. 132—**C.A.** **ESHER, M.R.**, **COTTON** and **BOWEN, L.J.** **COTTON, L.J.**—**Cahill v. Cahill** only shows that a husband cannot make his wife deal with property not settled to her separate use, as if it were separate property.—p. 378.

Cahill v. Cahill, *discussed*.

M'Intyre's Trustees' Estate, In re (1888) 21 L. R. Ir. 421.—**CHATTERTON, V.C.**; **Harle v. Jarman** (1895) 64 L. J. Ch. 779, [1895] 2 Ch. 419, 13 R. 610, 73 L. T. 20, 43 W. R. 618—**NORTH, J.**

Besant v. Wood (*supra*) and **Rowley v.**

Rowley (1896) L. R. 1 H. L. (SC.) 63—**CHELMSPFORD, L.C.** and **LORD CRANWORTH**, *followed*

McGregor v. McGregor (1888) 57 L. J. Q. B. 591, 21 Q. B. D. 424, 37 W. R. 46, 62 J. P. 772—**C.A.** **ESHER, M.R.**, **LINDLEY** and **BOWEN, L.J.**; *affirming*, 58 L. T. 227.—**STEPHEN** and **A. L. SMITH, JJ.**

Marshall v. Marshall (*supra*, col. 1204) and

Besant v. Wood, *applied*

Rowley v. Rowley and **McGregor v. McGregor**, *followed*.

Aldridge v. Aldridge (or **A. v. M.**) (1888) 58 L. J. P. 8, 13 P. D. 210, 59 L. T. 896, 37 W. R. 240.—**HANNEN, P.** *And see post*, col. 1207.

Rowley v. Rowley and **Besant v. Wood**,

referred to, **Gooch v. Gooch** (1893) 62 L. J. P. 73; [1893] P. 93 (*post*, col. 1239)

Besant v Wood (col 1205), *referred to*.
Russell v. Russell (1895) 64 L J P 105;
 [1895] P 315—C.A. (*post*, col. 1208)

Besant v Wood, *considered*
Kauski v. Kauski (1898) 68 L J P 18
JEUNE, P.—It is clear that the view taken by Sir G. Jessel in that case is that one party to the deed must have committed a clear, deliberate, and serious breach of the covenants before the Court of Chancery will interfere to prevent the other party from enforcing his or her rights under it—p. 18.

Besant v Wood and Aldridge v Aldridge
(supra), *referred to*
Weston, In re, Davies v. Taggart (1900) 69 L J Ch. 555 [1900] 2 Ch. 164, 82 L T. 591, 48 W. R. 467—STIRLING, J.

Field v Field (1888) 58 L. J. P. 21; 14 P. D. 26, 59 L. T. 880; 37 W. R. 181—C.A. COTTON, LINDLEY and BOWEN, *L.J.s*, *dissenting*.
Smith v Smith (1890) 15 P. D. 11, 47; 69 L. J. P. 9, 62 L. T. 237, 38 W. R. 276—C.A., *reversing DUTT J.*

LINDLEY, L.J.—I also think that this case is not governed by **Field v Field** to the extent to which the learned judge held it to be. That case differs from the present in more respects than one. In the first place the letter there was nothing more than a lawyer's letter. In the next place the present appellant expressed what we were unable to find in the letter in **Field v Field**—her desire to return to cohabit with her husband. Thirdly, it appears in the present case that the husband received the letter and answered it immediately with an unqualified refusal to take his wife back; whereas in **Field v Field**, there was no proof that he had ever received the letter—p. 49.
COTTON and PRY, L.J.s to the same effect

● **Norris v Norris and Gyles** (1858) 27 L. J. Mat. 72; 1 Sw. & Tr. 174, 6 W. R. 640—**CAMPBELL, C.J.**, **FOLLOCK, O.B.**, and **SIR C. CRESSWELL, approved**.
Swift v Swift (1890) 60 L. J. P. 14, [1891] P. 129, 63 L. T. 711—**HANNEN, P.**, and **Sentle v Sentle** (1860) 80 L. J. Mat. 216; 4 Sw. & Tr. 230.—**SIR C. CRESSWELL, explained**.
Mitchell v. Mitchell (1891) 60 L. J. P. 46, [1891] P. 208; 64 L. T. 607, 39 W. R. 680.—C.A. **LINDLEY, BOWEN and KAY, L.J.s**, *reversing* [1891] P. 116, 64 L. T. 91.—**JEUNE, J.**

Bigwood v Bigwood (1888) 57 L. J. P. 80; 18 P. D. 80, 58 L. T. 642, 36 W. R. 928—**HANNEN, P.**; and **Tress v Tress** (1887) 56 L. J. P. 93, 12 P. D. 128; 87 L. T. 501, 35 W. R. 872; 51 L. J. P. 604.—**HANNEN, P., followed**

Beaulerk v Beaulerk (1891) 60 L. J. P. 20; [1891] P. 189, 64 L. T. 84—C.A. **LINDLEY, LOPES and KAY, L.J.s**, *commented on*.

Beaulerk v. Beaulerk (1895) 61 L. J. P. 102, [1895] P. 220, 11 R. 651, 43 W. R. 636.—**JEUNE, P.**

● **Dicks v Dicks** (1899) 68 L. J. P. 118, [1899] P. 275; 81 L. T. 402—**BARNES, J.**; and **Tress v Tress, followed**.

Hardie v. Hardie, Bateman v. Bateman (1901)

70 L. J. P. 29; [1901] P. 136, 84 L. T. 61, 831.—**BARNES, J.**

2 DIVORCE.

Cruelty

Jones v Jones (1860) **Sentle and Smith** Rep. 138; and **Gioco v Gioco** (1858) 1 Spinks Ecc. & Ad. 121—**DR LUSHINGTON, referred to**.
Bonchman v Bonchman (1896) L. R. 1 P. 233, 14 W. R. 1024—**LORD PENZANCE**

Popkin v Popkin (1794) 1 Hagg. Ecc. Rep. 765, n.—**SIR W. SCOTT** (*and see post*), and **Boardman v Boardman, considered**.
Reg. v. Clarence (1888) 58 L. J. M. C. 101; 22 Q. B. D. 23, 59 L. T. 780, 37 W. R. 166, 16 Cox C. C. 511; 53 J. P. 119—**CORR.**

Evans v. Evans (1790) 1 Hagg. Cons. 37—**SIR W. SCOTT, dissented**. **Curle v Curle** (1858) 27 L. J. Mat. 73, 1 Sw. & Tr. 192.—**SIR C. CRESSWELL, followed**. **Kelly v. Kelly** (1870) 80 L. J. Mat. 28; L. R. 2 P. 59, 22 L. T. 308, 18 W. R. 767.—**LORD PENZANCE, CHANNELL, B and HANNEN, J.**

Kelly v Kelly, followed
Methuen v. Bethune (1890) 60 L. J. P. 18, [1891] P. 205; 63 L. T. 259.—**HANNEN, P.**

Evans v. Evans, approved.
Bray v. Bray (1828) 1 Hagg. Ecc. Rep. 163, *commented on*.
Popkin v Popkin (*supra*); **Oliver v. Oliver** (1801) 1 Hagg. Cons. 361; **Gale v. Gale** (1852) 2 Rob. Ecc. Rep. 421; and **Burch v. Birch** (1878) 42 L. J. Mat. 23; 28 L. T. 40, 21 W. R. 163, *explained*.
Peterson v. Peterson (1850) 3 H. L. Cas. 308—**H. L. (SC.)** **LORD BROUGHAM, and Kelly v. Kelly** (*supra*), *distinguished*.
Seaver v. Seaver (1846) 2 Sw. & Tr. 665, **Dysart v. Dysart** (1841) 3 Notes of Cases 324, and **Mackenzie v. Mackenzie** [1895] 4 C. 384.—**H. L. (SC.), dissented**.
Russell v. Russell (1895) 61 L. J. P. 105, [1896] P. 315; 73 L. T. 295; 41 W. R. 213—C.A. **LINDLEY and LOPES, L.J.s**; **RIGBY, L.J.** *dissenting*, *affirmed, post*.

Russell v. Russell and Yeatman v. Yeatman (1888) 16 W. R. 734.—**SIR J. WILDS, dissented**.
Oldroyd v. Oldroyd (1896) 65 L. J. P. 113, [1896] P. 175; 75 L. T. 281.—**BARNES, J.**

Evans v. Evans; Westmeath v. Westmeath (1820) 2 Hagg. Ecc. Supp. 1; **Neeld v. Neeld** (1831) 4 Hagg. Ecc. 263; **Popkin v. Popkin; Clouburn's Case** (1680) **Haley v. v. Saunders v. Saunders** (1847) 1 Rob. Ecc. 549, **Bray v. Bray, Gale v. Gale; Peterson v. Peterson; Tomkins v. Tomkins** (1868) 1 Sw. & Tr. 168, **Pickard v. Pickard** (1864) 33 L. J. Mat. 158, 3 Sw. & Tr. 523, 10 Jur. (N.S.) 830, 14 L. T. 789; 13 W. R. 188, **Forth v. Forth** (1867) 36 L. J. Mat. 122, 16 L. T. 574, 15 W. R. 1091; **Milford v. Milford** (1866) 36 L. J. Mat. 30, L. R. 1 P. 295; 15

- L. T. 392; 15 W. R. 319; *affirmed*, 37 L. J. Mat. 30—H. L. (N.), and *Milner v. Milner* (1861) 31 L. J. Mat. 159, 4 Sw. & Tr. 240, *discussed*.
- Russell (Earl) v. Russell (Countess) (1897) 69 L. J. P. 122, [1897] A. C. 395, 75 L. T. 249, 61 J. P. 756—H. L. (N.), *affirming* S. C. (*supra*)
- LORDS WATSON, HURSCHELL, MACNAGHTEN, STAN and DAVEY, HALSBURY, L.C., LORDS HOBHOUSE, ARBOURNE and MORRIS, *dissenting*. See judgments at length.
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- Coffey v. Coffey (1898) 67 L. J. P. 86, [1898] L. 169, 78 L. T. 796.—BARNES, J., and Thompson v. Thompson (1901) 85 L. T. 172.—JEUNE, P., *followed*.
- Bosworthick v. Bosworthick (1901) 86 L. T. 121, 60 W. R. 217; 18 Times L. R. 104.—BARNES, J.

Desertion.

- Nott v. Nott (1866) 36 L. J. Mat. 10; L. R. 1 P. 251, 15 L. T. 229.—LORD PENZANCE, *distinguished*.
- Crabb v. Crabb (1868) 37 L. J. Mat. 42, L. R. 1 P. 601; 18 L. T. 153, 16 W. R. 650.—LORD PENZANCE, *confirmed*.
- Parkinson v. Parkinson (1869) L. R. 2 P. 25, 39 L. J. Mat. 14, 21 L. T. 732.
- LORD PENZANCE.—The question then is, whether a woman who voluntarily enters into an agreement that her husband shall live apart from her, can be said to have been deserted without just cause. I repeat the opinion I formed in *Crabb v. Crabb*, that she cannot. There is a material difference between such a case as this and *Nott v. Nott*. The *ratio decidendi* in *Nott v. Nott* was, that the wife never agreed to live separate from the husband. The making of a deed was contemplated, and some of the parties executed it, but the party whose execution was to make it an efficient and binding agreement was the trustee who covenanted for the wife, and he never signed it, so that the deed was never completed. In this case the Court is jointly obliged to hold that the wife has bargained away her right to relief on the ground of desertion, and that the charge of desertion without cause for two years is not established.—P. 27

- Nott v. Nott; Dagg v. Dagg and Speake (1882) 51 L. J. P. 19, 7 P. D. 17, 47 L. T. 182; 30 W. R. 431.—HANNEN, P.; and Crabb v. Crabb, *commented on*.
- Piper v. Piper (1902) 71 L. J. P. 100, [1902] P. 138; 67 L. T. 150.—JEUNE, P., and BARNES, J.

- Farmer v. Farmer (1884) 53 L. J. P. 113, 9 P. D. 245, 33 W. R. 169.—HANNEN, P., and Fitzgerald v. Fitzgerald (1869) 38 L. J. Mat. 14; L. R. 1 P. 694; 18 L. T. 575; 17 W. R. 264.—LORD PENZANCE, *followed*. And see *post*, col. 1210.
- Garcia v. Garcia (1888) 57 L. J. P. 101, 18 P. D. 216; 59 L. T. 524; 52 J. P. 534.—BUTT, J.

- Farmer v. Farmer and Garcia v. Garcia, *followed*.
- Edwards v. Edwards (1893) 62 L. J. P. 38.—BARNES, J.

- Farmer v. Farmer, *followed*.
- Lapington v. Lapington (1888) 58 L. J. P. 26, 14 P. D. 21, 59 L. T. 608; 37 W. R. 384; 53 J. P. 427.—BUTT, J.

- Fitzgerald v. Fitzgerald (*supra*), *explained*.
- Mahoney v. McCarthy (1891) 61 L. J. P. 41, [1892] P. 21.—JEUNE, P.

- Pape v. Pape (1887) 57 L. J. M. C. 8, 20 Q. B. D. 76, 36 W. R. 125.—STEPHEN and A. L. SMITH, JJ., *approved and applied*.

- Fitzgerald v. Fitzgerald, *referred to*.
- Reg. v. Leresche (1891) 60 L. J. M. C. 153, [1891] 2 Q. B. 418, 65 L. T. 602; 10 W. R. 2.—G. A. LOPES and KAY, JJ.

- Reg. v. Leresche, *distinguished*.
- Chudler v. Chudler (1893) 63 L. T. 348, 617; 17 Cox C. C. 697.—G. A. LINDLEY, SMITH and DAVEY, *affirming*, 62 L. J. M. C. 97, 57 J. P. 790.—DAY and LAWRENCE, JJ.

- Fitzgerald v. Fitzgerald and Reg. v. Leresche, *explained and distinguished*.
- Bradshaw v. Bradshaw (1896) 66 L. J. P. 81, [1897] P. 24, 75 L. T. 391, 45 W. R. 142; 61 J. P. 8.—JEUNE, P. and BARNES, J.

- Fitzgerald v. Fitzgerald and Buckmaster v. Buckmaster (1890) 38 L. J. P. 73, L. R. 1 P. 719, 2 L. T. 231, 17 W. R. 1114.—LORD PENZANCE, *distinguished*.
- De Lanbrenque v. De Lanbrenque (1898) 68 L. J. P. 20; [1898] P. 42, 79 L. T. 708.
- JEUNE, P.—In *Buckmaster v. Buckmaster* the wife bargained away her right to a cohabitation for an allowance.—p. 22

- Reg. v. Leresche and Fitzgerald v. Fitzgerald, *considered*.

- Bradshaw v. Bradshaw, *followed*.
- Huxtable v. Huxtable (1899) 68 L. J. P. 83.—JEUNE, P.—It is not an uncommon thing to find that *Reg. v. Leresche* has not been properly understood. The circumstances of life, such as business duties, domestic service, and other things, may separate husband and wife, and yet, notwithstanding, there may be cohabitation. In giving judgment in *Fitzgerald v. Fitzgerald* Lord Penzance said, "I come, then, to the following conclusions as applicable to cases of this kind: No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion'." This is a true statement of the law, but it must not be taken to mean that cohabitation necessarily implies the daily and nightly residence together of the husband and wife. This was pointed out by this Court as recently as the year 1897 in *Bradshaw v. Bradshaw*—p. 85. BARNES, J. concurred.

- Fitzgerald v. Fitzgerald and Reg. v. Leresche, *discussed*.
- Synge v. Synge (1901) 70 L. J. P. 97; [1901] P. 317, 85 L. T. 88.—G. A. RIGBY, ROMER and COLLINS, JJ.

Graves v Graves (1864) 33 L. J. P. 66, 3 Sw. & Tr. 350, Dickinson v Dickinson (1880) 62 L. T. 330—BUTT, J. Pizzala v Pizzala (1896) 12 Times L. R. 451—JEUNE, P., and Koch v. Koch (1899) 68 L. J. P. 90, [1899] 1 221, 81 L. T. 61—BARNES, J., *condoned*.

Sickert v Sickert (1896) 68 L. J. P. 114, [1899] P. 278, 81 L. T. 495.

BARNES, J.—In my opinion, the party who intends to bring the cohabitation to an end, and

Condonation.

Worsley v Worsley (1780) 1 Hagg. Ecc. Rep. 734, and D'Aguiar v D'Aguiar (1794) 1 Hagg. Ecc. Rep. 773.—SIR W. SCOTT, *discovered*.

Durant v Durant (1825) 1 Hagg. 733.

D'Aguiar v D'Aguiar, *discovered*. Russell (Earl) v. Russell (Countess) (1897) 66 L. J. P. 122, [1897] A. C. 305—R. L. (H) (Nuttall, col 1209).

Turton (1830) (INGTON; and 1831) 3 Hagg. *discovered*.

81 L. J. Mat. 41; 5 L. T. *post*, col. 1214.

J. Mat. 118; 252, *direction* *cond*; also *discovered*.

B. v. Blandford P. 17, 48 L. T. *post*, col 1215 p. Cas 205, 32

t v. Durant, Sir

as unnecessary to decide upon the point, as no was satisfied that adultery subsequent to the established condonation was proved, expresses an opinion which is, no doubt, a weighty authority, though not a decision. He went very far in his language. He says (p. 761), "If nothing but clear proof . . . cruelly will revive adultery." If this language is to be taken without qualification, and followed to its logical result, it would follow that, however long a spouse had, after condoned adultery, lived chastely and in full performance of all that a spouse should do, any lapse, however slight and venial in itself, from duty, revived the old adultery, and obliged, or at least enabled, the Court to decree a separation. This does not seem to me either just or expedient, I doubt if it was meant. No case in the Ecclesiastical Courts was cited in which the ground of complaint was not one which was, from its nature, capable of being aggravated by the previous, though condoned, adultery, and in most, if not all, it was so grave that it might well be a ground for separation, even if not so aggravated, and in *Dent v. Dent*, to be noticed later, it was such cruelty as, without adultery, would have entitled the petitioner to a divorce *à mensâ et thoro* (p. 237). . . In *Dent v. Dent* the wife petitioned on account of adultery and cruelty. The husband pleaded condonation of the cruelty. On the point it was admitted that he had been *condoned*.

present case is so clearly distinguishable from *Pizzala v Pizzala*. There the husband was carrying on an adulterous intercourse with another woman, but not in the matrimonial home, and refused to break it off, although his wife told him that unless he did so she must leave him. The wife then left him, and he continued to live with the woman for over two years. The President held the husband guilty of desertion. These cases all appear to me to have been decided in accordance with the principles shortly stated above, and no distinction has been made whether the adulterous intercourse was carried on in the matrimonial home or elsewhere—p. 115.

Lawrence v. Lawrence (1862) 31 L. J. Mat. 145, 2 Sw. & Tr. 575.—SIR C. CRESSWELL, *distinguished*.

Townsend v. Townsend (1873) 12 L. J. Mat. 71; L. R. 3 P. 129, 29 L. T. 254, 21 W. R. 984.—SIR J. HANNEN

Townsend v. Townsend, *distinguished*. Drew v. Drew (1888) 53 L. T. 923, 57 L. J. P. 64, 13 P. D. 97; 86 W. R. 927.

HANNEN, P.—In that case the correspondence was kept up between the parties while they were away from one another—p. 924

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taken place in 1861, there is evidence that in 1864 the husband was guilty of cruelty. If you are satisfied of that fact, you will find that though the wife did pardon the husband's adultery there was subsequently committed which revived that adultery. The cruelty must have been within the 27th section, 'such cruelty as, without adultery, would have entitled her to a divorce *à mens et thoro*.' This is, I think, the only case reported in which the doctrine of revival has been made the ground on which a divorce *à mens et thoro* has been granted, and the strong objection arising from its varying the status of married persons does not seem to have been brought to the notice of the learned judge. In *Blanford v. Blanford*, there had been adultery and desertion: there had been a forgiveness of both that adultery and of the desertion, and a resumption of conjugal intercourse for a few months; after which the adultery with the same person was resumed; there was no condonation of that latter adultery, and the question was whether it could be coupled with the previous desertion, though that desertion had ceased before the adultery complained of was committed. This seems to me a very different question from that raised in *Dent v. Dent*. But it is to be observed that the judge ordinary, Sir J. Hannen, seems to express approbation of the doctrine laid down in the *dictum* in *Durant v. Durant*—p 240.

LORD WATSON, who concurred, dealt with the Scotch authorities. SELBORNE, L.C. concurred.

Durant v. Durant, explained.

Russell v. Russell (1895) 64 L. J. P. 105, [1895] P. 315—C.A. (*supra*, col. 1208).

Dent v. Dent (*supra*), followed.

Moore v. Moore (1892) 62 L. J. P. 10; [1892] P. 382, 67 L. T. 539—BARNES, J.

Anichini v. Anichini (1899) 3 Curt. 210—DR.

LUSHINGTON, *reargued*, Goode v. Goode and Hannan (1861) 30 L. J. Mat. 105, 2 Sw. & Tr. 253; 4 L. T. 122, 9 W. R. 552—SIR C. CRESSWELL, *discussed*, Lantour v. Queen's Proctor (1864) 33 L. J. Mat. 89; 10 H. L. Cas. 685, 10 Jur. (N.S.) 825; 10 L. T. 198, 12 W. R. 611—H. L. (2d). WESTBURY, L.C., LORDS CRANWORTH and CHELMSFORD, affirming S. C. nom. Lantour v. Lantour and Weston (1861) 31 L. J. Mat. 66; 2 Sw. & Tr.—SIR C. CRESSWELL, *approved*, Goode v. Goode (1898) 62 L. J. P. 73; [1898] P. 99 (*post*, col. 1239).

Lantour v. Queen's Proctor, referred to.

Clarke v. Clarke and Clarke (1865) 34 L. J. Mat. 94; 13 W. R. 848.—SIR J. WILDE.

Joseph v. Joseph and Wentzel (1865) 34

L. J. Mat. 96; 13 W. R. 872.—SIR J. WILDE, Coleman v. Coleman (1866) 35 L. J. Mat. 37; L. R. 1 P. 81, 13 L. T. 684.—LORD PENZANCE (*and see post*), and Anichini v. Anichini, referred to. Morgan v. Morgan and Porter (1869) 38 L. J. Mat. 41; L. R. 1 P. 644, 20 L. T. 688, 17 W. R. 688.—LORD PENZANCE.

Morgan v. Morgan and Porter, discussed.

Noble v. Noble and Goodman (1869) 38 L. J. Mat. 52; L. R. 1 P. 691; 20 L. T. 1016.—LORD PENZANCE. *And see post*.

Morgan v. Morgan, reasoning adopted.

McCord v. McCord, Ogle and Coxon (1875) 44 L. J. Mat. 38; L. R. 3 P. 237, 33 L. T. 264; 23 W. R. 684.—SIR J. HANNEN.

Morgan v. Morgan and McCord v. McCord, Ogle and Coxon, followed.

Grosvenor v. Grosvenor and Smith (1885) 84 W. R. 140, 2 Times L. R. 35.—BUTT, J. *And see post*.

McCord v. McCord, followed.

Stoly v. Story and O'Connor (1887) 57 L. J. P. 15, 12 P. D. 196 (*post*, col. 1215), Boucher v. Boucher (1892) 1 B. 194, 67 L. T. 720; 9 Times L. R. 70.—BARNES, J.

Morgan v. Morgan (*supra*), approved.

Symons v. Symons (1897) 66 L. J. P. 81, [1897] P. 167, 77 L. T. 152.—SUNK, P. *See judgment at length where earlier cases are discussed.*

Coleman v. Coleman (*supra*, col. 1213) and

Symons v. Symons, discussed. Burdon v. Burdon (1900) 69 L. J. P. 118; [1901] P. 62.—BARNES, J.

McCord v. McCord, referred to.

Morgan v. Morgan (*supra*) and Grosvenor v. Grosvenor and Smith (*supra*), commented on and applied.

Wandley v. Wandley and Bowland (1901) 71 L. J. P. 43; [1902] P. 85 (*post*, col. 1238).

Alexandre v. Alexandre (1870) 39 L. J. Mat.

84, L. R. 2 P. 104; 23 L. T. 268, 18 W. R. 1087.—LORD PENZANCE, *considered*. *And see post*.

Butler v. Butler (1890) 59 L. J. P. 25; 15 P. D. 66, 62 L. T. 844, 38 W. R. 390.—C.A. GOTTON, LINDLEY and LOPES, L.JJ.

Noble v. Noble and Goodman (*supra*, col.

1213), applied. Moore v. Moore (1892) 62 L. J. P. 10; [1892] P. 382; 67 L. T. 539.—BARNES, J.

Noble v. Noble and Moore v. Moore, discussed and applied.

Whitworth v. Whitworth (1893) 62 L. J. P. 71, [1893] P. 55, 1 R. 609; 68 L. T. 467, 41 W. R. 592.—BARNES, J.

Hulse v. Hulse and Tavernor (1871) 41

L. J. Mat. 19; L. R. 2 P. 257, 25 L. T. 764, 20 W. R. 417.—LORD PENZANCE, and Alexandre v. Alexandre (*supra*), explained.

Butler v. Butler (*supra*), discussed.

Moore v. Moore, followed.

Rogers v. Rogers (1894) 63 L. J. P. 97, [1894] P. 161, 6 R. 650, 70 L. T. 690.—JUNE P.

Dempster v. Dempster (*supra*, col. 1212);

Alexandre v. Alexandre, Peacock v. Peacock (1858) 27 L. J. Mat. 71; 1 Sw. & Tr. 183, 6 W. R. 806.—SIR C. CRESSWELL; and Keats v. Keats and Montezuma (1859) 28 L. J. Mat. 37, 1 Sw. & Tr. 834, 5 Jur. (N.S.) 176; 7 W. R. 377.—CHELMSFORD, L.C., WIGHTMAN, J. and SIR C. CRESSWELL, *discussed*.

Norris v. Norris, Lawson and Mason (1894) 30 L. J. Mat. 111, 4 Sw. & Tr. 237.—WILDE, J., distinguished.

Pomero v. Pomero and Hadley (1884) 54

L J T 93, 10 P. D 174: 34 W. R 124.—

BUTT, J. overruled.

Story v Story and O'Connor (1887) 57 L. J. P. 15, 12 P. D 196: 57 L. T. 536, 36 W. R 190, 51 J. P. 680.—*HANNEN, P. approved.*
Bernstein v Bernstein (1893) 63 L. J. P. 3, [1893] 1 P. 292, 6 R. 609: 63 L. T. 513.—*C. A. LINDLEY, LOPES and A. L. SMITH, L.J.s.* See judgments at length.

Story v Story and O'Connor, referred to.

Gooch v. Gooch (1895) 62 L. J. P. 73, [1895] P. 99 (*post*), col 1239; *Waulby v. Waulby* and *Bowland* (1901) 71 L. J. P. 43, [1902] P. 85, (*post*), col 1235.

Badham v. Badham and Gorst (1890) 62

L. T. 963.—*HANNEN, P. followed.*

Lander v. Lander (1891) 60 L. J. P. 65,

[1891] P. 161, 61 L. T. 120, 39 W. R 416,

55 J. P. 152.—*HANNEN, P. distinguished.*

Edwards v. Edwards and Francis (1893) 63 L. J. P. 62; [1894] P. 33, 70 L. T. 39.—*BARNES, J.*

Pearman v. Pearman and Burgess (1890)

29 L. J. Mat. 54, 1 Sw. & T. 601,

8 W. R. 274.—*SIR C. CRESSWELL, Bad-*

ham v. Badham and Gorst, Edwards v.

Edwards and Francis, and Newman v.

Newman (1870) 39 L. J. Mat. 86, L. R.

2 P. 57, 22 L. T. 552, 18 W. R. 584.—

LORD PENZANCE, dissented.

Parry v. Parry (1895) 65 L. J. P. 38, [1896] P. 37, 73 L. T. 759, 12 Times L. R. 126.—*BARNES, J.*

Edwards v. Edwards and Francis and Parry

v. Parry, referred to.

Tanham v. Tanham, Beeson and Ballard (1897) 13 Times L. R. 453.—*BARNES, J.*

Pearman v. Pearman and Burgess and

Edwards v. Edwards and Francis, re-

ferred to.

Pryor v. Pryor, Cowie and Macdonald (1900) 69 L. J. P. 99, [1900] P. 157.—*JEUNE, P.*

Continued.

Timmings v. Timmings (1792) 3 Hagg. 76,

dissented.

Dillon v. Dillon (1841) 3 Curt. 86.—*DR. LUSHINGTON.*

Timmings v. Timmings, dissented from

Timmings v. Timmings, dissented from.

words were uttered by that learned judge, because they are wholly inconsistent with the tenor of the rest of his judgment, but as they are attributed to him in this report I think it right to say, that so far as my judgment extends, that is not the law, and that it would be a disgrace to the law if it were so. If a husband knowing the tendency and the evil habit of the wife—misled by the expression—"let the licentiousness of the wife take its full scope"—without reproof or interference, I hold that he would never obtain any remedy in a Court of Justice. In subsequent cases a very different rule is represented [His Lordship then dealt with the subsequent cases]—p. 105.

Sugg v. Sugg and Moore (1861) 31 L. J. Mat.

41.—*SIR C. CRESSWELL, considered.*

Ploken v. Ploken and Simmonds (1864) 34

L. J. Mat. 22.—*SIR J. WILDE, affirmed.*

Gower v. Gower, Pearson, Hill and Bann (1872)

L. R. 2 P. 428, 41 L. J. Mat. 49, 27 L. T. 43;

20 W. R. 889.

LORD PENZANCE.—Sugg v. Sugg and Moore

was relied on; but that is not a very satisfactory

authority on which to decide an important

question of law, because it is the report of a

summing-up to a jury, in which the learned

judge would be more diffuse than in giving

judgment, and might very possibly use expres-

sions which did not convey his precise meaning.

Besides, the question in that case was whether

there had been collusion between the petitioner

and the co-respondent and other persons. The

allegation in the answer was that "the peti-

tioner, in collusion with the co-respondent and

with divers other persons, in or about the month

of October, 1860, procured the defilement of the

respondent by the co-respondent, which is the

adultery (if any) alleged in his petition", and

it was in reference to that allegation that the

learned judge made the following observations

upon which the petitioners relies:—"On the part

of the respondent . . . that would not affect the

petitioner's case." If by these observations the

learned judge merely intended to convey that it

was not a necessary result of the evidence that

the petitioner was acting in collusion with the

co-respondent, that may be so; but I desire to

state distinctly and broadly, in order that, if I

am wrong, I may be corrected by a Court of

liberty to let the licentiousness of the wife take its full scope." I cannot believe that these

Evans v. Evans and Platt (1890) 68 L. J. P. 70, [1890] P. 195; 81 L. T. 60.—*JEUNE, P.*

Custody and Maintenance of Children.

Marsh v. Marsh (1858) 28 L. J. Mat. 13, 1 Sw. & Tr. 312; 5 Jur. (N.S.) 46; 7 W. R. 129.—SIR C. CRESSWELL, *approved*
Boynston v. Boynston (1861) 30 L. J. Mat. 156, 2 Sw. & Tr. 275, 1 L. T. 238, 9 W. R. 620.—SIR C. CRESSWELL, WIGHTMAN and WILLIAMS, JJ.

Marsh v. Marsh, Boynston v. Boynston and Suggate (1859) 29 L. J. Mat. 167, 1 Sw. & Tr. 492, 8 W. R. 26.—SIR C. CRESSWELL, *discussed and applied*
Chetwynd v. Chetwynd (1865) 34 L. J. Mat. 180; 4 Sw. & Tr. 151, L. R. 1 P. 39; 11 Jur. (N.S.) 958, 13 L. T. 197; 14 W. R. 184.

Boynston v. Boynston, discussed
Wigney v. Wigney (1882) 51 L. J. P. 60; 7 P. D. 177.—C.A. (*post*, col. 1222).

Webster v. Webster (1862) 31 L. J. Mat. 184.—SIR C. CRESSWELL, *followed* And *see post*.

Blanford v. Blanford (1892) 61 L. J. P. 97, [1892] P. 148; 67 L. T. 392.—BUTT, P.

Blanford v. Blanford, explained.

Midwinter v. Midwinter (1893) 62 L. J. P. 77; [1893] P. 93 (*post*, col. 1222).

Ryder v. Ryder (1861) 30 L. J. Mat. 44; 2 Sw. & Tr. 225, 3 L. T. 678; 9 W. R. 44

—SIR C. CRESSWELL, WILLIAMS, J. and CHANNELL, B. **Webster v. Webster** (*supra*); and **Mallinson v. Mallinson** (1865) 35 L. J. Mat. 81; L. R. 1 P. 221; 14 L. T. 636; 14 W. R. 973.—LORD PENZANCE, *disapproved*

Benyon v. Benyon and O'Callaghan (1876) 45 L. J. P. 98, 1 P. D. 447, 24 W. R. 950 —HANNIN, P., *followed*

Blanford v. Blanford, reversed
Thomson v. Thomson (1894) 63 L. J. P. 140, [1894] P. 205; 6 R. 637, 71 L. T. 148, 42 W. R. 958.—C.A., *reversing JUDGE, P.*

LINDLEY, L.J. (after having discussed the cases at law and in equity as to the custody of infants) continued: "It was there [*Ryder v. Ryder*] decided that the Court had no jurisdiction to make any order as to the custody of children over sixteen. The main ground for this decision appears to have been that Courts of Common Law did not make orders disposing of the custody of children over sixteen, and the Divorce Court had not the children before it, and could not therefore enforce against them any order it might make. This reason does not appear to me satisfactory. The Divorce Court could decide as between the parents which parent should have the custody of the children. And even if the Divorce Court could not bring the children before it and exercise jurisdiction over them, still, if the Divorce Court had made an order binding on the parents, such an order might, if necessary and proper, have been enforced by proceedings in Chancery. The effect of *Ryder v. Ryder* practically was to enable a delinquent father to set up the age of his infant child as an answer to an application for an order for its custody. This was, in my opinion, an unfortunate decision, but it is one from which the Judicature Acts have, in my opinion, set us free. It was also wrong to hold as a matter of law that maintenance followed custody and that

the Court had no jurisdiction to order maintenance for a child over sixteen. This was decided in *Webster v. Webster*, although WILLIAMS, J., in *Ryder v. Ryder*, had pointed out that it did not follow from that decision that maintenance could not be ordered for a child over sixteen. Even before the Judicature Act, 1873, the cases, in my judgment, went too far. But after that Act I confess my inability to understand how it can be right to hold that the statutory discretion conferred upon the Court is restricted within the narrow limits previously supposed. And, in *Benyon v. Benyon* an allowance was made for a child until twenty-four. However, in *Blanford v. Blanford* the late President (Sir C. Butt) distinctly held that the Court had no power to make an order as to the custody or maintenance or education of a child who was over sixteen years of age. The attention of the President does not, however, appear to have been called either to the Judicature Act, 1873, or to *Agar-Ellis, In re* (1883) 53 L. J. Ch. 10; 24 Ch. D. 317.—C.A. *See "INFANTS," post*, col. 1220) and his decision, in my judgment, was erroneous. In the present case the learned President has simply followed *Blanford v. Blanford*, which he considered to be binding on him.—p. 142.

LOPES, L.J. to the same effect.

Miller v. Miller (1870) 39 L. J. Mat. 38; L. R. 2 P. 64; 22 L. T. 418, 18 W. R. 585 —LORD PENZANCE, *principle applied*
Allen v. Allen (1885) 54 L. J. P. 77; 10 P. D. 187; 33 W. R. 826.—HANNIN, P.

Miller v. Miller, explained
Allen v. Allen, approved.
Hyde v. Hyde (1888) 13 P. D. 166, 57 L. J. P. 89, 59 L. T. 629, 36 W. R. 708.—C.A.
COTTON, L.J.—It was contended that in *Miller v. Miller* the order of sequestration was only against the separate estate of a married woman as to which there was no restraint against antipaction, but we find from the minutes of the order (which have been obtained by the registrar) that that is not so, but that the order and writ were in the same general form as in the present case, and we are told that the practitioner in the Divorce Court has always been to make the order and issue the writ in that form.—p. 172.

BOWEN, L.J. to the same effect.

FRY, L.J.—Then it was argued that the sequestration order ought to be confined in the same manner as the judgment in *Scott v. Morley* (1887) 57 L. J. Q. B. 43, 20 Q. B. D. 120, *post*, col. 1287. Now, in the first place, I may observe that *Scott v. Morley* has really nothing to do with a case of sequestration. This was a case of a judgment for damages, which can be obtained against a married woman only under the provisions of the Married Women's Property Act of 1882. . . . But with regard to sequestration, it appears to me that that statute does nothing at all—p. 177.

Symington v. Symington (1875) L. R. : Sc. App. 415 —HE (SC.) CAIRNS, L.C.
LORDS O'HAGAN and SELBORNE, applied
Clout v. Clout and Hallebone (1861) 3 L. J. Mat. 275, 2 Sw. & Tr. 391; L. T. 130.—SIR C. CRESSWELL; **Bent v. Bent and Footman** (1861) 30 L. J. Mat. 176, 2 Sw. & Tr. 392, 5 L. T. 189.—SIR C. CRESSWELL, and **Taylor v. Taylor** an

Walters (1870) 39 L. J. Mat. 23; 22 L. T. 140.—*LORD PENZANCE, referred to.*

Handley v Handley and Wroughton (1890) [1891] P. 124, 63 L. T. 537, 39 W. R. 97.
55 J. P. 293.—C. A. LINDLEY, BOWEN and FRY, L. JJ.

Cartledge v Cartledge (1862) 31 L. J. Mat. 85, 2 Sw. & Tr. 567, 6 L. T. 397; 10 W. R. 672.—*SIR C. CRESSWELL, distinguished.*

Barnes v Barnes and Beaumont (1867) L. R. 1 P. 463, 16 W. R. 283

LORD PENZANCE—This is distinguishable from *Cartledge v Cartledge*. The children in this case are both of tender age; they are not living with their father, and it is clear that the mother's health has suffered from being deprived of their society. No doubt the father is, at common law, entitled to the custody of his children. But they are not under his roof as in *Cartledge v Cartledge*, he does not enjoy the solace of their society, and that case clearly expressed the state of things now before the Court.—p. 463

Webley v. Webley (1891) 64 L. T. 839.
—*JEUNE, J., approved.*

Hitchings v Hitchings (1892) 67 L. T. 530.
—*BARNES, J.*

Mrs. Addison's Case (1801) Macq. Pract. H. L. p. 598, *followed*.
Hart's Divorce Bill (1898) [1898] A. C. 405.—H. L. (18.). HALLSBUCK, L. C., LORDS HERSHELL, MACNAGHTEN and BRAND.

Skinner v. Skinner (1888) 57 L. J. P. 104
13 P. D. 90, 58 L. T. 923, 36 W. R. 912
52 J. P. 406.—*HANNEN, P., distinguished*.
Woolnoth v. Woolnoth (1902) 85 L. T. 598.—*JEUNE, P.*

Judicial Separation.

Chambers v. Chambers (1810) 1 Hag. Cons. 439.—*SIR W. SCOTT*; and *Harris v Harris* (1829) 2 Hag. 411.—*DR. LUSHINGTON, discussed*

Dillon v. Dillon (1841) 3 Curt. 86.—*DR. LUSHINGTON. And see post*

Proctor v. Proctor (1819) 2 Hag. 202.—*SIR W. SCOTT, referred to*.
Drummond v. Drummond (1861) 30 L. J. P. 177, 7 Jur. (N.S.) 762, 4 L. T. 416.—*SIR C. CRESSWELL.*

Drummond v. Drummond, *approved*

Otway v. Otway (1888) 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153.—C. A.; *reversing* 13 P. D. 12.—*BUTT, J.*

FRY, L. J.—It is to be borne in mind that not a single case can be found in which a decree of divorce *a mensa et thoro* has been pronounced in favour of a wife who has been guilty of adultery. Lord Stowell, no doubt, in *Chambers v. Chambers* (*supra*) expressed a doubt as to whether a decree might not be pronounced where the husband was guilty of cruelty; but Dr. Lushington in *Dillon v. Dillon* (*supra*) expressly dissented from that intimation of opinion on Lord Stowell's part. Since the passing of the Act of 1857 the point has been fully discussed and considered in *Drummond v. Drummond*, in which the judge ordinary arrived at the conclusion that the adultery of the wife was a bar to any relief.—p. 151

COTTON and LOPES, L. JJs. to the same effect.

Otway v. Otway, *followed* 1
Duplany v. Duplany (1891) 61 L. J. P. 49; [1892] P. 63; 66 L. T. 267.

JEUNE, J.—In allowing the petition [for divorce] to be turned into a petition for judicial separation, I am doing that which was done by the President in *Otway v. Otway*, although that judgment was afterwards reversed by the C. A. on the ground that the wife by her misconduct had disentitled herself to any relief at all.—p. 55.

Otway v. Otway, *applied*

Gooch v. Gooch (1893) 62 L. J. P. 73; [1893] P. 99 (*post*, col. 1239)

Duplany v. Duplany, *explained and applied*
Boreham v. Boreham (1866) 35 L. J. Mat. 49, L. R. 1 P. 77, 11 W. R. 317.—*SIR J. WILDE, referred to.*

Synges v. Synges (1900) 69 L. J. P. 106, [1900] P. 180, 88 L. T. 224; 64 J. P. 464.—*JEUNE, P., affirmed*, (1901) 70 L. J. P. 97, [1901] P. 317, 85 L. T. 88.—C. A. (*supra*, col. 1210).

Effect of, on Property.

Bullmore v. Wynter (1883) 22 Ch. D. 619; 31 W. R. 498.—*FRY, J., distinguished*, Knox v. Wells (1883) 48 L. T. 656, 31 W. R. 559.—*BACON, V.-C., commented on and not followed*, Morrison, In re, Hitchins v. Morrison (1887) 58 L. J. Ch. 80, 40 Ch. D. 80; 59 L. T. 817; 37 W. R. 91.—*KAY, J.*

Evans v. Carrington (1890) 90 L. J. Ch. 964; 2 De G. F. & J. 181; 7 Jur. (N.S.) 197; 4 L. T. 65.—*CAMPBELL, L. C., reversing* 29 L. J. Ch. 330, 1 J. & H. 598, 6 Jur. (N.S.) 268; 1 L. T. 229, 8 W. R. 113.—*WOOD, V.-C., followed. And see post*, col. 1221

Jessop v. Blake (1862) 3 Grif. 639; 8 Jur. (N.S.) 537, 6 L. T. 454; 10 W. R. 643.—*STUART, V.-C. Swift v. Wenman* (1870) 39 L. J. Ch. 336; L. R. 10 Eq. 15; 21 L. T. 194; 18 W. R. 480; and *Fussell v. Dowding* (1872) 41 L. J. Ch. 716; L. R. 14 Eq. 421, 27 L. T. 406, 20 W. R. 881.—

ROMILLY, M.R. And see S. C. (1861) 53 L. J. Ch. 924; 27 Ch. D. 237; 51 L. T. 392, 82 W. R. 790.—*CHITTY, J., not followed*

Fitzgerald v. Chapman (1875) 45 L. J. Ch. 23, 1 Ch. D. 563; 38 L. T. 587, 24 W. R. 130

JEUNE, M.R.—There was, first, *Jessop v. Blake*, very soon after the passing of the Divorce Act. [His lordship, having stated the facts of the case, continued.] The judgment was . . . not that the settlement was destroyed, but apparently (for I can only guess) the V.-C. adopted the plaintiff's counsel's argument that it ceased because the dissolution of the marriage was equivalent to the death of the husband. If that were so, it is difficult to see how all the preceding law on the subject could have been right; and it is impossible to see that there is any change in the declaration of trust or the position of the parties, which authorised it. All I can say is that, considering the vast current of authority which existed previously as regards marriages dissolved, I am quite unable to follow these cases which were decided upon the ground that the dissolution of the marriage was equivalent to the death of the husband. The next case is . . .

Swift v. Wenman. . . The judgment . . . is thus reported in the Law Reports: "Lord Romilly, M.R., considered that the husband had no interest in the trust fund, and made a decree according to the prayer of the bill." I am utterly at a loss to know why. It is a decision without a reason, and it cannot furnish a guiding principle for deciding anything. Whether or not it might be binding in the identical case I am not sure, but my present impression is, that I should not consider it as binding, even in the identical case, under the circumstances. The next is . . . *Bussell v. Darding*. . . The judgment was in these words: "I am of opinion that the plaintiff is entitled to the whole property." Why? I cannot find out at all, but there it is. That is the third decision. I am unable to follow it. . . I am quite unable to say how he [Lord Romilly] distinguished *Bussell v. Darding* from *Evans v. Carrington*—pp 25—27.

Burton v. Sturgeon (1876) 45 L. J. Ch. 638, 2 Ch. D. 318, 31 L. T. 706; 21 W. R. 772—C.A. JAMES, MELLISH and HAGGALLAY, L.J., affirming JESSEL, M.R., referred to, *Rosier's Trusts*, in re (1887) 37 L. T. 126.—MALLINS, V.C.

Fitzgerald v. Chapman (*supra*), referred to *Hamilton v. Hamilton* (1892) 61 L. J. Ch. 220, [1892] 1 Ch. 395, 66 L. T. 112, 40 W. R. 312—NORTH, J., *Rosier's Trusts*, in re (*supra*).

Evans v. Carrington (*supra*), referred to. *Wastneys v. Wastneys* (1900) 69 L. J. P. C. 88, [1900] A. C. 146—P.C. HALSBURY, L.C., LORDS HOBHOUSE, MACNAGHTEN, DAVEY and ROBERTSON.

Insole, in re (1865) 35 L. J. Ch. 177, L. R. 1 Eq. 470, 35 Beav. 92; 13 L. T. 455—ROMILLY, M.R. (*quod non post*); and *Johnson v. Lander* (1869) 38 L. J. Ch. 229; L. R. 7 Eq. 228; 19 L. T. 692; 11 Jur. (NS) 1011, 14 W. R. 160.—ROMILLY, M.R., followed. *Emery's Trusts*, in re (1884) 50 L. T. 197; 32 W. R. 357.—KAY, J.

Johnson v. Lander, followed. *Coward and Adams' Purchase*, in re (1875) 44 L. J. Ch. 381, L. R. 20 Eq. 179, 32 L. T. 682, 23 W. R. 605—JESSEL, M.R.

Coward and Adams' Purchase, in re, applied. *Nicholson v. Drury Building Estate Co* (1877) 47 L. J. Ch. 192; 7 Ch. D. 48, 37 L. T. 459, 26 W. R. 76—FRY, J.

Insole, in re (*supra*), and *Johnson v. Lander*, applied. *Middleton v. Andrews* (1888) 21 L. R. 11 411.—CHATTEBORTON, V.C.

Insole, in re, and *Coward and Adams' Purchase*, in re, distinguished. *Waite v. Morland* (1888) 57 L. J. Ch. 655; 38 Ch. D. 185—C.A. (*post*, col. 1225).

Variation of Settlement.

Chapman v. Bradley (1863) 33 L. J. Ch. 139, 4 De G. J. & S. 71, 3 N. R. 10, 10 Jur. (NS) 5; 9 L. T. 495, 12 W. R. 140.—KNIGHT BRUCE and TURNER, L.J.; varying 33 Beav. 61—M.R., followed. A. (f. c. M.) v. M. (1884) 54 L. J. P. 81, 10

P. D. 178; 33 W. R. 232.—BUTT, J. *And see post*

A. (f. c. M.) v. M., followed. *Leeds v. Leeds* (1886) 57 L. T. 373.—BUTT, J.

Chapman v. Bradley, followed. *Pawson v. Brown* (1879) 49 L. J. Ch. 193, 13 Ch. D. 202, 41 L. T. 339; 28 W. R. 652—MALLINS, V.C. *Neale v. Neale* (1898) 79 L. T. 630.—C.A. A. L. SMITH, HIGBY and COLLINS, L.J.

A. (f. c. M.) v. M. (*supra*), *Chapman v. Bradley* and *Pawson v. Brown*, distinguished. *Dormer (otherwise Ward) v. Ward* (1900) 69 L. J. P. 141, [1901] P. 29—C.A. (*post*, col. 1223).

Fisher v. Fisher (1861) 31 L. J. Mat. 1, 2 Sw. & Tr. 410, 8 Jur. (NS) 103, 5 L. T. 364, 10 W. R. 122—SIR C. CRESSWELL, and *Chetwynd v. Chetwynd* (1865) 35 L. J. Mat. 21, L. R. 1 P. 39, 11 Jur. (NS) 988, 13 L. T. 474; 14 W. R. 184—LORD PENZANCE, distinguished. *Narroott v. Narroott and Hesketh* (1865) 31 L. J. Mat. 54, 4 Sw. & Tr. 76; 11 L. T. 750, 13 W. R. 505.—SIR C. CRESSWELL, followed.

Gladstone v. Gladstone (1876) 45 L. J. P. 82, 1 P. D. 442; 35 L. T. 880; 24 W. R. 759.—HANNEN, P.

Gladstone v. Gladstone, discussed. *Wigney v. Wigney* (1882) 51 L. J. P. 60; 7 P. D. 177; 46 L. T. 441; 30 W. R. 722—C.A. JESSEL, M.R., COTTON and LINDLEY, L.J.

Gladstone v. Gladstone, approved. *Benyon v. Benyon* (1890) 59 L. J. P. 39, 15 P. D. 54, 62 L. T. 581.—C.A. COTTON, LINDLEY and LOPES, L.J.

Gladstone v. Gladstone, referred to. *Kettlewell v. Kettlewell* (1897) 67 L. J. P. 16; [1898] P. 138 (*post*, col. 1229).

Wigney v. Wigney, followed. *Ponsonby v. Ponsonby* (1884) 53 L. J. P. 112, 9 P. D. 122, 51 L. T. 174; 32 W. R. 746—C.A. BAGGALLAY, COTTON and LINDLEY, L.J.; *Dormer (otherwise Ward) v. Ward* (1900) 69 L. J. P. 144, [1901] P. 21 (*post*, col. 1223).

Ponsonby v. Ponsonby, discussed. *Meredith v. Meredith and Leigh* (1895) 64 L. J. P. 54; [1895] P. 92 (*post*, col. 1223).

March v. March and Palumbo (1867) 36 L. J. Mat. 280, L. R. 1 P. 437; 16 L. T. 366, 15 W. R. 799—LORD PENZANCE, MELLOR, J. and PIGOTT, B. and *Bacon v. Bacon and Bacon* (1860) 29 L. J. Mat. 129; 2 Sw. & Tr. 86; 2 L. T. 458, 8 W. R. 652.—SIR C. CRESSWELL, MARTIN, B. and WILLES, J., applied. *Midwinter v. Midwinter* (1893) 62 L. J. P. 77, [1893] P. 93, 1 R. 612, 68 L. T. 262; 41 W. R. 560.—JUNES, P.

March v. March and Palumbo, principle applied. *Savary v. Savary* (1899) 79 L. T. 607.—C.A. (*post*, col. 1223).

Nunneley v. Nunneley and Marrian (1890) 15 P. D. 186, 63 L. T. 118.—HANNEN, P. *explained and followed*. *Crisp v. Crisp* (1872) 42 L. J. Mat. 13, 1 R.

2 P 126; 27 L. T. 428, 21 W. R. 79.—
LORD PENZANCE, *applied*. *And see post*.
Forsyth v. Forsyth (1891) 61 L. J. P. 13,
[1891] P. 363; 65 L. T. 656.

JUNE, J.—It is true that in that case [*Nesbitt v. Nesbitt*] the parties appear to have had an English domicile. The learned judge mentioned the fact that the wife, being Scotch originally, acquired her husband's English domicile; but his language appears to show clearly that the principle of his decision was that sect 5 of the 22 & 23 Vict. c. 61, gave power to vary the settlement, although it was Scotch, and was to be interpreted according to Scotch law.—p. 14.

And see post.

Noel v. Noel (1885) 54 L. J. P. 73, 10 P. D. 179; 33 W. R. 552 HANSEN, P., *discussed*.

Meredith v. Meredith and Leigh (1895) 64 L. J. P. 54, [1895] P. 92, 11 R. 651; 72 L. T. 898, 43 W. R. 304.—JUNE, P. *And see post.*

Noel v. Noel, *commented on but followed*.
Branton Day v. Branton Day and Ekinne (1898) 78 L. T. 378.—JUNE, P.

Noel v. Noel, *principle applied*.

Harrison v. Harrison (1887) 56 L. J. P. 76, 12 P. D. 139, 57 L. T. 119; 35 W. R. 703.—BUTT, J., *not applied*.

Savary v. Savary (1899) 79 L. T. 607.—C.A. LINDLEY, M.R., CHITTY and V. WILLIAMS, L.J.

Noel v. Noel; Crisp v. Crisp (*supra*, col. 1223), Forsyth v. Forsyth (*supra*), Pollard v. Pollard (1894) 63 L. J. P. 104, [1894] P. 172; 6 R. 894; 70 L. T. 815.—JUNE, P., and Hipwell v. Hipwell (1892) 61 L. J. P. 84, [1892] P. 147, 67 L. T. 396.—BUTT, P., *considered*.

Hartopp v. Hartopp (1899) 68 L. J. P. 39, [1899] P. 65, 80 L. T. 297.—BARNES, J.

Pollard v. Pollard, *followed as to costs*.
Whitton v. Whitton (1901) 71 L. J. P. 10, [1901] P. 348; 85 L. T. 646.—JUNE, P.

Crisp v. Crisp, *not applied*.
Whitton v. Whitton, *approved*.
Blood v. Blood (1902) 71 L. J. P. 97; [1902] P. 190, 80 L. T. 641, 50 W. R. 547, 18 Times L. R. 588.—C.A. COLLINS, M.R., STIRLING and COZEN-HARDY, L.J.

Thomas v. Thomas (1860) 29 L. J. Mat. 160, n.; 2 Sw. & Tr. 89; 2 L. T. 438, 8 W. R. 504, Bird v. Bird (1866) 35 L. J. Mat. 102; L. R. 1 P. 231, 14 L. T. 360; 14 W. R. 1023, and Corrance v. Corrance (1868) 37 L. J. Mat. 44, L. R. 1 P. 485, 18 L. T. 635, 16 W. R. 893, *referred to*.
Farrington v. Farrington (1889) 65 L. J. P. 69; 11 P. D. 81.—BUTT, J., and Meredith v. Meredith and Leigh (*supra*), *discussed*.

Dormer (otherwise Ward) v. Ward (1900) 69 L. J. P. 144; [1901] P. 20, 83 L. T. 556, 49 W. R. 149.—C.A.; *reversing* 69 L. J. P. 65, [1900] P. 130, 82 L. T. 466, 48 W. R. 524.—BARNES, J.

V. WILLIAMS, L.J.—*Farrington v. Farrington*, A. v. M. (*supra*, col. 1221) (a nullity case), and *Meredith v. Meredith* are all cases to show that

the Court has exercised the power under sect 5 of the [Matrimonial Causes] Act of 1859 in cases where there never had been issue of the marriage. In these cases the Court does not seem to have been much, if at all, discussed, but in *Wigney v. Wigney* (*supra*, col. 1223), the question was directly raised and argued, and, according to Sir G. Jessel, the amendment contained in the latter section was not expressed in the most artistic way, because, where there were no children of the marriage there could be no person to whom the former section could in terms apply, but what was meant, of course, was that, where there were no children, the persons to be benefited were the divorced husband and wife. This seems a direct decision of the C.A. on the point, it was followed by the C.A. in *Ponsonby v. Ponsonby* (*supra*, col. 1222). . . . Now it is said that the jointure rechargé and term could only come into force if the marriage should take effect, and that as the marriage has been declared void it did not take effect, and the jointure rechargé and term cannot come into force, and the settlement was without consideration. Barnes, J. says that *Chapman v. Bradley* (*supra*, col. 1221) and *Chapman v. Brown* (*supra*, col. 1222) support these reasons. I agree with Barnes, J. as to the effect of these cases, except that, as a deal does not require consideration, I should rather have said the condition had not happened on which the deal was to take effect than that the deal was without consideration. But I do not agree with Barnes, J. as to the result, for, as I have already said, inasmuch as all marriage settlements are subject to the condition marriage, if one were to hold that the Court cannot under sect 5 apply settled property for the benefit of the wife and children unless there has been a valid marriage, it would be to hold that the powers of sect. 5 can never be exercised in the case of a decree of nullity, but the section says that the powers may be exercised in such a case. This, in my opinion, by necessary implication gives the Court the power to vary the settlement to this extent.—p. 150 HALSBURY, L.C. and A. L. SMITH, L.J. *concur*.

Meredith v. Meredith and Wynne v. Wynne (1898) 78 L. T. 736.—JUNE, P., *discussed*.
Walpole v. Walpole and Goddard (No. 2) (1901) 70 L. J. P. 49, [1901] P. 196; 84 L. T. 727.

JUNE, P.—I am afraid I can hardly deal with this case in the same way as in *Meredith v. Meredith*. The two cases are distinguishable, because here, if the respondent's life interest is extinguished, as admittedly it should be, the petitioner does not himself acquire an absolute interest, and has not power to dispose of this property. His next-of-kin still would have an interest in the property under the Statute of Distributions, and if I were to destroy their interest, I should be extinguishing the interests of persons entitled to property and whose conduct is in no way impugned. In *Meredith v. Meredith* I thought that, although *Noel v. Noel* (*supra*, col. 1223) showed that the Court will not disturb settlements further than the alteration of circumstances warrants, and will respect the interests of persons whose conduct has not been impugned, still I considered myself justified in going the length of giving the property wholly

and absolutely to the petitioner. So in *Wyman v. Wyman* the wife obtained the whole property. It was only in the event of the wife not disposing of the property that the interests of the next-of-kin would have come into operation in that case—p. 51.

Chalmers v. Chalmers (1892) 68 L. T. 28; 1 R. 501—*JEUNES*, *p. approved*.
Hubbard (obitervie Rogers) v. Hubbard (1901) 70 L. J. P. 81; [1901] P. 157; 84 L. T. 441—*C. A. RIGBY, v. WILLIAMS and STIRLING, L.J.*

Protection Order

Dawes v. Creyke (1885) 54 L. J. Ch. 1096, 30 Ch. D. 500; 53 L. T. 292; 33 W. R. 808.—*BAIGNS, v. C.*, and *Cooke v. Fuller* (1858) 26 Bev. 99.—*ROMILLY, M.R., distinguished*.
Waite v. Morland (1888) 38 Ch. D. 135, 57 L. J. Ch. 655, 53 L. T. 185, 36 W. R. 484.—*C. A. CORTON, J.*—In *Isaacs, In re* (*supra*, col. 1221), the property was a reversionary interest on wife which came into possession after the decree for judicial separation, and there it was properly held that she took it as a *feme sola*. That case has, therefore, no application to the present. Then in *Howard and Adams Purchase, In re* (*supra*, col. 1221), there was a legacy to the wife which became payable before the protection order, but it was not reduced into possession by the husband, and after the protection order the person liable to pay it paid it to the wife; and the M.R. held he was justified in so doing. That is intelligible, but it does not govern the present case. . . . It is not necessary for us to express any opinion upon that decision [*Dawes v. Creyke*], but there, in fact, the property did come to the wife after the decree, and it does not govern this case. We are not bound by that decision [*Cooke v. Fuller*], and if it has the effect contended for by the appellants I should decline to follow it. No doubt it was very similar to this case. A wife was deserted by her husband, and afterwards her father bequeathed a fund to her for her separate use without power of anticipation, and she subsequently obtained a protection order. Lord Romilly held that she was entitled to payment of the fund free from the restraint on anticipation. There may have been circumstances that justified the decision, but the case is very shortly reported, and the reasons for the decision are not stated—p. 137.
LINDLEY, J.—That case [*Cooke v. Fuller*] was not decided under sect. 25 [Divorce and Matrimonial Causes Act, 1857], but under sect. 21, which has reference to a protection order, and is expressed in different terms—p. 138. *BOWEN, L.J.* concurred. *And see post.*

Dawes v. Creyke, discussed.
Davenport v. Marshall (1901) 71 L. J. Ch. 29, [1902] 1 Ch. 82; 85 L. T. 840; 87 L. T. 432; 50 W. R. 39.—*BUCKLEY, J.*

Davenport v. Marshall, explained and not approved.
Bankes, In re, Reynolds v. Ellis (1902) 71 L. J. Ch. 708; [1902] 3 Ch. 838, 87 L. T. 432, 50 W. R. 463.—*BUCKLEY, J.*

Waite v. Morland (supra), followed.
Hill v. Cooper (1898) 62 L. J. Q. B. 423; [1898] 2 Q. B. 85; 4 R. 418; 69 L. T. 216; 4

W. R. 500, 57 J. P. 663.—*C. A. ESHER, M.R., LOPES and A. L. SMITH, L.J.*

Hill v. Cooper, distinguished.

Hughes, In re, Brandon v. Hughes (1897) 67 L. J. Ch. 279, [1898] 1 Ch. 529; 78 L. T. 133, 16 W. R. 502; *affirmed*, *C. A. LINDLEY, M.R., RIGBY and WILLIAMS, L.J.*

KECKWICH, J.—*Hill v. Cooper* decided that a married woman who has obtained a protection order is still a married woman, and if you once find that, then as to any separate property settled subject to a restraint on anticipation that restraint still holds good as regards what was so settled before the date of the protection order. This is under sect. 25 [Matrimonial Causes Act, 1857], where there are words of futurity. I am not dealing with property, I am dealing with contract—p. 281.

Woods v. Woods (1884) 10 P. D. 172; 33 W. R. 323, 50 J. P. 199.—*BUTT, J., followed.*
Powell v. Powell (1889) 14 P. D. 177; 61 L. T. 436, 53 J. P. 519.—*BUTT, J.*

Powell v. Powell, overruled.
Jones v. Jones (1895) 64 L. J. P. 84; [1895] P. 201, 11 R. 614; 72 L. T. 662, 43 W. R. 656, 59 J. P. 390.—*JEUNES, R. and BRUCE, J.*

Jones v. Jones, explained.
Woodhead v. Woodhead (1895) 11 R. 658; [1895] P. 343.

JEUNES, P.—All my brother Bruce and I there meant to say was, that although the orders then under consideration had been made at the same time, they were not all parts of a criminal proceeding so that the husband's mouth would be shut on the subject of his means, and he would have been unable to give evidence on that point—that seemed to us a contention that could not possibly be maintained, more especially as upon any application to vary the order he could be heard. We never intended to say that after a conviction of an aggravated assault there could be a subsequent application for an order for cohabitation, or for the custody of children, or for maintenance—p. 661. *BARNES, J.* concurred.

See now Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39).

Mudge v. Adams (1881) 50 L. J. P. 49, 6 P. D. 54, 44 L. T. 185, 29 W. R. 307.—*HANNEN, P., discussed.*

Cargill v. Cargill (1858) 27 L. J. Mat. 69, 1 R. & T. 235, 4 Jur. (N.S.) 704, 6 W. R. 870.—*SIR C. CRUSWELL, approved.*

Matthew v. Matthew (1869) 19 L. T. 662.—*SIR J. WILDS, applied.*
Mahoney v. McCarthy (1901) 61 L. J. P. 41, [1902] P. 21.—*JEUNES, J.*

Hall, Ex parte (1858) 27 L. J. Mat. 19.—*SIR C. CRUSWELL, followed.*
Morris, In re (1902) 71 L. J. P. 56, [1902] P. 101, 85 L. T. 596.—*JEUNES, P.*

Summary Jurisdiction

Reg. v. Huggins (1891) 60 L. J. M. C. 139.—*COTTERIDGE, C.J. and MATHEW, J.* *See Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 12.*

Reeve v Yeates (1862) 31 L. J. M. C. 241, 1 H. & C. 485, 8 Jur. (N.S.) 751; 10 W. R. 779—*ex. applied*.
Ellis v Ellis (1896) 65 L. J. P. 124, [1896] P. 251; 75 L. T. 890, 15 W. R. 144, 60 J. P. 823—**JEUNE, P.** and **BARNES, J.**

Ellis v Ellis, approved. **Medway v Medway** (1900) 69 L. J. P. 56, [1900] P. 141, 82 L. T. 627, 48 W. R. 622, 64 J. P. 120—**JEUNE, P.** and **BARNES, J., followed**, **Rowlands v Rowlands** (1902) 86 L. T. 127—**JEUNE, P.** and **BARNES, J.**

Alimony and Maintenance

Latham v Latham and Gethin (1861) 30 L. J. Mat. 163; 2 Sw. & Tr. 298, 7 Jur. (N.S.) 219, 4 L. T. 308, 9 W. R. 680—**SIR C. CRESSWELL, doubted**, **Laxton v Laxton** (1861) 30 L. J. Mat. 208—**SIR C. CRESSWELL, discussed**, **Ossey v Ossey and Atkinson** (1875) 43 L. J. P. 38; 1 P. D. 56 (*post*, col. 1235)

Latham v Latham, overruled
Ellis v Ellis (1888) 8 P. D. 188; 52 L. J. P. 99; 49 L. T. 225, 31 W. R. 642—**C. A.**
CORTOX, L. J.—The question we have to deal with is whether during the period between the decree *nisi* and the final decree alimony can be granted. Until the final decree the Court can make no permanent provision for the wife, therefore it seems reasonable that it should have power to make some temporary provision. For this reason, independently of authority, I should come to the conclusion that the order appealed from was right. **Latham v Latham** is no doubt an authority against it, but that is not binding upon us. If it had been generally followed it might not have been right to disturb the practice. But it is not so. In **Laxton v Laxton**, the same judge who decided **Latham v Latham** seems to have doubted its correctness, and said that it ought to be considered again. **Laxton v Laxton** is an authority for the view that an application for permanent alimony before the final decree is premature. Therefore, I think, we are justified in overruling **Latham v Latham**—**p. 189**
BOWEN, L. J. to the same effect

Ellis v Ellis and Laxton v Laxton, referred to
Stanhope v Stanhope (1886) 55 L. J. P. 36; 11 P. D. 163—**C. A.** *See post*, col. 1236

Wells v Wells and Hudson (1864) 33 L. J. Mat. 151; 3 Sw. & Tr. 542; 10 Jur. (N.S.) 755; 10 L. T. 696—**SIR J. WILDE, discussed**

Ellis v Ellis, distinguished
Dunn v Dunn (1888) 18 P. D. 91, 57 L. J. P. 58; 59 L. T. 885, 36 W. R. 639—**C. A.**
CORTOX, L. J.—The question is whether **Wells v Wells** lays down a binding rule that after the verdict of a jury has established the adultery of a wife, she can as a matter of right claim that alimony *pendente lite* which has been allowed her shall go on till the period during which a new trial can be applied for has expired. In **Wells v Wells**, there was no motion for a new trial, in the present case a motion for a new trial has been refused. We do not find on inquiry that **Wells v Wells** has been treated in the Divorce Court as establishing such a general rule as is contended for—that, although the wife

has been found guilty, the alimony must go on till the case is finally disposed of. **Ellis v Ellis** was an entirely different case. The wife there took the proceedings against her husband, and she had in no way forfeited her rights against him. The case was one where it would be proper ultimately to grant permanent alimony, and we thought it reasonable that in the meantime she should have intermediate alimony—**p. 92** **LINDLEY and BOWEN, L. J.** concurred

Bird v Bird (1753) 1 Lee 209, *followed*.
Blackmore v. Mills (f. c. Blackmore) (1868) 18 L. T. 586; 16 W. R. 892—**SIR J. WILDE, explained**.

Foden v Foden [1894] P. 307, 68 L. J. P. 168, 61 R. 338, 71 L. T. 279; 42 W. R. 689—**C. A.**
HALESHELL, L. C.—Under the circumstances of that case [**Blackmore v. Mills**] it may have been quite right to refuse to grant alimony. But I do not think Lord Penzance meant to lay down that the Court had no jurisdiction to grant alimony in a suit for nullity on the ground that the marriage was void *ab initio*, if he did, I cannot agree with him. In **Bird v Bird**, in 1753, Sir G. Lee, the then judge of the Court of Aches, in a suit for nullity of marriage, brought by the husband on the ground that at the time of the marriage the wife had another husband living, a *de facto* marriage being admitted, held that the husband must bear the expenses of the wife. Sir G. Lee said that, as there was no precedent, he must determine the case upon the general principles of law and reason. And he added, "I must presume, until the contrary appeared in evidence, that she was his wife *de jure*, as well as *de facto*, for otherwise she must be guilty of bigamy, and is a felon by stat. of Jac. 1; but the law presumes, on the contrary, everybody to be innocent till they are found guilty." That was, no doubt, the first decision of the kind. But it appears to have become afterwards the settled practice of the ecclesiastical courts to grant alimony to a wife pending suit in all cases of this kind, unless there was some special reason to the contrary.

In my opinion, the practice is in accordance with reason and good sense—**p. 312**
LINDLEY and DAVEY, L. J. to the same effect

Haviland v Haviland (1863) 32 L. J. Mat. 67, 3 Sw. & Tr. 114; 9 Jur. (N.S.) 208, 7 L. T. 757, 11 W. R. 650—**SIR C. CRESSWELL, commented on**
Benson v Benson (1867) 66 L. J. P. 35, [1897] P. 77, 76 L. T. 168, 45 W. R. 304

JEUNE, P.—It was argued before me that the husband's income of £60 a month is a voluntary allowance from his brother, and that, therefore, it ought not to be taken into account in fixing alimony, and reliance was placed on **Haviland v Haviland**, I therefore reserved judgment, because I wished to ascertain by an examination of the authorities and by inquiry whether it has been since the date of that case the practice in the Registry to exclude from their calculations all incomes to which the recipients have no legal claim. I am informed that it has not, but, on the contrary, in many cases such incomes have been taken into calculation. Not only do I think it right that this should be so, but I can easily understand why **Haviland v Haviland** has not been considered to forbid such a practice.—**p. 86.**

- Bonsor v Bonsor, referred to**
Nott v Nott (1901) 70 L. J. P. 94; [1901] P. 211, 84 L. T. 573, 65 J. P. 378.—*JUNES, P.*
- Vandergrucht v. De Blaquiere** (1839) 5 Myl & Cr. 229, 3 Jun 1116.—*COTTENHAM, L.C., varying.* (1838) 7 L. J. Ch. 270, 8 Sim. 315, 2 Jun 738.—*v. c.*, *Stones v Cooke* (1835) 8 Sim. 821, n.—*LYNCHBURST, L.C., reversing* (1834) 3 L. J. Ch. 325, 7 Sim. 22.—*v. c.*, and *Prescott v Prescott* (1869) 20 L. T. 381.—*SIR J. WILDE, referred to.*
- Robinson, In re** (1881) 55 L. J. Ch. 986, 27 Ch. D. 160, 51 L. T. 747; 33 W. R. 17.—*C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ.*
- Prescott v. Prescott, applied.**
Robinson, In re, referred to
Linton v. Linton (1885) 51 L. J. Q. B. 529, 15 Q. B. D. 289, 52 L. T. 782, 33 W. R. 711, 49 J. P. 597.—*C.A. BRETHER, M.R., BAGGALLAY and JOWEN, L.JJ.*
- Robinson, In re; Hawkins, In re, Hawkins, Ex parte** (1893) [1894] 1 Q. B. 25, 10 L. 29; 69 L. T. 769, 42 W. R. 292; 1 Mansf. 6.—*v. WILLIAMS and KENNEDY, JJ.*; and *Jardine v. Jardine* (1881) 51 L. J. P. 4, 6 P. D. 213, 30 W. R. 91.—*C.A. COLERIDGE, C.J., HANSEN, P.* and *SIR M. PHILLIMORE, discussed*
Watkins v. Watkins (1896) 65 L. J. P. 75, [1896] P. 222, 74 L. T. 636; 44 W. R. 677.—*C.A. LINDLEY, LOPES and KAY, L.JJ.*
- Watkins v. Watkins and Hawkins, In re, discussed**
Kerr v. Kerr (1897) 66 L. J. Q. B. 838, [1897] 2 Q. B. 439; 77 L. T. 29, 46 W. R. 46.—*HAWKINS and V. WILLIAMS, JJ., WRIGHT, J. dissenting.*
- Dart v. Dart** (1863) 32 L. J. P. 125; 3 Sw. & Tr. 208, 9 Jur. (N.S.) 474; 11 W. R. 551.—*SIR C. CRESSWELL, and White v. White* (1859) 1 Sw. & Tr. 591, 6 Jur. (N.S.) 28, 1 L. T. 197, *overruled*
Prichard v. Prichard (1864) 3 Sw. & Tr. 528; 10 Jur. (N.S.) 839; *reported as Prichard v. Prichard*, 33 L. J. Mat. 138; 10 L. T. 789, 13 W. R. 188.—*SIR C. CRESSWELL.*
[Dart v. Dart and White v. White, where it was laid down that the Court has no jurisdiction to order that a husband who obtains a decree of judicial separation by reason of his wife's cruelty should make any provision for her maintenance, are overruled by Prichard v. Prichard, and the Court will expect some provision to be made for the maintenance of the wife in such a case.]
- Carew v. Carew** (1891) 61 L. J. P. 24, [1891] P. 360; 65 L. T. 167.—*JUNES, J., distinguished.*
- Tonge v. Tonge** (1891) 61 L. J. P. 87, [1892] P. 61; 67 L. T. 890.—*JUNES, J.*
- Tonge v. Tonge, discussed and applied.**
Sykes v. Sykes (1897) 66 L. J. P. 162, [1897] P. 306, 77 L. T. 160.—*C.A. LINDLEY, LUDLOW and GUTTY, L.JJ.*
- Sykes v. Sykes and Wood v. Wood** (1891) 60 L. J. P. 66, [1891] P. 272, 64 L. T. 586.—*C.A. LINDLEY, BOWEN and KAY, L.JJ., followed.*
- Kettlewell v. Kettlewell** (1897) 67 L. J. P. 16; [1898] P. 138, 77 L. T. 681.

SLONE, P.—In *Sykes v. Sykes* it was suggested by Lord Ludlow and Chitty, L.J. that a proper way to look at a matter of this kind is to ask oneself what would be an adequate jointure, or dower, to be allotted to the wife by her husband in case of his death as his widow. With regard to the second question, as to whether or not the *dam sola et curia* clause should be inserted in the deed, I desire to follow in the most ample way I can *Wood v. Wood*, the decision in which somewhat modified the earlier case of *Glidstone v. Glidstone* (*supra*, col. 1222)—*p. 17.*

Morris v. Morris (1861) 31 L. J. Mat. 33.—*SIR C. CRESSWELL, followed*
Stanley v. Stanley (1898) 68 L. J. P. 7, [1898] P. 227, 79 L. T. 104.—*BARNES, J.*

Vloars v. Vloars (1859) 29 L. J. Mat. 20.—*SIR C. CRESSWELL, overruled.*

Sidney v. Sidney (1817) 36 L. J. Mat. 73.—*H.L. (K.) CHILMSFORD, L.C., LORDS CRANWORTH, WESTBURY and COLONNAY, overruled* (1866) 35 L. J. Mat. 46; 1 L. R. 1 P. 78, 13 L. T. 682, 14 W. R. 317.—*C.A., which reversed* 34 L. J. Mat. 122, 4 Sw. & Tr. 178, 11 Jur. (N.S.) 815, 12 L. T. 826.—*LORD PENZANCE, discussed*
Bradley v. Bradley (1878) 47 L. J. P. 53; 3 P. D. 47; 39 L. T. 203, 26 W. R. 831.—*HANSEN, P. And see Osney v. Osney* (col. 1235).

Shorthouse v. Shorthouse (1898) 78 L. T. 687.—*JUNES, P., affirmed*, 79 L. T. 866.—*C.A. LINDLEY, M.R., CHITTY and V. WILLIAMS, L.JJ., distinguished*
Smith v. Smith (No. 2) (1898) 79 L. T. 124.—*JUNES, P.*

Hanbury v. Hanbury (1894) 63 L. J. P. 105, [1894] P. 316, 6 R. 591; 70 L. T. 569; 42 W. R. 494.—*C.A. LINDLEY, LOPES and KAY, L.JJ., varying* [1894] P. 102.—*JUNES, P., appeal compromised*, [1895] A. C. 417; 11 R. 302, 72 L. T. 480.—*H.L. (K.) HERSCHELL, L.C., LORDS WATSON, MACNAGHTEN and SHAND.*

Sidney v. Sidney (1867) 17 L. T. 9.—*MALINS, v. c. (and see post); and Noakes v. Noakes and Hill* (1878) 47 L. J. P. 20; 4 P. D. 60, 37 L. T. 47, 26 W. R. 284.—*HANSEN, P., discussed and distinguished*
Newton v. Newton (1885) 55 L. J. P. 13, 11 P. D. 11, 31 W. R. 123.—*HANSEN, P.*

Newton v. Newton, referred to.
Armstrong v. Armstrong (1896) 67 L. J. P. 90, [1896] P. 178, 79 L. T. 689.—*BARNES, J.*

Sidney v. Sidney (*supra*), *followed*.
Newton v. Newton (1895) 65 L. J. P. 15; [1896] P. 36.—*BARNES, J.*

Robertson v. Robertson (1885) 8 P. D. 94, 48 L. T. 590, 31 W. R. 652.—*C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ., considered.*

Ashcroft v. Ashcroft (1902) 71 L. J. P. 125, [1902] P. 270, 87 L. T. 229, 18 Times L. R. 821.—*C.A. v. WILLIAMS and MATTHEW, L.JJ.*

Proceedings

Charles v. Charles (1866) 36 L. J. Mat. 17, 1 L. R. 1 P. 260, 15 L. T. 416.—*LORD PENZANCE, adhered to* *And see Bradley v. Bradley* (*supra*)
Wilson v. Wilson and Howell (1871) L. R. 2 P. 341, 41 L. J. Mat. 1; 25 L. T. 600, 20 W. R. 125.

LORD PENZANCE—Upon the question of the validity of the rules made by the judge ordinary alone, I adhere to what I said in *Charles v. Charles*. [The judge ordinary read his judgment upon this question in that case.] To this I have only to add that I agree with my brother Pigott, that if the 1st section of the 23 & 24 Vict. c. 144 had been confined to conferring upon the judge ordinary the powers of the "full Court," there might be ground for the suggestion that the expression "full Court" was used in a technical sense as meaning the three judges who, before the passing of that statute, sat to hear suits for dissolution and nullity. There was no statutory definition of the full Court, but it consisted of a certain number of judges, of whom it was necessary that three should be present. But the section goes on to say, "or by three or more judges of the said Court." Now, the full Court never consisted of more than three judges. Something more, therefore, was intended than the full Court of three judges. It seems to me, therefore, that under this section also the judge ordinary alone has power to make the rules—p. 350.

BRAMWELL and PIGOTT, BB. to the same effect.

Bawden v. Bawden (1862) 31 L. J. Mat. 94, 2 Sw. & Tl. 417, 8 Jur. (N.S.) 167; 6 L. T. 27, 10 W. R. 292.—**SIR C. CRESSWELL**, **BRITT** and **KEATING, JJ.**, dissenting, disapproved.

Mordaunt v. Moncrieffe (1874) 48 L. J. Mat. 49; 13 R. 2 H. L. (Sc.) 374, 30 L. T. 649, 23 W. R. 12.—**H. L.** with the Judges, reversing S.C., *nom.* **Mordaunt v. Mordaunt**; 39 L. J. Mat. 57; 13 R. 2 P. 109, 23 L. T. 85, 18 W. R. 845.—**LORD PENZANCE** and **KEATING, J.**; **KELLY, CB.** dissenting.

BRETT, J.—The importance of the decision of Sir C. Cresswell in *Bawden v. Bawden* is therefore attacked. It was said by the learned counsel at the bar that it was a pauper case, and therefore, probably, any reason was thought sufficient to get rid of the suit. To anyone who knew the late Sir C. Cresswell, his chivalrous honour, his intellectual ardour for right decision in matters of law, and his utter disregard and contempt for superior station of parties in litigation, such an assertion is not merely deplorable, it is, to use the mildest word, futile. The authority of *Bawden v. Bawden* cannot be diminished one iota by the only refutation of it which has been suggested. Your lordships must deal with that case upon the footing that it was as much a deliberate and carefully-considered opinion as any ever given by that learned and conscientious judge.—p. 55.

KEATING, J. to the same effect.

KELLY, CB.—It may be convenient here to refer to *Bawden v. Bawden*, in which Sir C. Cresswell, undoubtedly a judge of great learning and high authority, decided that a suit like this could not be proceeded with against a respondent who had become insane. But this decision, if it can be called a decision, was certainly pronounced under circumstances detracting from the weight to which it might otherwise have been entitled. The respondent was a pauper inmate in a workhouse, and a guardian the overseer of the parish. We find no trace of any argument at the bar, and no reasons delivered from the bench. A case was referred to as a supposed precedent, which turns out to have

been no decision at all. And if the view which I take of the Act of Parliament, under which this proceeding was instituted, be correct, the case itself stands alone, as an example of a Court taking upon itself to put an end to a suit lawfully instituted, by an arbitrary act, unauthorised by the common law, and directly opposed to the provisions of an Act of Parliament.—p. 61.

LORD CHELMSFORD—Great stress has been laid on the judgment of Sir C. Cresswell in *Bawden v. Bawden*, and of Lord Penzance in the present case, as proceeding from judges of the highest authority, and more particularly consonant with the procedure of the Divorce Court. But, as the question before your lordships depends entirely upon a judicial construction of an Act of Parliament, those eminent judges cannot derive any peculiar advantage from their experience of the practice of that Court.—p. 65.

LORD HATHERLEY.—I ought not to omit noticing *Bawden v. Bawden*. The decision there adds the weight of Sir C. Cresswell's opinion to that of the majority of the judges in the present case, and of the judge ordinary, and I admit that weight, and regard his judgment as worthy of all respect, but where no argument could be had on one side the weight of all decisions must be greatly impaired.—p. 70.

Mordaunt v. Moncrieffe, *discussed*.

Baker v. Baker (1880) 49 L. J. P. 49, 5 P. D. 142, 42 L. T. 332, 28 W. R. 630.—**HANNEN, P.**, affirmed, 49 L. J. P. 83, 6 P. D. 12.—**C. A. COLERIDGE, C. J.**, **HANNEN, P.**, and **SIR R. PHILLIMORE**, **Redfern v. Redfern** (1890) 60 L. J. P. 9, [1891] P. 139, 64 L. T. 68, 39 W. R. 212; 55 J. P. 37.—**C. A. LINDLEY, BOWEN** and **FRY, L. JJ.**

Baker v. Baker, *discussed*, **Stanhope v. Stanhope** (1886) 55 L. J. P. 36, 11 P. D. 109.—**C. A. (post, col. 1236)**, followed, **Bunell v. Bunell** and **Blake** (1900) 17 Times L. R. 41.—**BARNES, J.**

Trübner v. Trübner and **Oristiani** (1889) 59

L. J. P. 56, 15 P. D. 21; 62 L. T. 186; 38 W. R. 464, 54 J. P. 167.—**BUTT, J.**, followed.

Stumpel v. Stumpel and **Zepfel** (1900) 70 L. J. P. 6; 17 Times L. R. 17.—**JEUNE, P.**

Crawford v. Crawford and **Dilke** (1886) 55

L. T. 303; 34 W. R. 677.—**C. A. COTTON, LINDLEY** and **LOPES, L. JJ.**, affirming 55 L. J. P. 42.—**HANNEN, P.**, referred to.

Grieve v. Grieve (1893) 1 R. 553, 63 L. J. P. 29; [1893] P. 285, 62 L. T. 402.

JEUNE, P.—*Crawford v. Crawford* was a case decided on very special grounds.—p. 553.

Grieve v. Grieve, *followed*.

Carow v. Carow (1897) 63 L. J. P. 74, [1894] P. 31, 6 R. 602.—**BARNES, J.**

Grieve v. Grieve and **Carow v. Carow**, explained.

Wheeler v. Wheeler and **Rhodes** (1880) 58

L. J. P. 65, 14 P. D. 154, 61 L. T. 306.—**BUTT, J.**, distinguished.

Harrop v. Harrop (1899) 68 L. J. P. 58, [1899] P. 61; 60 L. T. 171.

BARNES, J.—Since the [Matrimonial Causes] Act of 1860, the question has arisen in three cases in *Grieve v. Grieve* and *Carow v. Carow* persons charged with adultery by the Queen's

Proctor sought to intervene, but these applications were refused. I think the ground of those decisions is that there was no power to allow them, as intervention is only permitted in the specific cases, which are provided for under sect. 28 of the [Matrimonial Causes] Act of 1857.

In *Wheeler v. Wheeler and Rhodes* a person charged, like the applicant, by a respondent with adultery, applied for leave to intervene. In that case the answer, though it did not in terms claim cross-relief against the petitioner, claimed "such further or other relief as to the Court may seem fit," and this being so, the judge held that it was in effect a cross-petition, and allowed the application, basing the decision on this very ground, and as I read his judgment, expressly declining to decide the point raised. My impression is that he thought that the respondent could have been compelled to cite the applicant, and that it did not much matter whether he was cited or allowed to intervene.—p. 59

Harrop v. Harrop, approved and followed. *Low v. Lowe* (1899) 68 L. J. P. 60; [1899] P. 201; 80 L. T. 575; 47 W. R. 553.—C.A. LINDLEY, M.R., RIGBY and COLLINS, L.J.

Glennie v. Glennie and Bowles (1863) 32 L. J. Mat. 17; 3 Sw. & Tr. 109; 7 L. T. 696, n., 11 W. R. 28.—SIR C. CRUSWELL, disapproved. *Allen v. Allen and Bell* (1894) 63 L. J. P. 120, [1894] P. 248; 6 R. 597, 70 L. T. 733, 42 W. R. 519.—C.A.

LOPES, L.J. (for self, LINDLEY and KAY, L.J.)—Whatever may have been the grounds for the decision of *Glennie v. Glennie* at the time it was decided, we entertain grave doubts if it can be supported, and whether any practice in accordance with it can be maintained after the Evidence Further Amendment Act, 1869.—p. 124.

Brown v. Brown (1861) 33 L. J. Mat. 203.—SIR J. WILDE, followed. *Valentine v. Valentine* (1901) 70 L. J. P. 89; [1901] P. 283; 85 L. T. 171.—JENKINS, P.

Bruce, Ex parte (1881) 50 L. J. P. 64, 6 P. D. 16; 29 W. R. 174.—HANNEN, P., distinguished.

Turt, Ex parte (1886) 34 W. R. 368. [In *Bruce, Ex parte*, the solicitor to the petitioner was allowed to swear the affidavit verifying a petition for divorce.]

BUTT, J.—In that case the petitioner was serving in the Afghan war; but here he is absent from the country by his own will. The case is not a precedent, and the motion must be refused.—p. 368

Jinkings v. Jinkings (1867) 36 L. J. Mat. 48; 1 R. 1 P. 330, 15 L. T. 512.—LORD PENZANCE, followed.

Gill v. Gill (1888) 60 L. T. 712, 37 W. R. 623.—BUTT, J.; *Bogot v. Bogot* (1890) 62 L. T. 612.—HANNEN, P.

Tollemache v. Tollemache (1858) 28 L. J. Mat. 2.—SIR C. CRUSWELL, and *Pitt v. Pitt* (1868) 37 L. J. Mat. 24; 1 R. 1 P. 461, 17 L. T. 671.—LORD PENZANCE, followed.

Hooke v. Hooke (1858) 27 L. J. Mat. 61, 1 Sw. & Tr. 183, 4 W. R. 868.—SIR C. CRUSWELL. *Muspratt v. Muspratt* (1861) 31 L. J. Mat. 28.—SIR C. CRUSWELL;

Quicke v. Quicke (1861) 31 L. J. Mat. 24,

2 Sw. & Tr. 419, 5 L. T. 690.—SIR C. CRUSWELL; *Jinkings v. Jinkings* (supra), *Payne v. Payne*, *Rodway and Eddels* (1888) 60 L. T. 238.—BUTT, J., *Gill v. Gill* (supra); *Cornish v. Cornish* (1890) 59 L. J. P. 84, 15 P. D. 131, 62 L. T. 667.—BUTT, J., and *Carrier v. Carrier* and *Watson* (1865) 34 L. J. Mat. 47, 4 Sw. & Tr. 81, 11 Jun. (N.S.) 862, 13 L. T. 250, 13 W. R. 507.—SIR J. WILDE disapproved.

Jones v. Jones (1896) 65 L. J. P. 101, [1896] P. 165; 75 L. T. 190.—BARNES, J.

Jones v. Jones, overruled. *Saunders v. Saunders* (1897) 66 L. J. P. 57; [1897] P. 89; 76 L. T. 330; 45 W. R. 583.—C.A. LINDLEY and RIGBY, L.J.; A. L. SMITH, L.J. dissenting. See judgments at length.

Jones v. Jones, Pitt v. Pitt and Saunders v. Saunders, considered and explained. *Edwards v. Edwards and Wilson* (1897) 67 L. J. P. 1, [1897] P. 316, 77 L. T. 408.

JENKINS, P.—In *Jones v. Jones* I am correctly reported as having expressed to Barnes, J. my belief that his judgment was in accordance with the decisions I had previously given in similar cases. The subject has since been under the consideration of the C. A. in *Saunders v. Saunders*, and I think it desirable to state how I conceive the practice now stands, having regard to the decision of that tribunal, which must of course be followed here. The general effect of sect. 28 of the Act of 1857 has long since been determined. In *Pitt v. Pitt* Lord Penzance pointed out, and I gather, on the whole, that the same view is adopted by the C. A. in *Saunders v. Saunders*, that the words "alleged adulterer" do not mean a person charged by name in the petition, but that in every case where adultery is charged there is an alleged adulterer. In other words, where adultery is alleged, *ex necessitate rei* an adulterer is alleged, though it may be that he cannot be identified with any person, living or dead. It has always appeared to me, therefore, that the mere belief of the petitioner, founded on the insufficiency of the evidence then before him, that a person accused of being the adulterer is not guilty, cannot be sufficient to excuse his being made a co-respondent, because, if so, there would practically never be a call on the Court to exercise its discretion, and I did not understand the language used by the learned judge in *Jones v. Jones* to state more than this. Of a principle stated with thus exact limitation, which can hardly be considered a rule, I do not understand the C. A. to express disapproval. But if the petitioner can go farther, and satisfy the Court that no evidence can be obtained against the man accused, then the authority of *Saunders v. Saunders* shows that there may be a case for relieving the petitioner from making a co-respondent.—p. 2

Symons v. Symons and Pike (1862) 31 L. J. P. 84.—SIR C. CRUSWELL, not followed. *Slater v. Slater and Bolderston* (1900) 69 L. J. P. 48.—BARNES, J.

Matthews v. Matthews (1860) 29 L. J. Mat. 118, 120; 1 Sw. & Tr. 490, affirmed. 4 Sw. & Tr. 161 and *Glocci v. Glocci* (1860) 29 L. J. Mat. 60.—SIR C. CRUSWELL distinguished.

Green v. Green (1873) 43 L. J. Mat. 60; 1 L. E.

3 P 121, 29 L T 251, 21 W. R. 824—*STR J HANNEN*

Green v Green (supra), applied.

Mason v Mason (1883) 52 L J P. 27, 8 P D 21; 48 L T 290, 31 W R 361—*C. A. JESSEL*, *M. R., LINDLEY* and *BOWEN, L.J.*, *reversing* (1882) 51 L J P 88, 7 P D 238; 47 L T 25; 31 W. R. 184.—*HANNEN, P.*

Wilkins v Wilkins (1896) 65 L J P 55, [1896] P 108, 74 L T 62, 44 W R 305.—*C. A. LINDLEY, LOPES* and *KAY, L.J.*, *explained*

Bateman v Bateman (otherwise Harrison) (1898) 78 L T 172.

BARNES, J.—In that case the husband was out of time, and the C. A. had him, as it were, under their thumb. It was on that account that it was possible to make provision for the wife a term of granting him an indulgence. That was the ground of the decision.—*p. 473*

Murfett v Smith (1887) 56 L J P 87; 12 P D 116, 57 L T 498; 35 W R 460, 31 J. P. 374—*COLERIDGE, C.J.* and *HUTCH, J.*, *followed*

Taplin v Taplin and *Holland* (1888) 57 L J P 79, 13 P D 100, 58 L T 925, 37 W R 256, 52 J. P. 406.—*COLERIDGE, C.J.* and *HANNEN, P.*

Lewis v Lewis (1861) 30 L J Mat 199; 2 Sw & Tr 304, 7 Jur (Ns) 891, 4 L T 772—*SIR C. CRISWELL, referred to.*

Osney v Osney and *Atkinson* (1875) 45 L J P. 33, 1 P D 56, 33 L T 789, 21 W R. 486.—*HANNEN, P.*

Osney v Osney and *Atkinson, applied*

Halfen (or Halpin, otherwise Boddington) v Boddington (1881) 50 L J P. 61; 6 P D 13, 44 L T 252; 29 W R. 444—*HANNEN, P.*

Halfen v Boddington, followed.

Lewis v Lewis (1892) 61 L J P. 95, (1892) P. 212; 67 L T 358.—*JUNE, J.*

Prole v Soady (1868) 37 L J Ch 246, L R 3 Ch 220, 16 W R 445—*CAIRNS, L.J.*, *distinguished and limited*

Hulse v Hulse and *Tavernor* (1871) 40 L J Mat. 51, L R 2 P. 259, 24 L T. 847, 19 W R 880—*LORD PENZANCE, approved.*

Norman v Villars (1877) 2 Ex. D 359, 46 L J. Ex 579, 36 L T 788, 25 W R 780.—*C. A.*, *reversing* 36 L T. 663, 25 W. R. 558.—*EX. D CAIRNS, J. C.*—As for the authorities, all those which have been cited in argument are, with one exception, *Prole v Soady*, unfavourable to the plaintiff's contention, and I do not think that that case affords any support to it, for I am utterly unable to see that it has any real bearing on the question of status. The observations I there used are these "I am of opinion that according to the Act, it is impossible to hold otherwise than that the order nisi is the decree which the Court eventually makes absolute against the parties. Therefore, I think the order absolute in this case took effect from the date of the order nisi, and that everything done in the interval was subject to the danger of being set aside by the order becoming absolute." And I am of opinion that those observations were correct with reference to the case with which the Court then had to deal. It was not there

intended to lay down as a broad rule that in all cases, and for all purposes, the decree, upon being made absolute, relates back to the date of the order nisi. So to construe the above observations is to overlook the important qualifying words "in this case", they must be construed with reference to the particular subject-matter then before the Court. There the question was whether a husband or his assignee could reduce into possession a fund standing in Court to the wife's credit after a decree nisi had been pronounced for the dissolution of the marriage. It is one thing for a Court of equity to refuse to allow a husband, after a decree nisi has been pronounced, to reduce his wife's choses in action into possession, and thereby defeat her right of survivorship, it is quite another thing to say that the decree nisi alters the status of the parties. I am of opinion then that until the legislature otherwise orders, the status of a married woman remains the same until the decree is made absolute.—*p. 363 BAGGALLAY, L.J. concurred.*

BRETT, L.J.—Until the decree is absolute there is no decree at all. On this point I think *Hulse v Hulse* is decisive.—*p. 461.*

Prole v Soady, distinguished

Wadgway v Tepper (1877) 46 L J Ch. 579; 5 Ch D. 516, 25 W R. 726—*MALINS, V.-C.*, *affirmed, C.A.* (*See post*, col 1276)

Norman v Villars, referred to

Ellis v Ellis (1883) 52 L J. P. 99, 8 P. D 188.—*C. A. (supra)*, col 1227

Stoate v Stoate (1861) 30 L J Mat 173, 2 Sw & Tr 384, 5 L T 138—*SIR C. CRISWELL, referred to, Osney v Osney (supra), applied, Harris v Harries* (1901) 86 L T 262—*BARNES, J.*

Grant v Grant, Bowles and Patterson (1862) 31 L J Mat 174, 2 Sw. & Tr. 522, 6 L T 660.—*SIR C. CRISWELL, Ling v.*

Lung and Croker (1865) 34 L J Mat 52, 4 Sw & Tr. 99—*SIR J. WILDE; and*

Norman v Villars, discussed.

Stanhope v Stanhope (1886) 55 L J P 36; 11 P D. 103, 51 L T. 906; 34 W. R. 446; 50 J P. 276—*C. A. COTTON, BOWEN* and *FRY, L.J.*

Stanhope v Stanhope, Ling v Ling, Smithe v Smithe and Ruppell (1868) L R. 1 P. 587—*SIR J. WILDE; and Sykes v Sykes and Smith* (1870) 39 L J Mat 52, L R. 2 P. 163, 23 L T. 239, 18 W. R. 981.—*LORD PENZANCE, discussed.*

Thomson v Thomson and *Rodochinka* (1896) 65 L J P. 65, 80, [1896] P. 263 74 L T. 801, 45 W R 184—*JUNE, P.*, *affirmed, C.A. LINDLEY, LOPES* and *MIDY, L.J.*

Costs.

Flower v Flower (1873) 42 L J. Mat. 45; L R. 3 P. 132, 29 L T 253, 21 W. R.

776—*SIR J. HANNEN, referred to Robertson v Robertson* and *Favargosse* (1881) 51 L J P 5; 6 P D 119, 45 L T 237; 29 W R. 880—*C. A. JESSEL, M. R., BRETT* and *COTTON, L.J.*

Robertson v Robertson and *Favargosse, and Somerville v Somerville* and *Webb* (1867) 36 L J. Mat. 87, 16 L T. 466—*SIR J. WILDE, considered.*

Smith v Smith, Major and Child (1882) 51

I. J. P. 81; 7 P. D. 81; 46 L. T. 696; 30 W. R. 688.—HANNEN, P. See judgment at length

Smith v. Smith, referred to

Narine v. Narine (1901) 71 L. J. P. 37, 85 L. T. 619, 65 J. P. 777, 18 Times L. R. 16.—HANNEN, J.

Robertson v. Robertson (supra) and Holt v. Holt and Fleming (1858) 28 L. J. Mat. 12—SIR C. CRESSWELL, followed

Otway v. Otway (1888) 57 L. J. P. 81, 13 P. D. 111—C.A. (supra, col. 1219)

Whitmore v. Whitmore (1866) 35 L. J. Mat. 52, L. R. 1 P. 95; 14 L. T. 171; 14 W. R. 352—LORD PENZANCE, **Gladstone v. Gladstone (1876) 44 L. J. Mat. 46; L. R. 3 P. 260; 32 L. T. 404**—SIR J. HANNEN, and **Jones v. Jones (1872) L. R. 2 P. 833, 20 W. R. 320**—LORD PENZANCE, *discussed*.

Flower v. Flower (supra), and Robertson v. Robertson, distinguished. And see post.

Butler v. Butler (No 3) (1890) 15 P. D. 126; 62 L. T. 477—C.A. COTTON, LINDLEY and LOPES, L.J.J. affirming 69 L. J. P. 30, 15 P. D. 32, 62 L. T. 177—BUTT, J.

Lynch v. Lynch (1885) 54 L. J. P. 83, 10 P. D. 183, 34 W. R. 47—HANNEN, P., *approved*.

Bates v. Bates (1888) 14 P. D. 17, 60 L. T. 125, 37 W. R. 280—C.A. COTTON, LINDLEY and BOWEN, L.J.J.

Bates v. Bates, distinguished

Robertson v. Robertson (supra, col. 1236), referred to

Clarke v. Clarke [1891] P. 278, 60 L. J. P. 97 JUNE, J.—*Bates v. Bates* is not in point, because here it is the petitioner against whom the attachment is asked—p. 278

Priske v. Priske and Goldby (1860) 29 L. J. P. 195—SIR C. CRESSWELL, CHANNING, B. and KEATING, J., *discussed from*.

Learmouth v. Learmouth and Austin (1889), 62 L. T. 608, 8 C. non Learmouth v. Learmouth and Austin, 89 J. P. 14—BUTT, J.

Learmouth v. Learmouth, referred to

Robinson v. Robinson and Wilson (1898) 78 L. T. 891.—DAINIES, J.

Blackhall v. Blackhall and Clarke (1888) 57 L. J. P. 60; 13 P. D. 94, 59 L. T. 151, 36 W. R. 926—BUTT, J., *distinguished*

Taplin v. Taplin and Cowen (or Taplin v. Taplin and Cowen) (1891) 60 L. J. P. 88, [1891] P. 283; 64 L. T. 870, 7 Times L. R. 508

COLLINS, J.—**Blackhall v. Blackhall** is not in point. The ruling must be read in the light of the circumstances of the case, and the point before the Court at the time. The petitioner had claimed a divorce, the respondent and co-respondent had pleaded connivance; the Queen's Proctor intervened in the interest of the co-respondent to establish connivance between the petitioner and respondent. The co-respondent was not made a party, and Butt, J., did not think he could treat him as a party against whom he could make an order. In this case the Queen's Proctor has intervened, and has charged collusion between the petitioner and co-respondent. He has made the co-respondent a party. He is a party, and I have ample power to deal with him as a party.—p. 85.

Smith v. Smith and Palk (1882) 7 P. D. 227, 47 L. T. 355; 31 W. R. 124—HANNEN, P., *overruled*

Blackett v. Blackett and Fraul (1902) 71 L. J. P. 49, [1902] P. 170, 86 L. T. 669, 50 W. R. 516, 18 Times L. R. 566—C.A. COLLINS, M. R. STIRLING and COLENS-HARDY, L.J.J.

Barnes v. Barnes and Beaumont (1868) 38 L. J. Mat. 10, L. R. 1 P. 572; 19 L. T. 625, principle applied

Brenner v. Brenner and Brett (1864) 33 L. J. Mat. 202, 3 Sw. & Tr. 878; 10 L. T. 99, 12 W. R. 444, followed

Waudby v. Waudby and Bowland (1901) 71 L. J. P. 43; [1902] P. 85, 86 L. T. 123, 50 W. R. 176; 66 J. P. 280, 18 Times L. R. 150—BARNES, J.

3. SEPARATION DECREES

Morrall v. Morrall (1881) 60 L. J. P. 62, 6 P. D. 98, 47 L. T. 50, 29 W. R. 897—HANNEN, P., *discussed*.

Gandy v. Gandy (1882) 51 L. J. P. 41, 7 P. D. 168; 46 L. T. 607; 30 W. R. 673—C.A. JESSEL, M. R. COTTON and LINDLEY, L.J.J., *reversing* 7 P. D. 77.—HANNEN, P.

Gandy v. Gandy, followed, Rose v. Rose (1883) 52 L. J. P. 25, 8 P. D. 98, 48 L. T. 378, 31 W. R. 575—C.A. JESSEL, M. R. BAGGALLAY and LINDLEY, L.J.J. (*And see post*, col. 1239); *explained*, **Gandy v. Gandy (1885) 54 L. J. Ch. 1154; 30 Ch. D. 57, 53 L. T. 306; 33 W. R. 803**—C.A. COTTON, LINDLEY and BOWEN, L.J.J., *discussed*, **Tress v. Tress (1887) 56 L. J. P. 93, 12 P. D. 128; 57 L. T. 501, 35 W. R. 672, 31 J. P. 504**—HANNEN, P.

Gandy v. Gandy and Powell v. Powell (1874) 43 L. J. P. 9, L. R. 3 P. 186, 20 L. T. 466, 22 W. R. 82—SIR J. HANNEN GROVE, J. and POLLOCK, B. *distinguished*, **Wood v. Wood (1887) 57 L. J. Ch. 2, 57 L. T. 748, 36 W. R. 33**—C.A. LINDLEY and LOPES, L.J.J.

Gandy v. Gandy, explained.

Bishop v. Bishop, Judkins v. Judkins (1897) 66 L. J. P. 69, 76, [1897] P. 138, 76 L. T. 409, 45 W. R. 567—C.A.

LINDLEY, L.J. (for self, A. L. SMITH and RIGBY, L.J.J.)—**Gandy v. Gandy** came twice before the C.A.—first, on one state of facts; and secondly, on another and quite different state of facts. The first decision of **Gandy v. Gandy** appears to have been greatly misunderstood. [His lordship explained both decisions and continued.] The short result of **Gandy v. Gandy** may be summed up thus: first, Lord Hauser's decision that continued chastity was an implied condition in separation decrees was overruled; secondly, in the first case of **Gandy v. Gandy**, the Court held the wife bound by her agreement, there being no circumstances to relieve her from it, and no power in the Divorce Court to disregard her covenant; thirdly, in the second case of **Gandy v. Gandy**, the wife having the custody of the children and the husband refusing to support them, she was held no longer bound by the covenants in the separation deed; and the Divorce Court being free to disregard it, had power to do what it thought just in making her an allowance in the shape of alimony, and to take into account whatever circumstances it considered material

in arriving at a conclusion as to what was just under the altered position of the parties fourthly, nothing was decided respecting any of the statutory powers of the Divorce Courts in suits for dissolution of marriage. fifthly, nothing was decided in the first suit of *Gandy v Gandy* as to the power of the Divorce Court to make orders respecting the custody, maintenance and education of the children—p 73.

See judgments at length.

Gandy v Gandy (*supra*), *applied*
Drumma v Davies (1898) : [1899] 1 Ir R 176
 —CA FITZGIBBON, WALKER and HOLMES, L.JJ.

Ross v Ross (*supra*, col 1238), *considered*
Goch v Goch (1893) 62 L J P 73, [1893]
 P 99; 1 R 516; 68 L T 462, 41 W R 655—
 JUNE, P. See judgment at length where the
 cases are discussed.

Ross v Ross, *distinguished*.
Dowling v Dowling (1898) 68 L J P 8,
 [1898] P 238, 47 W R 272
 BARNES, J.—I think that this case may be
 distinguished from *Ross v Ross* on the ground
 that the deed of separation has not been pleaded
 by the husband—p. 8

Guth v Guth (1792) 3 Bro C C 614—
 ARDEN, M.R. *questioned*
Legard v Johnson (1747) 3 Ves 352.—LOUGH-
 BOROUGH, L.C. St John (Lord) v St John
 (Baron) (1803) 11 Ves. 526—ELDON, L.C. *And*
see post

Legard v Johnson, *not applied*
McGregor v McGregor (1848) 20 Q B D
 529, 58 L T 237—STEPHEN and A. L. SMITH,
 JJ. *affirmed*, 37 L J Q B 591, 21 Q B D
 424.—CA. (*supra*, col 1200)

St. John (Lord) v St. John (Lady), *referred to*
Westmeath (Earl) v Westmeath (Countess)
 (1821) Jacob 126—ELDON, L.C. *followed*; *See v*
Thurlow, *post* *discussed*, *Hope v Hope*, *post*,
 col 1240

Green v Green (1810) 5 Hare 400, n.—SHAD-
 WELL, V.-C., *followed*, *Wood v Wood* (1871) 19
 W R 1019—MALINS, V.-C., *Symonds v Hallett*
 (1885) 53 L J Ch 60, 24 Ch D 346, 19 L T
 340; 32 W R 103—CHITTY, J., *affirmed*, CA
 BRETT, M.R., COTTON and BOWEN, L.JJ. [The
 U. A. declined to express any opinion as to the
 correctness of the decision in *Green v Green*]

Symonds v Hallett, *adhered to*
Weldon v De Bathe (1884) 54 L J Q B 113,
 14 Q B D 339; 53 L T 520, 33 W R 328.—
 CA. BRETT, M.R., COTTON and LINDLEY, L.JJ.

Wood v Wood, *Symonds v Hallett* and
Weldon v De Bathe, *applied*.
Gaynor v Gaynor [1901] 1 Ir R 217.—
 FORTER, M.R.

Durant v Titley (1819) 7 Price 577; 21
 R. B. 773, *principle applied*.
Scholey v Goodman (1825) 8 Moore 350, 1
 C & P 56, 1 Bing 319, 2 L J (OS) C P 11
 —C.P. *And see post*, col 1242

Durant v Titley, *distinguished*
Joe v Thurlow (1821) 2 Bl & C 547, 1 D & R.
 11; 2 L J (OS) R. D. 81. 26 R R. 458—K.B.
And see post, col 1242

Joe v Thurlow and Durdat v Titley,
referred to
Hindley v Westmeath (Marquis) (1827) 6
 D. & C 209, 9 D & R 351, 5 L J (OS) K. B
 115, 30 R R. 290—K.B.

Joe v Thurlow, *followed*
Raynon v Batly (1832) 1 L J C. P. 75; 8
 Bing 256, 1 M. & Scott 339—C.P.

Joe v Thurlow, *followed*
Hindley v Westmeath (Marquis) and
Westmeath (Marquis) v Westmeath
(Marchioness) or (Salisbury) (1830) 5
 Bligh (N.S.) 339, 1 Dow 619, 35 R. R.
 54.—H.L., *distinguished*
Wilson v Musbett (1832) 1 L J K. B. 250;
 3 B & Ad 743, 37 R R. 542.—K.B.

Westmeath v Westmeath, *distinguished*,
Webster v Webster (1853) 22 L J Ch. 337;
 4 De G M. & G 437; 1 W R 500.—KNIGHT
 BROOK and TURNER, L.JJ. *affirming* 1 Sm & G
 491—V.-C., *discussed*, *Hope v Hope* (1857) 26
 L J Ch 417; 8 De G. M. & G. 781; 3 Jar. (N.S.)
 454; 5 W R. 387—L.JJ.

Joe v Thurlow; Wilson v Musbett; and
Webster v Webster, *approved*.
Randle v Gould (1857) 27 L J Q R 57, 8
 El & Bl 457, 4 Jar (N.S.) 304; 6 W R. 108.—
 Q.B. *And see Nicol v Nicol*, *post*, col 1241.

Randle v Gould, *referred to*.
Crouch v Waller (1859) 4 De G & J. 302.—
 CHELMSFORD, L.C. *And see post*, col 1241.

Hope v Hope, *referred to*, *Vansittart v*
Vansittart (1858) 27 L J Ch 289; 2 De G. & J.
 449 (*post*, col 1242), *distinguished*, *Hart v*
Hart (1881) 18 Ch. D. 670 (*post*, col 1218).

Charlesworth v Holt (1873) 43 L J Ex
 25, L R 9 Ex. 38, 29 L T 647, 22
 W. R. 91.—EX., *followed*, *but doubted*.
Grant v Budd (1874) 22 W R 514; 30 L T.
 319

COCKBURN, C.J.—I think that as regards the
 first question, whether looking to the whole
 tenor of the deed on its true construction the
 covenant to pay the annuity is to endure only so
 long as the marriage endureth, we are bound by
 the authority of *Charlesworth v Holt*. But I
 must say that, so far as my own opinion is con-
 cerned, though I am bound by the authority, if
 the matter were *res integra* I should have hesi-
 tated long to come to the same conclusion. But
 if this authority is to be overruled it must be in
 a higher Court.—p 546

BLACKBURN, J. to the same effect. LUSH, J.
 concurred.

Charlesworth v Holt, *discussed*.
Bateman v Ross (Countess) (1813) 1 Dow
 235, 14 R R. 55, *not applied*
Negus v Forster (1822) 46 L T. 675; 30
 W R. 671.—CA. COLERIDGE, C.J., BRETT and
 HOLKER, L.JJ.

Bateman v Ross (Countess), *discussed*, *Gibbs v*
Harding (1870) 39 L J Ch. 374; L R 5 Ch
 366, 18 W R 361.—L.C. and L.J.; *Cahill v*
Cahill (1883) 8 App. Cas. 420—H.L. (IR.)
 (*supra*, col 1205); *Haddon v Haddon* (*post*).

Resumption of Cohabitation

Randle v. Gould (*supra*), *dictum* questioned
Crouch v. Waller (*supra*, col 1240), *referred to*

Nicol v. Nicol (1886) 81 Ch. D. 524; 34 W. R. 283, 55 L. J. Ch. 437; 54 L. T. 470; 50 J. P. 468—C.A.

CURTON, J.—We have the authority of Lord Eldon in *Bateman v. Ross* (County) (*supra*) that cohabitation and reconciliation put an end to all the effects of separation. This is the general principle. . . . The first case I shall refer to is *Randle v. Gould*. There was an express agreement in that case that the provision for the wife was to come to an end in the event of the parties agreeing in writing to return to cohabitation, and it was held that as there was a condition respecting the kind of reconciliation which should put an end to the agreement, it excluded the contention that a different kind of reconciliation would have that effect. Undoubtedly there was a *dictum* of Lord Campbell, who delivered the judgment of the Court, to the effect that even if there had been no such express proviso he could not have held that there was an implied condition that the agreement should be avoided by reconciliation and renewed cohabitation. I doubt whether I should have agreed with the *dictum*. At all events it is not a decision governing the present case. In *Crouch v. Waller* there were two deeds, one of which contained an express proviso that it was to be void in case of a renewal of cohabitation, and it was contended that the other deed was avoided also by reconciliation, but it was held that inasmuch as that deed contained a provision for future children of the marriage it must be treated as a post-nuptial settlement which will not come to an end on the termination of the separation. It is true that *Randle v. Gould* was referred to by the L.C. in that case without disapproval, I think it will, therefore, be right for me to express my disapproval of the *dictum* of Lord Campbell in *Randle v. Gould*, lest it should be said hereafter that it was approved of by this Court. Then there was *Charlieworth v. Holt*, but that has no bearing upon the present question. In that case it was held that a subsequent divorce dissolving the marriage did not put an end to the wife's rights under a separation deed. . . . Undoubtedly it was there [*Negus v. Myster*] held that the provisions in a separation deed for the wife's benefit continued though the separation was at an end. But there was no principle there laid down which can bind us to come to any conclusion different from that which I have stated, namely, that this case falls within the general rule. The agreement was made expressly subject to the decree for judicial separation being pronounced.—pp 526, 528.

BOWEN and FRY, L.JJ. to the same effect.

Randle v. Gould and **Nicol v. Nicol**, *referred to*

Haddon v. Haddon (1887) 56 L. J. M. C. 69; 18 Q. B. D. 773; 56 L. T. 716; 51 J. P. 480—**HAWKINS and A. L. SMITH, JJ.**

Sidney v. Sidney (1734) 3 P. Wms 269, and **Blount v. Winter** (1781) 3 P. Wms 276, *in approped*

Seagrave v. Seagrave (1807) 13 Ves 439; 9 R. R. 203.—**GRANT, M.R.** And *see post*.

Scholey v. Goodman (*supra*, col. 1239), *explained*,

Sullivan v. Sullivan (1824) 2 Addams 290—**SIR J. NICHOLL, referred to**

Peaton v. Aylesford (Earl) (1884) 14 Q. B. D. 792; 54 L. J. Q. B. 33; 52 L. T. 954; 48 W. R. 331; 49 J. P. 596.—C.A. **BRETT, M.R., COTTON and LINDLEY, L.JJ.**, *varying* 58 L. J. Q. B. 410; 12 Q. B. D. 539; 50 L. T. 662; 32 W. R. 718.—**DENMAN and MANISTY, JJ.**

BRETT, M.—That case [*Scholey v. Goodman*] is simply a decision as to the old law of pleading; it is not an authority upon any other question—p 795

LINDLEY, L.J.—The first [question] is whether the adultery of the wife is a defence to the action for the annuity. Now that appears to me to be settled, and to be settled by long authority, both at law and in equity, that it would be wrong for us to disturb that rule, even although we thought it unsound. It has been settled for at least 100 years, as may be seen by tracing the cases back from *Seagrave v. Seagrave* (*supra*, col 1241) and *Jee v. Thurlow* (*supra*, col 1239). The earliest cases that I need mention are *Sidney v. Sidney* (*supra*), decided in 1734, and *Blount v. Winter* (*supra*), decided in 1781, in these the matter was discussed, and from the time of these decisions it has not been seriously argued in Courts of either law or equity. I am aware that *dicta* may be found in the Court of Arches (see *Sullivan v. Sullivan*) which are not altogether in accordance with the view which has been taken in other cases. But this is a mere action at common law for an annuity due under a deed, and to that action adultery is no answer. That I take to be perfectly settled.—p 809.

Jee v. Thurlow (*supra*, col. 1239) and **Peaton v. Aylesford** (Earl), *discussed and applied*.

Sweet v. Sweet (1894) 64 L. J. Q. B. 108; [1895] 1 Q. B. 12; 15 R. 146; 71 L. T. 672; 48 W. R. 303; 59 J. P. 373—**MATHEW and CHARLES, JJ.**

Vansittart v. Vansittart (1858) 27 L. J. Ch. 285; 2 De G. & J. 249; 4 Ju. (N.S.) 519; 6 W. R. 386.—**CHELMSFORD, L.C., KNIGHT BRUCE and TURNER, L.JJ.**, *affirming* 4 K. & J. 62.—**WOOD, V.C.** and **Swift v. Swift** (1865) 34 L. J. Ch. 309; 34 Bear 266; 11 Jur. (N.S.) 148; 11 L. T. 697; 13 W. R. 378.—**ROMILLY, M.R.** *affirmed*, 34 L. J. Ch. 894; 11 Jur. (N.S.) 458; 12 L. T. 485; 13 W. R. 731.—**KNIGHT BRUCE and TURNER, L.JJ.**, *considered*.

Hamilton v. Hector (1872) L. R. 13 Eq. 511; 25 L. T. 146; *see* S. C. (1871) 40 L. J. Ch. 692; L. R. 6 Ch. 701; 19 W. R. 990—**HATHERLEY, L.C.**

ROMILLY, M.R.—With respect to the jurisdiction of the Court, which is exceedingly important in matters of this description, *Vansittart v. Vansittart* is constantly referred to, and, although that is an old case, in so far that it was before the statute passed for the regulation of the Court of Divorce under the present system, it was there laid down that if a husband, by a deed or by an agreement in that case it was only an agreement, agreed to abandon all his parental duties, and transfer them to the wife to be performed by her, this

Court would not specifically enforce a contract of that description. Then on the other hand, a case afterwards came before me which was unquestionably a case likely to try the principle very strongly—*Seyff v. Seyff*—where the father had been guilty of moral turpitude towards his own child, a little girl of seven years old and thereupon he consented to a deed by which the children were taken away from him and conveyed to the mother. He repented of that afterwards, refused to pay anything under that deed, and insisted that he should have possession of the children, upon which the mother instituted a suit to prevent him from so doing. Thereupon I endeavoured to point out that the limit of the jurisdiction must be defined in this manner, that the foundation of the jurisdiction lay in determining what was for the good of society in general, that it was against public policy to allow a father, under ordinary circumstances, to abandon his duties as a parent, and to allow another person to undertake those duties, and that there was no consideration which would be sufficient to enable a father to take that course. But on the other hand, a different and controlling equity arose where the father had shown himself utterly incompetent to perform those duties, and where he had so ill-behaved himself that the institution of this Court was necessary for the protection of his children, in which case the jurisdiction is constantly exercised by this Court—the children being made wards of Court, and an application to take the children away from the custody of their parent allowed and complied with. And accordingly, in *Seyff v. Seyff*, it was held that the Court would have enforced this equity, and would have prevented the parent from taking the custody of his own children, that in that state of circumstances, if a contract were made which really had for its object, not a violation of public policy by taking away the parental duties, but the enforcement of what was due to public policy by preventing the demoralization of the children by their own father, the Court would interfere at least to that extent. Accordingly, I so held in that suit, and upon appeal my judgment was affirmed by the L J—p. 519.

Vansittart v. Vansittart (*supra*), *discussed*, *Power v. Cook* (1869) 4 Ir. R. G. L. 247.—*MONAHAN, C.J.*, *MORRIS* and *LAWSON, L.J.*, *distinguished*, *Hart v. Hart* (1883) 50 L. J. Ch. 697; 43 Ch. D. 670; 43 L. T. 13. 80 W. R. 8.—*KAY, J.*, *explained*, *Cahill v. Cahill* (1883) 8 App. Cas. 429.—*H.L. (IR.)* (*supra*), col. 1205, *followed*, *Butler v. Butler* (1885) 55 L. J. Q. B. 55; 10 Q. B. D. 374.—*C.A.* (*supra*), col. 1209, *referred to*, *Ullee, In re*, *Nawab Nazim of Bengal's Infants* (1885) 53 L. T. 711.—*CHITTY, J.* affirmed, 54 L. T. 288.—*C.A.* *BAGGALLAY, BOWEN* and *FRY, L.J.*

Rowell v. Rowell (1890) 69 L. J. Q. B. 55; [1900] 1 Q. B. 9, 81 L. T. 429.—*C.A.* *RUSSELL* of *KILLOWEN, C.J.*, *A. L. SMITH* and *V. WILLIAMS, L.J.*, *distinguished*.
Macan v. Macan (1900) 70 L. J. Q. B. 90.
BIGHAM, J.—*In Rowell v. Rowell* the money became due after cohabitation had been resumed.—*Id.*

4. WIFE'S PROPERTY.

Equitable Separate Property

Anon. v. Lyne (1832) *Younge* 562, *commented on*, *Mussey v. Parker* (1831) 4 L. J. Ch. 47; 3 Myl & K. 174 (*post*, col. 1252); *Tullott v. Armstrong* (1840) 9 L. J. Ch. 41; 4 Myl & Cr. 390 (*post*, col. 1252), *unapplied*, *Gilbert v. Lewis* (*post*).

Adamson v. Armitage (1815) 19 Ves. 116; (4 Cooper 283—*in R.* and *Ray, Ex parte*, *May, In re* (1815) 1 Muhl. 109.—*V.C.*, *discussed*

Gilbert v. Lewis (1862) 32 L. J. Ch. 317, 1 De G. J. & M. 88, 9 Jur. (S.S.) 187, 7 L. T. 164; 11 W. R. 223—*L.C.*; *affirmed* 2 J. & II. 152.—*WOOD, V.C.*

WESTBURY, L.C., after referring to *Adamson v. Armitage* said: "There is no other case where these simple words, 'sole was and benefit,' occur, that I am aware of, except *Anon v. Lyne*. . . most erroneously reported, for nothing of the kind was decided in that case as stated in the report of it. The incorrectness of that report has been commented upon by Lordottenham in *Tullott v. Armstrong* (*supra*)—p. 351.

Inglefield v. Coghill (1845) 2 Coll. C. C. 247.—*KNIGHT BRUCE, V.C.*, *followed*

Tatsey's Trust, In re (1846) 35 L. J. Ch. 152; L. R. 1 Eq. 561, 12 Jur. (S.S.) 870, 11 L. T. 15, 11 W. R. 174.—*WOOD, V.C.*

Green v. Britten (1863) 1 De G. J. & S. 619.—*L.J.*, *distinguished*, *Lewis v. Mathews* (1866) 35 L. J. Ch. 638, L. R. 3 Eq. 177, 12 Jur. (S.S.) 512; 11 W. R. 682.—*KIDDERLEIGH, V.C.*; *not applied*, *Brown v. Gilday* (1867) 1 L. R. 2 Ch. 761, 17 L. T. 131, 15 W. R. 1168.—*GATHENS, L.J.*

Gilbert v. Lewis, (*supra*), *distinguished*, *Tatsey's Trust, In re* (*supra*); *followed*, *Lewis v. Mathews* (*supra*)

Ray, Ex parte, and *Adamson v. Armitage* (*supra*), *explained*

Killick, Ex parte and *In re* (1811) 13 L. J. Bk. 6, 3 Mont. D. & D. 180.—*KNIGHT BRUCE V.C.*, *commented on*.

Gilbert v. Lewis and *Lewis v. Mathews*, *advised*.

Massy v. Rowen (1869) L. R. 4 II. L. 288; 23 L. T. 141.—*H.L. (IR.)*; *affirming* *Ir. R. 1 Eq. 110*.—*C.A.* *BLACKBURNES, L.C.* and *CHRISTIAN, J.*, *HATHERLEY, L.C.*—The word "separate" is sometimes used alone; but if the word "sole" is used, it is never used alone, that I can find, in any book or precedent. Nor has it been attempted to be shown in the present case, as it would have been competent for the parties to show, according to the recognised doctrine in *Ray, Ex parte*, that the practice of conveyancers has been modelled according to a given construction of the word "sole". The only authorities which require to be noticed upon this subject are, first, *Adamson v. Armitage*, before Sir W. Grant, which regard being had to the character of that judge, would be undoubtedly a case of very great authority; if we could find the principle clearly established in it, that the word "sole" of itself had the efficacy which has been attributed to it by the appellants. But I think there are two circumstances which militate against that conclusion being drawn from the decision of Sir W. Grant. The one is, that the question which really arose in that case was, whether a life interest of an absolute

interest had been conferred. And there was there also an intimation of trustees with reference to the sole benefit of the person who was intended to take And, with reference to circumstances in that case which would seem in some respects to have created a life interest alone, except for other passages in the will, it became incumbent on Sir W. Grant to consider whether an interpretation might not properly be put on the word "sole," as there introduced, to the extent, that during the lifetime of the lady, in the case of any after-taken husband (she was not married at the time, but she might have married afterwards), the interest should be applied for his use, she having, nevertheless, a full and complete and beneficial ownership in the whole. Besides that, one cannot help feeling that the case is not to be regarded as a leading case impressing upon the word "sole" this technical meaning, because, in reading Sir W. Grant's judgment, you see that in the conclusion to which he comes he relies upon the whole will, and upon the cases in which it had been held that words of such import as "payment for the wife's own use and benefit," or "payment to her own hands," had received the construction of creating a separate use—words which undoubtedly, since his day, have been held not to have any such effect properly attributable to them. I cannot, therefore, look upon that as a case which has settled and determined the law.

In that case [*Killick, Ex parte*], undoubtedly, the V.-C., in deciding the case, did throw out some observations strongly tending in the direction contended for by Mr. Williams, but the character of the case itself is such that I think all judges would have concurred in the conclusion which was arrived at, because the character of the limitations showed the intention of excluding the husband from either portion of the property conveyed. That again [*Green v. Britten, supra*] is a case of a similar description, where the whole purport of the instrument clearly indicated a separation of the interest of the wife from the control and influence of the husband. That being so, on the other hand, we have *Gilbert v. Lewis* . . . and *Lewis v. Mathews* . . .

And it appears to me that in those cases the learned judges who decided them had not anything before them which ought to have embarrassed them in coming to the conclusion to which they did come, that the word "sole" was not a technical word. I have referred to the authorities which existed at the time when these decisions took place. Both of those learned judges came to a conclusion which I think will warrant your lordships in saying that if there is any weight to be given at all to the effect to be produced upon the minds of conveyancers and those who have to advise upon instruments of that kind, in consequence of a decision, the only effect would be this, that there is nothing anterior to those judgments which necessarily affixed a technical meaning to this word "sole"—and that those judges, not being embarrassed with any such previous conclusion, have now sufficiently established the contrary proposition.—pp 294–297. LORDS COLONEL and CAIRNS concurred.

Gilbert v. Lewis, referred to.

Hayman v. Rugby School Governors (1874) 48 L. J. Ch. 384, L. R. 18 Eq. 28, 30 L. T. 217, 22 W. R. 557.—MALINS, V.-C.

King v. Basingham (1723) 3 Mod. 199, distinguished; *Fleet v. Perkins* (1869) 38 L. J. Q. B.

257; L. R. 4 Q. B. 600 (*post*, col. 1287); followed, *Lloyd v. Pache* (1872) 42 L. J. Ch. 282; L. R. 8 Ch. 88, 28 L. T. 260; 21 W. R. 346.—SHEPPARD, L. C., JAMES and MELLISH, L. J., reversing L. R. 11 Eq. 241, 27 L. T. 174.—MALINS, V.-C.

Lloyd v. Pache, distinguished, Bykyn's Trusts, In re (1877) 6 Ch. D. 115, 37 L. T. 261.—MALINS, V.-C.; referred to, *Parke v. Lechmere* (1879) 12 Ch. D. 256, 28 W. R. 18.—PRY, J.

Ashworth v. Outram (1877) 46 L. J. Ch. 687; 5 Ch. D. 923, 37 L. T. 83, 25 W. R. 896.—C. A. COLERIDGE, C. J., JAMES and BAGGALLAY, L. J., applied.

Lovell v. Newton (1878) 4 C. P. D. 7, 39 L. T. 609, 27 W. R. 366.—DENMAN and LINDLEY, JJ.

Lovell v. Newton, followed, *Denman*, In re, *James v. Denman* (1885) 53 L. T. 905.—KAY, J.

Jarman v. Woolleton (1790) 3 Term Rep. 618, 1 R. R. 789; and *Haslington* (or *Haslington*) v. *Gill* (1760) 3 Doug. 115, 3 Term Rep. 620, n. (a); 1 R. R. 783, *discussed*.

Duncan v. Cashin (1875) 44 L. J. C. P. 225; L. R. 10 C. P. 564, 32 L. T. 497, 23 W. R. 561.—C. P.

Statutory Separate Property

Baynton v. Collins (1884) 53 L. J. Ch. 1112, 27 Ch. D. 604; 51 L. T. 681; 33 W. R. 41.—CHITTY, J.; *observed as but followed*, *Thompson and Curzon*, In re (1885) 54 L. J. Ch. 610; 29 Ch. D. 177, 52 L. T. 498; 33 W. R. 688.—KAY, J., *dissented from*, *Tucker*, In re, *Emmuel v. Parfit* (1885) 54 L. J. Ch. 874, 52 L. T. 923; 33 W. R. 982.—PEARSON, J., *Tench's Trusts*, In re (1885) 15 L. R. Ir. 406.—CHATTERTON, V.-C., *not followed*, *Adames' Trusts*, In re (1885) 54 L. J. Ch. 878, 53 L. T. 198, 33 W. R. 834.—KAY, J., *followed*, *Dixon*, In re, *Dixon v. Smith* (1885) 54 L. J. Ch. 964.—BACON, V.-C.; *not followed*, *Hobson's Settlement*, In re (*post*), *observed*, *Reid v. Reid* (*post*).

Tucker, In re, and *Adames' Trusts*, In re (*supra*), *followed*, *Hobson's Settlement*, In re, *Webster v. Rickards* (1885) 55 L. J. Ch. 800, 34 W. R. 195.—CHITTY, J., *upheld*, *Reid v. Reid* (*post*).

Thompson and Curzon, In re; and *Hughes' Trusts*, In re, W. N. (1885) 62.—PEARSON, J., *married*.

Reid v. Reid (1886) 81 Ch. D. 402, 55 L. J. Ch. 294, 54 L. T. 1004; 34 W. R. 332.—C. A. COTTON, BOWEN and FRY, L. J.

Headnote—Property to which at the commencement of the Married Women's Property Act, 1882, a woman married before the Act was entitled subject to a life estate, but not for her separate use, held not to become her separate estate by falling into possession after the commencement of the Act. If a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the Act acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate by sect. 6 of the Act, though it falls into possession after the Act.

(There had been considerable difference of opinion among the judges of first instance in the Chancery Division upon the true construction

of this sect. 5, but it may now be taken that *Heul v. Reid* has definitely settled the law on the question, and this being so, that the effect of this decision is to overrule *Baynton v. Collins*, *Thompson and Carson, In re*, and *Leaper's Trusts, In re*, and to uphold *Tucker, In re*, and *Adams' Trusts, In re*. In fact, *Baynton v. Collins*, on which the other two depended, according to Bowen, L.J., at p. 410, "cannot be sustained."]

Reid v. Reid (*supra*), principle adopted; *Beaupre's Trusts, In re* (1888) 21 L. R. 11, 307 —C.A. ASHBROOK, J.C., FITZGIBBON, BARRY and NAISH, L.J.; *distinguished*, Middleton v. Andrews (1888) 21 L. R. 411 —CHATTERTON, V.-C., explained, *Cuno, In re*, Mansfield v. Mansfield (1889) 43 Ch. D. 12, 62 L. T. 15 —C.A. COTTON, BOWEN and FRY, L.J.J. *See post*.

Beaupre's Trusts, In re, dissented from *Parsons, In re*, Stockley v. Parsons (1890) 59 L. J. Ch. 666; 45 Ch. D. 51, 62 L. T. 929; 88 W. R. 712 —KAY, J.

Cuno, In re, (*supra*), distinguished, Drummond and Davies Contract, *In re* (1891) 60 L. J. Ch. 258, [1891] 1 Ch. 524, 64 L. T. 246; 89 W. R. 443 —CHITTY, J.

Policies of Insurance.

Mellor's Policy Trusts, In re (1877) 47 L. J. Ch. 216; 6 Ch. D. 127, 7 Ch. D. 200; 26 W. R. 800. —MALINS, V.-C., not followed, *Adam's Policy Trusts, In re* (1888) 52 L. J. Ch. 442; 23 Ch. D. 625; 48 L. T. 727, 31 W. R. 810 —CHITTY, J., explained, Seyton, *In re* (*post*).

Adam's Policy Trusts, In re, dissented from, Seyton, *In re*, Seyton v. Satterthwaite (1887) 56 L. J. Ch. 775; 34 Ch. D. 511, 56 L. T. 479, 35 W. R. 373 —NORTH, J., *dictum not followed*, *Davies' Policy Trusts, In re* (*post*), followed, *Turnbull, In re* (*post*); *Kuyper's Policy Trusts, In re* (*post*, col. 1248).

Seyton, In re, followed *Davies' Policy Trusts, In re* (1891) [1892] 1 Ch. 90, 61 L. J. Ch. 650, 60 L. T. 104, CHITTY, J. —*In Adam's Policy Trusts, In re*, (*supra*), only stated my view as to what the rights of the widow and children were, without absolutely deciding the point, it being in the circumstances of that case unnecessary to do so. But as in *Seyton, In re*, where the words, "for the benefit of his wife and children," occurred, North, J. has, having had all the authorities brought to his attention, decided that the widow and children of the assured took as joint tenants, I feel myself bound to follow that decision. — p. 91.

Soutar's Policy Trusts, In re (1884) 54 L. J. Ch. 256; 26 Ch. D. 236; 32 W. R. 701 —PEARSON, J., distinguished *Turnbull, In re*, *Turnbull v. Turnbull* (1897) 66 L. J. Ch. 719, [1897] 2 Ch. 415, 77 L. T. 47; 46 W. R. 8.

STIRLING, J. —That [*Adam's Policy Trusts, In re* (*supra*)] was a decision that sect. 10 of the [Married Women's Property] Act of 1870, had not been repealed, but that is made more clear by the report of the case in the Law Times Reports. It appears that the petition was entitled, "In the matter of the Married Women's Property Acts, 1870 and 1874, and also in the matter of the Married Women's Property Act, 1882, and the Trustee Acts, 1850 and 1852," and counsel

suggested that it might be proper to amend the petition if the Court thought it unnecessary that it should be entitled in the latter Acts as well as in the Act of 1870, but that from the wording of sect. 11 of the Act of 1882 it did not appear whether it was intended to apply to a policy effected before as well as to one effected after the passing of the Act, whereupon Chitty, J. remarked that he thought that the Act of 1882 was prospective only, for that the words "shall vest" related only to the future, and counsel then suggesting that the petition should be amended by striking out the rest of the title, and entitling it only in the Act of 1870, Chitty, J. expressed his concurrence, and I have ascertained that this was done, and the order was actually made under the Act of 1870. Then there was *Soutar's Policy Trusts, In re*, before Pearson, J., in which *Adam's Policy Trusts, In re*, does not appear to have been brought to his attention. These counsel used the same argument which has been used with so much effect before Chitty, J., but Pearson, J., said, "I doubt whether sect. 10 of the Act of 1870 remains in force for any purpose, because sect. 11 of the Act of 1882 says that, if at the time of the death of the insured there shall be no trustee, a trustee or trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same." And he directed that the order should be made under all the Acts. I do not, however, read Pearson, J., as doing more than giving an expression of doubt, and I do not take it to be an actual decision — p. 721.

Turnbull, In re, referred to *Kuyper's Policy Trusts, In re* (1898) 68 L. J. Ch. 10; [1899] 1 Ch. 38; 79 L. T. 486, 47 W. R. 288. —NORTH, J.

Receipt by Husband.

Anon. (1855) 1 Griff. 392 —STUART, V.-C., commented on *Wollaston v. Berkeley* (1876) 45 L. J. Ch. 772, 2 Ch. D. 213, 34 L. T. 171; 34 W. R. 960. —HALL, V.-C.

Caton v. Rideout (1849) 1 Mac & G. 549, 2 H. & Tw. 33 —COTTENHAM, L.C., *distinguished*, *Darlin v. Darlin* (1853) 23 L. J. Ch. 890; 12 Beav. 578; 2 W. R. 185 —ROMILLY, M.R., *Dixon's Trusts, In re*, *Dixon v. Dixon* (1878) 48 L. J. Ch. 692; 9 Ch. D. 587; 40 L. T. 208; 27 W. R. 282. —JESSET, M.R., applied, *Lulham, In re*, *Bruton v. Lulham* (1884) 53 L. J. Ch. 928. —KAY, J., affirmed, 53 L. T. 9, 33 W. R. 788. —O.A.; *Curis, In re*, *Hawes v. Curis* (1885) 62 L. T. 216 —KAY, J., *Edward v. Cheyne* (1886) 13 App. Cas. 385. —H.L. (60) *MALSBURY, L.C.*, *LORDS WATSON and MACGATHEN, referred to*, *Blake, In re*, *Blake v. Power* (1889) 60 L. T. 668; 37 W. R. 441. —KAY, J., applied, *Tiamant, In re*, *Wood v. Cook* (1899) 58 L. J. Ch. 518, 40 Ch. D. 461, 60 L. T. 376; 37 W. R. 602. —KAY, J., *Hawes, In re*, *Buchell, In re*, *Buchell v. Hawes* (1892) 62 L. J. Ch. 463, 3 R. 133; 67 L. T. 756; 41 W. R. 173 —KECKWICH, J., *discussed*, *Hood-Barrs v. Heriot* (1896) 65 L. J. Q. B. 352, [1896] A. C. 174. —H.L. (8) (*post*, col. 1291); applied, *Dixon, In re*, *Heynes v. Dixon* (1899) 68 L. J. Ch. 689; [1899] 2 Ch. 561, 48 W. R. 71 —BYRNE, J. and (1900) 60 L. J. Ch. 609; [1900] 2 Ch. 561, 83 L. T. 129, 48 W. R. 665. —C.A.

Darkin v Darkin (*supra*), *discussed*, Dixon v. Dixon (*supra*), Blake, in re (*supra*)

Dixon v Dixon, *referred to*, Blake, in re (*supra*); **Aytoun v Aytoun** (1892) 8 Times L R 580.—A. L. SMITH, J.

Curtis, in re (*supra*), *discussed* Blake, in re (*supra*)

Rewley v Unwin (1855) 2 K & J. 138.—WOOD, v.-c.; *referred to*, Edward v. Cheyne (*supra*), Hood-Barre v. Heriot (*supra*)

Beresford v Armagh (Archbishop) (1843) 13 L. J. Ch 235; 13 Sim 613, 8 Jur. 262.—SHADWELL, v.-c. *referred to* Edward v. Cheyne (*supra*)

Edward v Cheyne, *principle applied*, Hale v. Sheldrake (1889) 60 L. T. 292, 5 Times L R 276.—KREWECH, J.; **Flamank, in re** (*supra*), *referred to*, Hood-Barre v. Heriot (*supra*)

Flamank, in re (*supra*), *applied*. Hawes, in re, Burchell, in re (*supra*).

Carrying on Trade

Holland, Ex parte, Henage, in re (1874) 43 L. J. Bk 85; L. R. 9 Ch 307; 30 L. T. 106, 22 W. R. 425.—C.A. CADRIS, L.C. JAMES and MELLISH, L.J.J., *referred to*, Day v. Freund (1876) 35 L. T. 551.—BACON, v.-c. *discussed and applied*, Jones, Ex parte, Grissell, in re (1879) 48 L. J. Bk 109; 12 Ch. D. 484; 40 L. T. 790.—C.A. JAMES, BRETT and COTTON, L.J.J.

Jones, Ex parte, Grissell, in re, *referred to*, Gardiner, in re, Coulson, Ex parte (1887) 57 L. J. Q. B. 149, 20 Q. B. D. 249, 58 L. T. 119, 36 W. R. 142; 5 Morrell L.—CAYE and A. L. SMITH, JJ.

Gardiner, in re, Coulson, Ex parte, and Jones, Ex parte, *applied*. A Debtor, in re, a Debtor, Ex parte (1898) 67 L. J. Q. B. 820, [1898] 2 Q. B. 576, 78 L. T. 824, 46 W. R. 675, 5 Manson 122.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.J.J.

Genese, in re, District Bank of London, Ex parte (1885) 55 L. J. Q. B. 118, 16 Q. B. D. 700, 84 W. R. 79.—CAYE, J.; *applied*, May, in re, Crawford v. May (1890) 60 L. J. Ch. 84, 45 Ch. D. 499, 63 L. T. 375, 38 W. R. 765.—NORTH, J., *referred to*, Leng, in re, Tain v. Emmerson (1896) 64 L. J. Ch. 468, [1896] 1 Ch. 632, 12 R. 202; 72 L. T. 407, 43 W. R. 406.—C.A., *explained*, Connure, in re, Cronnie, Ex parte (1901) 70 L. J. K. B. 310, [1901] 1 K. B. 480; 84 L. T. 842, 8 Manson 140.—C.A. RIGBY, v. WILLIAMS and STIRLING, L.J.J.

Death of Wife.

Humphrey v Bullen (1737) 1 Atk 458; **Elliot v. Gollier** (1747) 3 Atk 526, 1 Ves. sen. 15, **Squib v. Wyn** (1717) 1 P. Wms 378, **Drew v. Long** (1853)* 22 L. J. Ch 717; 17 Jur 178; 1 W. R. 318.—v.-c., **Proudey v. Fielder** (1838) 2 Myl & K. 57, 39 R. R. 136.—M.R. and **Molony v. Kennedy** (1839) 10 Sim 264, 3 Jur 793.—v.-c., *referred to*, **Lambert's Estate, in re, Stanton v. Lambert** (1888) 57 L. J. Ch. 927; 39 Ch. D. 626; 69 L. T. 429.—STIRLING, J.

O.C.

Squib v Wyn, *approved*

Smait v. Tranter (1890) 59 L. J. Ch. 363, 13 Ch. D. 587, 62 L. T. 356; 38 W. R. 520.—C.A. COTTON, LINDLEY and LOPES, L.J.J.; *reversing*, 58 L. J. Ch 183; 40 Ch. D. 165, 59 L. T. 890, 37 W. R. 218.—KAY, J.

Lee v. Prieaux (1791) 3 Bro. C. C. 381, and **Lambert's Estate, in re** (*supra*), *referred to*, **Surman v. Wharton** (1891) 60 L. J. Q. B. 233; [1891] 1 Q. B. 491, 64 L. T. 866; 39 W. R. 416.—POLLOCK, B. and CHARLES, J.

Surman v. Wharton, *discussed and applied*, **Wheeler's Settlement, in re**, Buggs v. Ryan (1896) 68 L. J. Ch. 663, [1896] 2 Ch. 717 (*post*, col. 1268)

Dealings With

Poncock v. Monk (1750) 2 Ves. sen. 190.—L.C. *approved*, **Holme v. Tenant** (1778) 1 Bro. C. C. 16.—L.C.; *referred to*, **Taylor v. Meads** (*post*); **Adams v. Gamble** (1861) 12 Ir. Ch. R. 102.—C.A. (*post*, col. 1252), **Edward v. Cheyne** (*supra*, col. 1248), **Hale v. Sheldrake** (*supra*, col. 1249)

Taylor v. Meads (1865) 34 L. J. Ch. 203, 4 De. G. J. & S. 597, 5 N. R. 318, 11 Jur. (N.S.) 166; 12 L. T. 6, 13 W. R. 394.—WISTBURY, L.C., *discussed*, **Allen v. Walker** (1870) 39 L. J. Ex. 153, L. R. 5 Ex. 187; 22 L. T. 610.—EX.; **Pride v. Bubb** (1871) 41 L. J. Ch. 105, L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220.—HATHERLEY, L.C., *applied*, **Bishop v. Wall** (1876) 45 L. J. Ch. 773, 3 Ch. D. 194, 25 W. R. 93.—MALINS, v.-c., *referred to*, **Cooper v. Macdonald** (1877) 47 L. J. Ch. 373; 7 Ch. D. 288, 38 L. T. 191, 26 W. R. 377.—JESSEL, M.R., *affirmed*, C.A.; **Drummond and Davies' Contract, in re** (*post*)

Riddell v. Errington (1884) 26 Ch. D. 220; 50 L. T. 581, 32 W. R. 58.—PEARSON, J., *commented on*, **Smith's Estate, in re, Clements v. Ward** (1887) 58 L. J. Ch. 726, 35 Ch. D. 589, 56 L. T. 860, 35 W. R. 514; 51 J. P. 692.—STIRLING, J.

Smith's Estate, in re, *distinguished*, **Drummond and Davies' Contract, in re** (1891) 60 L. J. Ch. 258, [1891] 1 Ch. 524, 64 L. T. 246, 39 W. R. 445.—CHITTY, J.

Rippon v. Dawding (1769) Amb. 555, *commented on*, **Field v. Moore** (1855) 25 L. J. Ch. 66, 7 De. G. M. & G. 718; 2 Jur. (N.S.) 145, 4 W. R. 187.—KNIGHT DRUGG and TURNER, L.J.J.

Rippon v. Dawding, *observed on*, **Dye v. Dye** (1884) 53 L. J. Q. B. 442; 13 Q. B. D. 147, 51 L. T. 146; 33 W. R. 2.—C.A. FRY, L.J. (for self, BRETT, M.R. and BOWEN, L.J.)—The only authority in any way in conflict with the views which we have expressed appears to be **Rippon v. Dawding**, where Camden, L.C., undoubtedly treated as creating a valid trust of the fee an ante-nuptial agreement, in respect of which it is at least doubtful whether it was evidenced by any writing of the wife. But the point arising from the Statute of Frauds was not raised in the case, and the doubt expressed by Turner, L.J., in **Field v. Moore** as to the sufficiency of the evidence of the agreement in

Rippon v Daeding, probably refers to this want of a writing signed by the wife.—p 447

Chapman v Biggs (1883) 11 Q. B. D. 27, 48 L. T. 704, 47 J. P. 485—WATKIN WILLIAMS and MATTHEW, JJ., *applied*, Gaimoye v Cowan (1889) 58 L. J. Ch. 769—CHITTY, J., *discussed*, Hood Bars v Cathcart (1894) 63 L. J. Q. B. 602; [1894] 2 Q. B. 559, 9 R. 802, 70 L. T. 865, 12 W. R. 622.—C.A. (*post*, col. 1290).

Restraint on Anticipation

Aston v White (1823) 1 Sim. & S. 429, 24 R. R. 208—LEACH, V.-C., *discussed*
Field v Evans (1846) 15 Sim. 375—SHADWILL, V.-C., *approved*
Baker v Bradley (1856) 25 L. J. Ch. 7, 7 De G. M. & G. 397, 2 Jui. (N.S.) 98, 4 W. R. 78—KNIGHT BRUCE and TURNER, L.J.J., *reversing* 2 Sim. & G. 531; 1 Jui. (N.S.) 489, 3 W. R. 361—STUART, V.-C.

Baker v Bradley, *followed*
Smith, In re, Chapman v. Wood (1884) 51 L. T. 501—KAY, J.

Elliott v Cordell (1820) 5 Madd. 149, 1 Russ. 71, n; 21 R. R. 287, *discussed and applied*

Stanton v Hall (1831) 2 Russ. & M. 175, 9 L. J. (O.S.) Ch. 111, 84 R. R. 49.—BROUGHAM, L.C.

Stanton v Hall; *distinguished*, Tyley v Lake (*post*), *referred to*, Massey v. Parker (*post*, col. 1252), Peacock's Trusts, In re (1878) 48 L. J. Ch. 265; 10 Ch. D. 490, 39 L. T. 661, 27 W. R. 500.—MALINS, V.-C.

Hartley v Hurle (1801) 5 Ves. 540, 5 R. R. 118, *explained*, Tyley v Lake (1831) 2 Russ. & M. 163, 34 R. R. 63.—BROUGHAM, L.C.; *discussed*, Tassery's Trust, In re, (*supra*, col. 1244)

Tyley v Lake, *referred to*.
Massey v. Parker (*post*, col. 1252), Gilbert v Lewis (*post*)

Gould v Camm (1859) 1 De G. F. & J. 146, 6 Jur. (N.S.) 113; 1 L. T. 224, 8 W. R. 156.—L.J., *reversing* 5 Jui. (N.S.) 1196, 1 L. T. 17.—M.R., *approved*
Gilbert v Lewis (1862) 32 L. J. Ch. 347, 1 De G. J. & S. 38.—L.C. (*supra*, col. 1244).

Ashton v McDougall (1842) 11 L. J. Ch. 344, 5 Beav. 56; 6 Jur. 417.—M.R., *explained*, White v Cox (1876) 45 L. J. Ch. 636; 2 Ch. D. 387, 34 L. T. 418.—BACON, V.-C., *applied*, Brownrigg v. Pike (1882) 51 L. J. P. 29; 7 F. D. 61, 46 L. T. 821, 30 W. R. 567, 46 J. P. 360.—HANNEN, P.

Brandon v Robinson (1811) 1 Rose 197, 8 G. nom. Hudson, *Ex parte*, 18 Ves. 429; 11 R. R. 22b.—L.C., *discussed*, Barton v. Briscoe (1832) Jacob 803.—PLUMER, M.R.; *explained*, Benson v Benson (1836) 4 L. J. 59, 273, 6 Sim. 126 (*post*, col. 1255)

Barton v. Briscoe, *followed*, Woodmeston v. Walker (1831) 2 Russ. & M. 197; 9 L. J. (O.S.) Ch. 237; 34 R. R. 56.—BROUGHAM, L.C., *discussed*, Massey v. Parker (*post*); *explained*, Brown v Bamford (*post*).

Newton v Reid (1890) 4 Sim. 141, 9 L. J. (O.S.) Ch. 273—V.-C., *discussed*, Brown v Pocock (1839) 4 L. J. Ch. 15, 2 Russ. & M. 210, Coop. t.

Brough. 70.—BROUGHAM, L.C., *reversing* (1839) 2 Myl. & K. 189.—M.R.; *followed*, Knight v. Knight (1884) 8 L. J. Ch. 187, 6 Sim. 121.—SHADWELL, V.-C. (*post*, col. 1255), Massey v. Parker (*post*); *explained*, Benson v Benson (1836) 4 L. J. Ch. 59, 273, 6 Sim. 126 (*post*, col. 1255), *referred to*, Maber v. Hobbs (*post*); Nedby v. Nedby (*post*).

Woodmeston v. Walker (*supra*), *discussed*
Brown v Pocock (*supra*), Power v Hayne (1869) L. R. 8 Eq. 262, 17 W. R. 782.—MALINS, V.-C.; Hutton v May (1876) 3 Ch. D. 148; 24 W. R. 754.—MALINS, V.-C.

Jones v Salter (1815) 2 Russ. & M. 208, 34 R. R. 60.—GRANT, M.R., *discussed*
Massey v. Parker (1831) 4 L. J. Ch. 47, 2 Myl. & K. 174.—PEPYS, M.R.

Massey v. Parker, *commented on*, Davies v. Thornycroft (*post*), Nedby v. Nedby (1839) 1 Myl. & Cr. 367, 3 Jar. 18.—COTTENHAM, L.C.; *reversing*, 8 L. J. Ch. 28.—V.-C., *discussed*, Tullett v. Armstrong (*post*), Tarsey's Trust, In re (*supra*, col. 1244).

Brown v Bamford (1846) 15 L. J. Ch. 361; 1 Ph. 620.—L.C., *reversing* (1842) 11 L. J. Ch. 385, 11 Sim. 127.—V.-C., *discussed*.
Vaughan v. Vanderleggen (1851) 23 L. J. Ch. 798, 2 Diew. 363 (*post*, col. 1260)

Simson v Jones (1831) 2 Russ. & M. 365; 9 L. J. (O.S.) Ch. 106—M.R., *followed*, Davies v. Thornycroft (1836) 5 L. J. Ch. 140, 6 Sim. 420.—SHADWELL, V.-C., *discussed*, Tullett v. Armstrong (*post*), *distinguished*, Cooper v. Cooper (1888) 15 App. Cas. 88, 59 L. T. 1.—M.L. (SC.).
HALSBURY, L.C., LORDS WATSON and MACNAGHTEN

Davies v. Thornycroft, *referred to*.
Maber v. Hobbs (1836) 6 L. J. Ex. Eq. 12; 2 Y. & C. 817.—ALDRISON, B.

Brown v. Pocock (1831) 5 Sim. 663.—V.-C.; Beale v. Dodd (1786) 1 Term Rep. 193; 1 R. R. 182; and Anderson v. Anderson (1822) 2 Myl. & K. 427.—L.C., *discussed*
Tullett v. Armstrong (1840) 9 L. J. Ch. 41, 4 Myl. & Cr. 377, 390.—COTTENHAM, L.C., *affirming* 1 Beav. 1.—LANGDALE, M.R., *See judgment at length*, where all the cases are discussed

Tullett v. Armstrong, *followed*, Scarborough v. Borman (1840) 9 L. J. Ch. 48; 4 Myl. & Cr. 377.—COTTENHAM, L.C.; *affirmed*, 1 Beav. 34.—LANGDALE, M.R., *applied*, Baggett v. Mev (1844) 13 L. J. Ch. 228, 1 Coll. 188, 8 Jur. 391.—KNIGHT BRUCE, V.-C.; *affirmed*, (1846) 15 L. J. Ch. 262, 1 Ph. 627, 10 Jur. 213.—LYNDHURST, L.C.; *distinguished*, Teague's Settlement, In re (1870) L. R. 10 Eq. 564; 2 J. T. 742; 18 W. R. 752.—JAMES V.-C.; *applied*, Hawkes v. Hubback (1870) 40 L. J. Ch. 49; L. R. 11 Eq. 5 (*post*, col. 1258), *approved*, Stogdon v. Lee (1891) 60 L. J. Q. B. 665, [1891] 1 Q. B. 661.—C.A. (*post*, col. 1254), *referred to*, Wheeler's Settlement, In re, Briggs v. Ryan (1899) 68 L. J. Ch. 663, [1899] 2 Ch. 717 (*post*, col. 1258).

Tullett v. Armstrong and Baggett v. Mev, *discussed*
Adams v. Gamble (1861) 12 Ir. Ch. R. 102.—C.A. BLACKBURN, L.J. and HUGHES, B.; BRADY,

ARMISTEAD v. STURGEON (1860) 42 L. J. Ch. 577; 32 Beav. 352; 9 Jur. (N.S.) 705, 8 L. T. 751, 11 W. R. 814 — *HOMELLY, M.R.*

Lechmere v. Brotherhoods, occurred.

Taylor v. Meads (supra, col. 1250)

Baggett v. Meux, referred to, Taylor v. Meads (supra, col. 1250), applied, Gaskell's Trusts, in re (post), discussed, Ellis's Trusts, in re (post); referred to, Bown, in re (post), Thomas v. Price (1877) 46 L. J. Ch. 761. HALL, V.C. And see col. 1255.

Sarel, in re (1864) 10 Jur. (N.S.) 876; 4 N. R. 231, 10 L. T. 691 — WOOD, V.C., and Spring v. Pride (1864) 10 Jur. (N.S.) 646; 12 W. R. 892 — L.J.s, referred to Gaskell's Trusts, in re (1865) 11 Jur. (N.S.) 780, 12 L. T. 763 — WOOD, V.C.

Spring v. Pride, approved and applied Clinton's Trust, in re, Hollway's Fund (1871) 41 L. J. Ch. 191, L. R. 13 Eq. 295, 26 L. T. 159, 20 W. R. 826 — WICKENS, V.C.; Harrison v. Harrison (1868) 58 L. J. P. 28; 13 P. D. 180 — C.A. (post, col. 1263)

Gaskell's Trusts, in re (supra), followed. Sykes's Trusts, in re (1862) 2 J. & H. 415, 6 L. T. 350 — WOOD, V.C., not followed. Ellis's Trusts, in re (1874) 48 L. J. Ch. 444, L. R. 17 Eq. 409; 22 W. R. 148 — JESSE, M.R.

Sykes's Trusts, in re, referred to, Roberts v. Watkins (1877) 46 L. J. Q. B. 552; 36 L. T. 799 — LUSH, J., approved and followed, Pike v. Fitzgibbon (1881) 50 L. J. Ch. 391; 17 Ch. D. 454 — C.A. (post, col. 1262).

Ellis's Trusts, in re, observed on. Croughton's Trusts, in re (1878) 47 L. J. Ch. 795; 8 Ch. D. 460; 38 L. T. 447, 26 W. R. 874. — BACON, V.C.

Ellis's Trusts, in re, followed. Croughton's Trusts, in re, distinguished. Clarke's Trusts, in re (1882) 51 L. J. Ch. 855; 21 Ch. D. 748; 47 L. T. 48, 30 W. R. 778. — FRY, J.

Ellis's Trusts, in re, distinguished. Croughton's Trusts, in re, followed. Clarke's Trusts, in re, questioned. Sykes's Trusts, in re, approved. Bown, in re, O'Halloran v. King (1884) 27 Ch. D. 411, 53 L. J. Ch. 881, 50 L. T. 796, 38 W. R. 58 — C.A.; reversing 49 L. T. 163 — KAY, J.

BAGGALLAY, L.J.—Then we come to the direction that the interest which any female might take under the will should be for her sole and separate use, and without power to anticipate,

STANDARD WHEN A GIFT OF A SUM OF MONEY WAS EQUIVALENT TO A GIFT OF A PERPETUAL ANNUITY. AND IT IS CONSISTENT WITH THE DECISION OF BACON, V.C. IN *Croughton's Trusts, in re*, where the gift was held to be equivalent to a gift of a sum of money. With respect to the third case, *Clarke's Trust, in re*, I am unable to agree with it. So far as giving the sum of cash to the married woman I think it was right, but I cannot agree with Fry, L.J., so far as he decided that she was entitled to the proceeds of the sale of the stock in Court, because, although formerly an income-bearing fund, it had been converted into cash. It cannot make any difference that a sum of money which was at the testator's death invested on mortgage has been converted into cash. In the present case we have a gift substantially of a sum of cash, although invested at the time. Therefore I think that the person having survived at which this lady was to become entitled to the fund, she can give a valid receipt for it, and is entitled to have it paid to her. I also wish to say that I agree with the decision in *Sykes's Trusts, in re* — p. 420.

COTTON, L.J.—It has long been settled that when money is given to a woman for her separate use, inasmuch as the separate use is a creature of equity, she may be restrained from anticipating the income. *Baggett v. Meux* decided that this applied not only to a life interest but to separate interest given to a married woman absolutely. — p. 422.

His lordship also disapproved of *Clarke's Trusts, in re* LINDLEY, L.J. concurred.

Bown, in re, followed reluctantly, Spencer v. Thomas v. Spencer (1885) 55 L. J. Ch. 80; 30 Ch. D. 183, 31 W. R. 62. — PEARSON, J. explained. Chutey, in re, Gibson v. Way (1886) 55 L. J. Ch. 806, 32 Ch. D. 361, 54 L. T. 655; 34 W. R. 641. — CHITTY, J. And see post, col. 126.

Baggett v. Meux (supra), dictum approved. Stogdon v. Lee (1891) 60 L. J. Q. B. 66 [1891] 1 Q. B. 661; 64 L. T. 494, 39 W. R. 467; 55 J. P. 533. — C.A.

ESHER, M.R.—Then as to the will of the first husband, the question arises whether the will declaring that the defendant is not to have power to "alienate, charge, or anticipate" the income of the 5,000*l.* are of themselves, there being other words that would do so, sufficient to give her a separate estate as against her husband whether these words authorised the Court to draw the inference that the income was intended to be the wife's separate property. Upon that point there is the dictum of Knight Bruce, V. [in *Baggett v. Meux*], a very powerful judge and

master of this branch of the law, which, although it was not necessary for the decision of that particular case, is part of his considered judgment. He there says, in the most deliberate and explicit terms, that words, similar to those in the will in the present case, prohibiting alienation of property by a married woman, are of no effect unless the property is limited to her separate use. The language of Lord Langdale in *Tillotson v. Armstrong* (*supra*, col. 1255) shows that he took precisely the same view—p. 670.

FRY, L.J., to the same effect, *BOWEN, L.J.* concurred.

See Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1.

Bown, In re (*supra*), *approved but distinguished*.

Baggett v. Meux (*supra*), *referred to* Grey's Settlements, *In re*, Anson v. Greenwood (1887) 56 L. J. Ch. 511, 44 Ch. D. 712; 56 L. T. 350, 35 W. R. 560.—C.A. COTTON, LINDLEY and LOPES, L.J.

Bown, In re, distinguished.

Grey's Settlements, In re, followed Tipple's and Newnould's Contract, *In re* (1888) 37 Ch. D. 444, 58 L. T. 754, 36 W. R. 597.—C.A.

COLORIDGE, C.J.—*In Bown, In re*, it was held that the testator intended the legatees to have the capital paid to them, but in the other case, *Grey's Settlements, In re*, it was decided that the testator must be taken to have intended the legacies to remain in the hands of the trustees with a restraint on anticipation by the legatees. Both these decisions are, in my opinion, right, and consistent with each other. *In Bown, In re*, there was a direction to "pay" to the legatee after the death of the tenant for life. This showed the testator's intention to be that the shares of that legatee should then be handed over to her, and the restraint on anticipation was, therefore, held to be confined to the antecedent period. *In Grey's Settlements, In re*, there were no words showing an intention that the legacies should be paid over, and the restraint on anticipation was held to be general—p. 147.

COTTON, L.J. to the same effect. BOWEN, L.J. concurred.

Stogden v. Lee (*supra*), *Baggett v. Meux* and *Grey's Settlements, In re, referred to* *Wheeler's Settlement, In re, Briggs v. Ryan* (1891) 68 L. J. Ch. 683, [1890] 2 Ch. 717 (*post*, col. 1268).

Bown, In re (*supra*), *followed*.

Holmes, *In re*, *Hallows v. Holmes* (1892) 67 L. T. 345.—C.A. LINDLEY, LOPES and A. L. SMITH, L.J.; *Penon, In re, Hotckin v. Mayor* (1897) 45 W. R. 282.—KIDGELICH, J.

Bown, In re, and Holmes, In re, followed.

Currey, In re (col. 1254), *distinguished* *Banks, In re*, *Raynolds v. Ellis* (1902) 71 L. & Ch. 708, [1902] 2 Ch. 338, 87 L. T. 492, 50 W. R. 663.—BUCKLEY, J.

Benson v. Benson (1885) 4 L. J. Ch. 59, 273, 6 Sim. 120.—V.C.; and *Knight v. Knight* (1844) 3 L. J. Ch. 187; 6 Sim. 121.—V.C., *explained*.

Bradley v. Hughes (1886) 6 L. J. Ch. 385; 8 Sim. 149.—SHADWELL, V.C.

Knight v. Knight, Benson v. Benson and *Bradley v. Hughes, explained*. *Gaffee, In re* (1860) 19 L. J. Ch. 179; 1 Mac & G. 511; 1 H. & Tw. 635; 14 Jar. 277.—COTTENHAM, L.C.

Gaffee, In re, adopted.

Hawkes v. Hubback (1870) 40 L. J. Ch. 49, 18 R. 11 Eq. 5, 23 L. T. 642, 19 W. R. 117.—ROMILEY, M.R.

Gaffee, In re, and Hawkes v. Hubback, discussed.

Molyneux's Estate, In re (1872) 11 R. 6 Eq. 411.—FLANAGAN, J.

Gaffee, In re, and Sturgis v. Corp (1806) 13 Ves. 190, 9 R. R. 160.—GRANT, M.R., *discussed*.

King v. Lucas (1888) 23 Ch. D. 712; 49 L. T. 216, 31 W. R. 904.—C.A.; *reversing KAY, J.* *COTTON, L.J.*—That case (*Gaffee, In re*), in my opinion, lays down no rule applicable to the present case. There was a trust for separate use, not limited in duration, with a special reference to the present husband, and it was held that it did not prevent the trust from applying to a future coverture. In that case [*Sturgis v. Corp*] there was existing property settled with reference to an existing coverture; and the Court arrived at the conclusion that the lady could dispose of her interest, even though she was not in actual enjoyment of the property. But when I look at the words of the settlement in the case before us, I am of opinion that the trust for separate use applies to a future coverture only—p. 725.

BAGGALLAY, L.J.—In my opinion, although this case is not identical with *Re v. Fitzgibbon* (1881) 50 L. J. Ch. 394, 17 Ch. D. 454 (*post*, col. 1262), it is governed by the principles there laid down—p. 726. BOWEN, L.J. concurred.

Steelman v. Poole (1847) 16 L. J. Ch. 348, 6 Hare 193, 11 Jur. 449.—WIGRAM, V.C., *approved and applied*.

Harrison v. Harrison (1888) 58 L. J. P. 28; 13 P. D. 180.—C.A. (*post*, col. 1265).

Jaakson v. Hobhouse (1817) 2 Mer. 483; 16 R. R. 200.—L.C., *applied, Baggett v. Meux* (*supra*, col. 1262); *followed, Olive v. Carew* (1859) 28 L. J. Ch. 685, 1 J. & H. 199; 5 Jur. (N.S.) 487, 7 W. R. 433.—WOOD, V.C.; *distinguished, Sharpe v. Foy* (1868) L. R. 4 Ch. 35; 19 L. T. 541; 17 W. R. 65.—WOOD and SELWYN, L.J.; *referred to, Thomas v. Price* (1877) 46 L. J. Ch. 761.—HALL, V.C., *applied, Bateman (Lady) v. Faber* (1897) 67 L. J. Ch. 130, [1898] 1 Ch. 144; 77 L. T. 576; 46 W. R. 215.—C.A. LINDLEY, M.R., CHITTY and V. WILLIAMS, L.J.

Clive v. Carew (*supra*), *applied, Arnold v. Woodhams* (1878) 42 L. J. Ch. 578, 18 R. 16 Eq. 29; 28 L. T. 351; 21 W. R. 694.—MALLIN, V.C., *explained, Weyford v. Heyl* (1875) 44 L. J. Ch. 567; 18 R. 20 Eq. 321, 33 L. T. 155; 28 W. R. 848.—JESSEL, M.R.; *Sawyer v. Sawyer* (1885) 54 L. J. Ch. 444, 28 Ch. D. 595; 52 L. T. 292, 38 W. R. 408.—C.A. BAGGALLAY, BOWEN and FRY, L.J. *And see Thomas v. Price* (*supra*).

Arnold v. Woodhams, referred to.

Glanville, In re, Ellis v. Johnson (1886) 55 L. J. Ch. 826, 31 Ch. D. 532.—C.A. (*post*, col. 1264).

Sharpe v. Foy (*supra*), explained.
M'Intyre's Trustees' Estate, in re (1888) 21 L. R. Ir. 421.—MONROE, J.

Stanley v. Stanley (1878) 17 L. J. Ch. 256, 7 Ch. D. 589; 37 L. T. 777; 26 W. R. 310.—MALINS, V.-C., *discussed*, *Cahill v. Cahill* (1883) 5 App. Cas. 420.—H. L. (18) (*supra*, col. 1205).
Hyde v. Hyde (1888) 57 L. J. P. 89, 13 P. D. 166.—C. A. (*post*, col. 1287). *Hood Ball v. Cathcart* (1891) 63 L. J. Q. B. 802; [1894] 2 Q. B. 559.—C. A. (*post*, col. 1290), *principle applied*; *Hateman v. Fisher* (1897) 67 L. J. Ch. 130, [1897] 1 Ch. 111.—C. A. (*supra*, col. 1256).

Currey, in re, Gibson v. Way (No 2) (1887) 56 L. J. Ch. 389; 55 L. T. 80, 35 W. R. 326.—CHITTY, J., *principle applied*.

Blundell's Trusts, in re (1901) 70 L. J. Ch. 522; [1901] 2 Ch. 221; 84 L. T. 706.—C. A. COLLINS and STIRLING, L.J.

Wife's Debts and Liabilities

Miles v. Williams (1711) 1 P. Wms. 249, and **Sparkes v. Bell** (1828) 6 L. J. (O.S.) K. B. 206; 8 B. & C. 1; 2 M. & R. 121.—K. B., *questioned*.

Lockwood v. Salter (1833) 2 L. J. K. B. 198; 5 B. & Ad. 303; 2 N. & M. 255.—K. B., *discussed*.

Biscoe v. Kennedy (1762) 1 Bro. C. C. 17, n., *approved and followed*. *And see* col. 1258. *Chubb v. Stutch* (1870) 39 L. J. Ch. 329, L. R. 9 Eq. 655; 18 W. R. 488, 22 L. T. 86.

MALINS, V.-C.—It had been stated that it had been held in America [*Funderhayden v. Mallory* (1 Comstock 452)] that *Biscoe v. Kennedy* was not law. That might be the case in America, but in this country he was bound to assume that *Biscoe v. Kennedy* was law. It had been consistently cited by text writers without objection. [His honour referred to Roper on Husband and Wife, vol. 2, 2nd edition, p. 240.] In his opinion *Biscoe v. Kennedy* was good law, and was a sound and useful decision. He should follow that case cheerfully, because he thought it was founded upon justice and honesty.—p. 331

Lockwood v. Salter, referred to
Parkin, in re, Hill v. Schwarz (1892) 62 L. J. Ch. 55; [1892] 3 Ch. 510, 67 L. T. 77, 41 W. R. 120.—STIRLING, J.

Sanger v. Sanger (1871) 40 L. J. Ch. 372; L. R. 11 Eq. 470, 24 L. T. 649, 19 W. R. 792.—ROMILLY, M.R.; and *London and Provincial Bank v. Bogle* (1878) 47 L. J. Ch. 301, 7 Ch. D. 778; 87 L. T. 780, 26 W. R. 573.—BACON, V.-C., *followed*.
Hedgely, in re, Small v. Hedgely (1886) 56 L. J. Ch. 800; 34 Ch. D. 379; 56 L. T. 19, 35 W. R. 472.—NORTH, J.

Sanger v. Sanger, approved
Downe v. Fletcher (1888) 21 Q. B. D. 11, 59 L. T. 180; 36 W. R. 694; 52 J. P. 375.—COLLIDGE, C.J. and MATHEW, J., *followed*.

Axford v. Reid (1880) 58 L. J. Q. B. 230, 22 Q. B. D. 548, 60 L. T. 726; 37 W. R. 291; 53 J. P. 611.—C. A. BISHOP, M.R., FRY and BOWEN, L.J.

Kirk v. Murphy (1892) 80 L. R. Ir. 508.

—MADDEN, J., *overruled*.

Axford v. Reid, *discussed*.

Molony v. Harvey (1894) [1895] 2 Ir. R. 169. —HARRISON, JOHNSON and HOLMES, JJ.

Axford v. Reid, referred to
Wheeler's Settlement, in re, *Briggs v. Ryan* (1899) 68 L. J. Ch. 603; [1899] 2 Ch. 717 (*post*, col. 1268).

Allen v. Papworth (1718) 1 Ves. sen. 163.

—L. C., *discussed*.

Hulme v. Tenant (1778) 1 Bro. C. C. 16.—THURLOW, L. C.

Biscoe v. Kennedy (*supra*, col. 1257),

explained.

Hulme v. Tenant, *followed*.

Bolton (Duke) v. Williams (1793) 2 Ves. 138; 4 Bro. C. C. 297.—LOUGHBOROUGH, L. C.

Hulme v. Tenant; *discussed*, *Sockett v. Wray* (*post*), *distinguished*, *Sperling v. Rochford* (1803) 8 Ves. 161.—ELDON, L. C. *Nantes v. Curcock* (1803) 9 Ves. 182, 7 R. R. 156.—ELDON, L. C.

Hulme v. Tenant and Bolton (Duke) v. Williams, *considered*.

Jonas v. Harris (1804) 9 Ves. 486, 7 R. R. 282.—ELDON, L. C.

Hulme v. Tenant, referred to

Jackson v. Hobhouse (1817) 2 Mer. 483, 16 R. R. 200.—ELDON, L. C.

Jones v. Harris, *followed*

Agular v. Agular (1820) 5 Madd. 414.—LEACH, V.-C.

Norton v. Turvill (1723) 2 P. Wms. 114,

distinguished.

Sockett v. Wray (1798) 4 Bro. C. C. 483.—ARDEN, M.R.

Sperling v. Rochford (*supra*) and *Sockett v. Wray*, *discussed*.

Richards v. Chambers (1805) 10 Ves. 580, 8 R. R. 44.—GRANT, M.R.

Norton v. Turvill and Sockett v. Wray,

discussed.

Heatley v. Thomas (1809) 15 Ves. 596; 10 R. R. 596.—GRANT, M.R. *And see post*, col. 1261.

Compton v. Collinson (1789) 2 Bro. C. C.

377; **Hulme v. Tenant**; *Greatley v. Noble* (1818) 3 Madd. 79, **Stuart v. Kirkwall (Lady)** (1818) 3 Madd. 387, **Kenge v. Delavall** (1855) 1 Vern. 326, and **Lillie v. Airey** (1791) 1 Ves. 277, *discussed*.
Murray v. Barlee (1884) 3 L. J. Ch. 184, 8 Myl. & K. 209, 41 R. R. 52.—BROUGHAM, L. C. *And see post*, col. 1260.

Stuart v. Kirkwall (Lady), *discussed*, *Johnson v. Gallagher* (1861) 30 L. J. Ch. 298; 3 De G. F. & J. 194.—L. J. (*post*, col. 1260), *approved*, *Shattock v. Shattock* (1868) 35 L. J. Ch. 509, L. R. 2 Eq. 182 (*post*, col. 1260).

Hulme v. Tenant, *approved*.

Owens v. Dickenson (1840) Cr. & Ph. 48, 4 Jur. 1151.—COTTENHAM, L. C., *affirming* 3 Beav. 48.—LANGDALE, M.R. *And see post*, col. 1260.

Norton v. Turvill (*supra*), *followed*.

Hulme v. Tenant, *discussed*.

Vaughan v. Walker (1858) 8 Ir. Ch. R. 458.—BRADY, L. C., BLACKBURN, L.J. *dissenting*.

Hulme v. Tenant (*supra*), *Worsnop v. Benassi* (1873) 21 W. R. 684—**KIATING** and **BWRTT, JJ.**; *disapproved*, **Johnson v. Gallagher** (*post*, col. 1260); **Bowen**, in 10, *James v. James* (1892) 61 L. J. Ch. 432, [1892] 2 Ch. 291—**CHITTY, J.**

Norton v. Turvill (*supra*), *followed*.

Vaughan v. Walker (*supra*), *commented on*, **Hodgson v. Williamson** (1880) 15 Ch. D. 87; 42 L. T. 676; 28 W. R. 944—**BACON, V.-C.**

Hodgson v. Williamson, *distinguished*.

Norton v. Turvill, *explained*.

Vaughan v. Walker, *commented on*.

Hastings (Lady), in re, **Hallett v. Hastings** (1887) 56 L. J. Ch. 129, 631; 35 Ch. D. 94; 57 L. T. 126; 35 W. R. 554; 52 J. P. 100—**C.A.** **COTTON, LINDLEY** and **LOPES, L.JJ.**; *affirming* **KAY, J.**

COTTON, L.J.—The case which is most similar to this is **Vaughan v. Williamson**, before **Bacon, V.-C.**, in which the judge relied on the fact that the claimant had brought his action as soon as there was any fund out of which he could be paid, because the only property of the married woman was that which she got from her father, and that had only lately been realised. **Mr. Fischer** sought to make that argument applicable to the present case, and he relied on the fact that the property which passed under the testatrix's will became liable to the claim within six years. But there was property settled to her separate use ever since 1875, which could have been made available. Therefore the ground relied on by **Bacon, V.-C.** fails in the present case, and I have some doubt whether the **V.-C.** was right in the reliance he placed on that ground, because the statute begins to run as soon as an action can be brought to enforce the claim, irrespective of there being any property.

Norton v. Turvill is very shortly reported. The lady had a power to appeal by deed or will, and she gave a bond for 267. Of course, an action could have been brought against her on that bond, but, as I understand the judgment of the **M.R.**, he considered the execution of the bond as an exercise of her power of disposition. . . . The **M.R.** looked upon the bond, erroneously, as I think, as an execution of the power which the settlement gave her, so that the creditor became *creditor que trust* under it. That seems to be the ground of his judgment. **Beasley v. Thomas** (*supra*, col. 1258) does not appear to help us in this case, it turns on quite a different point. Then in **Vaughan v. Walker** the **L.C.** of Ireland held that the Statute of Limitations did not run against the creditors of a married woman; but the **L.J.** differed from that view, and I must express my opinion that the **L.C.** was wrong in the view which he took, and that he did not deal with the liability of the separate estate of a married woman as we ought to deal with it.—p. 688

LINDLEY, L.J.—I think that **Kay, J.** was right in saying that **Norton v. Turvill** is to be explained by saying that the bond was held to have acted as an appointment making the trustee of the settlement a trustee for the obligee of the bond. But that view is now exploded.—p. 634 **LOPES, L.J.** concurred.

Hodgson v. Williamson, *discussed*.

Willett v. Finlay (1891) 29 L. R. Ir. 156—**PORTER, M.R.**

Hastings (Lady), in re (*supra*), *referred to*, **Beck v. Pierce** (1889) 58 L. J. Q. B. 516; 23 Q. B. D. 316; 61 L. T. 448; 38 W. L. R. 29; 54 J. P. 198—**C.A.** **ESHER, M.R.**, **LINDLEY** and **BOWEN, L.JJ.**

Beck v. Pierce, *referred to*, **Parkin**, in re, **Hill v. Schwann** (1892) 62 L. J. Ch. 55; [1892] 3 Ch. 510 (*post*, col. 1266)

Murray v. Barlee (*supra*, col. 1258), *referred to*

Owens v. Dickenson (1840) Cr. & Ph. 48, 4 Jur. 1151—**L.C.** (*supra*, col. 1258).

Murray v. Barlee, Owens v. Dickenson; Barrymore v. Ellis (1830) 8 Sim. 1.—**V.-C.** and **Stead v. Gray** (1828) 4 Russ. 550, 6 L. J. (OS) Ch. 138; 1 Sim. 294; 28 L. R. 169—**L.C.** and **V.-C.** *discussed*, **Vaughan v. Vanderstegen** (1854) 23 L. J. Ch. 783; 2 Dew. 165, 363, 2 W. R. 599—**KINDERSLEY, V.-C.**

Vaughan v. Vanderstegen, *discussed*, **Edie v. Bashington** (1851) 3 Ir. Ch. R. 568—**M.R.**, *followed*, **Hobday v. Peters** (No. 2) (1860) 29 L. J. Ch. 780; 28 Beav. 384; 8 W. R. 512.—**ROMILLY, M.R.**, *discussed*, **Johnson v. Gallagher** (1861) 30 L. J. Ch. 298 (*post*), *followed*, **Blatchford v. Woolley** (1865) 32 L. J. Ch. 534, 2 Dr. & Sm. 204—**KINDERSLEY, V.-C.** *approved*, **Shattock v. Shattock** (*post*); **Lush's Trust**, in re (1869) 38 L. J. Ch. 650, L. R. 14 Ch. 591; 21 L. T. 376, 17 W. R. 374—**SHEPPES and O'BRYEN, L.JJ.**, *not followed*, **Harvey's Estate**, in re, **Codfrey v. Harben** (1879) 49 L. J. Ch. 3; 13 Ch. D. 216 (*post*, col. 1262); *discussed*, **Glitchin, Ex parte, Armstrong**, in re (1886) 55 L. J. Q. B. 578, 17 Q. B. D. 521—**C.A.** (*post*, col. 1263); *applied*, **McIntyre's Trustees' Estate**, in re (1888) 21 L. R. Ir. 421—**CHATTERTON, V.-C.**, **Roper**, in re (*post*, col. 1266).

Owens v. Dickenson, *discussed*.

Vaughan v. Walker (*supra*, col. 1258).

Murray v. Barlee and Owens v. Dickenson, *discussed*.

Johnson v. Gallagher (1861) 30 L. J. Ch. 298; 8 De G. F. & J. 494, 7 Jur. (N.S.) 273; 4 L. T. 72; 9 W. R. 506—**KNIGHT BRUCE** and **TURNER, L.JJ.** See judgment of latter, where all the cases are reviewed, *And see post*, cols. 1261—1263; **Pike v. Fitzgibbon** (1879) 41 L. T. 148.—**FRY, J.**

Owens v. Dickenson, *applied*, **Poole's Estate**, in re, **Thompson v. Bennett** (1877) 46 L. J. Ch. 808, 6 Ch. D. 732; 37 L. T. 119; 25 W. R. 862.—**HALL, V.-C.**; *referred to*, **Robinson v. Pickering** (1881) 50 L. J. Ch. 527, 16 Ch. D. 600; 44 L. T. 165, 29 W. R. 385.—**C.A.** **JESSEL, M.R.**, **JAMES** and **LUSH, L.JJ.**; *reversing* 16 Ch. D. 371.—**MALINS, V.-C.**

Johnson v. Gallagher (*supra*), *disapproved*, **Shattock v. Shattock** (1866) 35 L. J. Ch. 509; 35 Beav. 489, L. R. 2 Eq. 182; 12 Jur. (N.S.) 405, 11 L. T. 462, 14 W. R. 600—**ROMILLY, M.R.**, *applied*, **Leeds Banking Co.**, in re, **Matthewman's Case** (1866) 36 L. J. Ch. 90; L. R. 3 Eq. 781; 12 Jur. (N.S.) 982, 15 L. T. 266, 15 W. R. 146.—**KINDERSLEY, V.-C.**, **Butler v. Crompton** (1868) 38 L. J. Ch. 36; L. R. 7 Eq. 16; 17 W. R. 24.—**MALINS, V.-C.**, **Picard v. Hine** (1869) L. R. 6

Ch. 274; 16 W. R. 178.—HATHERLEY, L.C. and GIFFARD, J.J. *And see post*, cols 1262, 1263

Shattock v Shattock, disappeared
Johnson v Gallagher and Heatley v Thomas (col 1258), *adopted*

London Chartered Bank of Australia v Lempière (1875), 1 L. R. 1 P. C. 572, 42 L. J. P. C. 49; 9 Moore P. C. (N.S.) 426, 29 L. T. 186, 21 W. R. 513

JAMES, L.J. (for self, SIR D. PEACOCK, MELLISH, L.J. and SIR M. SMITH).—It is true, that in *Shattock v Shattock* the M.R. expressly overruled the judgment of TURNER, L.J. in *Johnson v Gallagher*, and held, that even a promissory note given by a married woman living separate and apart from her husband, and having property settled to her separate use for life, with a power to appoint it by will, was not a debt payable out of the property so appointed. In that judgment he bases his dissent from TURNER, L.J., on the ground, that the authorities cited by the latter do not warrant his conclusion. Their lordships are not able to concur in that view of the authorities, and have arrived at the conclusion, that TURNER, L.J.'s judgment is expressed with his usual accuracy. One of the cases, *Heatley v Thomas*, when carefully examined, is a direct authority for the L.J.'s proposition.—p. 594.

Picard v Hine (*supra*, col 1260), *followed*
Davies v Jenkins (1877) 6 Ch. D. 728; 26 W. R. 260.—HALL, V.-C., Penley v Anstruther (1883) 52 L. J. Ch. 367; 48 L. T. 661.—PEARSON, J.

Davies v Jenkins and Collett v Dickenson (1879) 11 Ch. D. 687, 40 L. T. 394—FRY, J., *distinguished*.

Pike v Fitzgibbon (1879) 41 L. T. 148

FRY, J.—In those cases declarations had been made declaring that the separate estate of the married woman was charged in the absence of the trustees—and I am not prepared to say that where the trustees cannot be found, as in *Collett v Dickenson*, that may not be a convenient and very proper course to pursue, but it is a course of great inconvenience as a course which leads to a great deal of, as it seems to me, needless expense; because, when the matter comes back on further consideration in such a state, all the Court can do is to repeat the declaration made at the hearing, reducing to a certainty the amount of the charge, and reducing to a certainty the amount of the separate estate, and then to leave the whole matter to be worked out, if necessary, by subsequent proceedings. The course, therefore, is inconvenient, and I refuse this application with costs.—p. 151.

Davies v Jenkins and Collett v Dickenson, *followed*.

Flower v Buller (1880) 49 L. J. Ch. 784, 15 Ch. D. 665; 43 L. T. 311; 28 W. R. 948.—DENMAN, J. *And see post*, col. 1262.

London Chartered Bank of Australia v Lempière, *not applied*

Adamson v Hammond (1873) 43 L. J. P. 17; L. R. 3 P. 141, 29 L. T. 700.—SIR J. HANNEN

Heatley v Thomas (*supra*, col 1258) and **London Chartered Bank of Australia v Lempière**; *discussed*, Mayd v Field (1876) 45 L. J. Ch. 699; 3 Ch. D. 687, 34 L. T. 614; 24 W. R.

660.—JESSE, M.R.; Willett v Finlay (1891) 29 L. R. Ir. 156.—M.R., *referred to*, Wheeler v Settlement, 10 to (1899) 68 L. J. Ch. 663, [1899] 2 Ch. 717 (*post*, col 1263)

Mayd v Field (*supra*), *referred to*

Tussaud's Estate, 10 re, Tussaud v Tussaud (1878) 47 L. J. Ch. 849, 9 Ch. D. 363, 39 L. T. 113, 26 W. R. 871.—C.A. JAMES, BRETT and COTTON, L.J.J.

Johnson v Gallagher (col 1260) and **London Chartered Bank of Australia v Lempière**, *distinguished*, Outram v Hyde (1877) 24 W. R. 268.—HALL, V.-C.; *followed*, Harvey's Estate, 10 re, Gilbert (or Godfrey) v Harben (1879) 49 L. J. Ch. 3, 18 Ch. D. 216, 28 W. R. 73.—HALL, V.-C.

London Chartered Bank of Australia v Lempière; **Harvey's Estate**, 10 re; and **Mayd v Field**; *considered*, Roper, 10 re, Roper v Doncaster (1886) 58 L. J. Ch. 213; 39 Ch. D. 492 (*post*, col 1266); Willett v Finlay (1891) 29 L. R. Ir. 156.—M.R.

Johnson v Gallagher (*supra*), *explained*.

Devitt v Faussett (1881) 7 L. R. Ir. 511.—CHATTERTON, V.-C.; *affirmed with a variation*, (1882) 9 L. R. Ir. 84.—C.A. LAW, L.C., DEASY and FITZGIBBON, L.J.J.

Harvey's Estate, 10 re, *followed*.

Hodges v Hodges (1882) 51 L. J. Ch. 549; 20 Ch. D. 749, 46 L. T. 366, 30 W. R. 483.—FRY, J.

Picard v Hine (*supra*, col 1260) and **Johnson v Gallagher** (*supra*), *explained*.

Flower v Buller (*supra*, col 1261) and

Harvey's Estate, 10 re, *observed on*

London Chartered Bank of Australia v

Lempière (*supra*), *explained*

Pike v Fitzgibbon, Martin v Fitzgibbon (1881) 17 L. J. Ch. 454, 60 L. J. Ch. 394, 44 L. T. 562, 29 W. R. 551.—C.A. *reversing* 49 L. J. Ch. 493, 14 Ch. D. 887, 42 L. T. 625, 28 W. R. 667.—MALINS, V.-C.

JAMES, L.J.—The language of the decree in *Picard v Hine*, which gave the plaintiff a charge upon the separate estate remaining, was intended to give effect to the rule that the creditor had a claim against the estate, but not a charge upon it, so as to prevent the operation of any intermediate alienation, and therefore the inquiry was directed what separate estate remained, meaning only what part remained of that separate estate in respect of which the married woman had at the time of contracting the debt a *ius disponendi*. That is evidently what was before the Court, no such point having been suggested as that she had acquired the general power of contracting debts to be paid out of any separate estate she might afterwards acquire. The misconception has arisen from not attending to what were the facts of the cases in which that inquiry was directed. I desire to have it distinctly understood as my opinion, and the opinion of my colleagues, and therefore as the decision of this Court, that in any future case the proper inquiry to be made is what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate, or any part of it, still remains capable of being reached by the judgment and execution of this Court. The decision in *Johnson v Gallagher* was that the debt of the married woman, although she had

separate estate, did not prevent her disposing of that separate estate any more than the contracting of a debt prevents a man from disposing of any part of his estate—p. 160

BRETT, L.J.—*Roberts v. Ifathus and Sykes's Trusts, In re* (supra, col. 1253), are adverse to the case of the plaintiffs, and with those decisions I entirely agree—p. 163

COTTON, L.J.—As regards *Godfrey v. Harben*, which was pressed upon us, that to some extent favours the contention of the respondents. I think it better not to give any opinion on the point there decided, as it may come to the C.A., but that case went very much further than the case it was supposed to follow. As I understand that case, the decision was that the power of appointment by will connected with the separate life estate, when exercised, made the appointed property separate property. In *London Chartered Bank of Australia v. Lemprière* there was power to appoint by deed or will, which makes a great difference between that case and the case before Hall, V.-C. However, I express no opinion upon that case, except to point out that distinction, leaving the case entirely free if and when it comes before the C.A.—p. 166

JAMES, L.J.—I may say as regards *Flopper v. Buller*, and *Roberts v. Watkins*, that in the former case Denman, J., must be understood as merely following what he thought was the decision of Malins, V.-C. [in *Pike v. Fitzgibbon*, 14 Ch. D. 837], and the judgment of Lush, L.J. in the latter case seems to me from beginning to end to be expressed with absolute accuracy.—b.

Johnson v. Gallagher (col. 1260), *discussed*, *Gilchrist, Ex parte*, or *Armstrong, Ex parte*, *Armstrong, In re* (1886) 55 L. J. Q. B. 573, 17 Q. B. D. 521; 55 L. T. 538, 34 W. R. 709; 3 Morrell, 1193, 51 J. P. 232—C.A. **ESHER, MR.**, **BOWEN** and **FRY, L.J.**, reversing 17 Q. B. D. 167.—**MANISTY** and **CAVE, JJ.**, *Hemmings v. Blathwaite* (1889) 61 L. T. 224.—**MATHEW** and **GLANTHAM, JJ.**; *Roper, In re* (post, col. 1266), *Willett v. Finlay* (1891) 29 L. R. Ir. 156—M.R.

Gilchrist, Ex parte, *applied*, *Armstrong, In re*, *Boyle, Ex parte* (1888) 57 L. J. Q. B. 553, 21 Q. B. D. 264; 39 L. T. 806; 36 W. R. 772, 5 Morrell 200—C.A. **LINDLEY** and **LOPES, L.J.**, **ESHER, MR.**, *dissenting*

Pike v. Fitzgibbon (supra), *applied*, *M'Queen v. Turner* (1881) 30 W. R. 80.—**FIELD** and **NORTH, JJ.**; *Myles v. Burton* (1884) 44 L. R. Ir. 256.—**HARRISON** and **MURPHY, JJ.**, *referred to*, *Bussell v. Tanner* (1884) 13 Q. B. D. 691 (post, col. 1289), *Turnbull v. Forman* (1885) 54 L. J. Q. B. 489; 16 Q. B. D. 234—C.A. (post, col. 1289); *explained*, *Glavin, In re* (post).

Pike v. Fitzgibbon, distinguished., *Dixon, In re*, *Dixon v. Smith* (1887) 56 L. J. Ch. 773, 35 Ch. D. 4; 57 L. T. 94, 35 W. R. 742.—C.A.

COTTON, L.J.—There what was sought was to enforce a liability arising from contract. But here Mrs. Smith received a sum which she ought not to have received, the V.-C. [Bacon] having erroneously ordered it to be paid to her. That order was reversed on appeal, and it was the duty of the Court to declare Miss Smith to be bound to refund the sum which she had received under it.—p. 774. **LINDLEY** and **LOPES, L.J.**, *concurred*

Claydon v. Finch (1873) 42 Q. J. Ch. 116; L. R. 13 Eq. 265, 23 L. T. 101.—**BACON, V.-C.**, *discussed*.

Glavin, In re, *Ellis v. Johnson* (1886) 55 L. J. Ch. 325, 31 Ch. D. 542, 54 L. T. 411; 34 W. R. 800—C.A. **COTTON, BOWEN** and **FRY, L.J.**, *reversing* 53 L. T. 752, 31 W. R. 118.—**BACON, V.-C.**; *Slade, In re*, *Hyde v. Hulme* (1881) 50 L. J. Ch. 729, 18 Ch. D. 553, 15 L. T. 276, 30 W. R. 28.—**FRY, J.**

Glavin, In re, *Ellis v. Johnson, referred to*, *Miller v. Miller* (1870) 39 L. J. Mat. 38; L. R. 2 P. 54, 22 L. T. 418, 18 W. R. 585.—**LORD PENZANCE**, *approved and applied*

Hyde v. Hyde (1888) 57 L. J. P. 89, 13 P. D. 166, 59 L. T. 529, 36 W. R. 708.—C.A. **COTTON, BOWEN** and **FRY, L.J.**

Pike v. Fitzgibbon, discussed, *Willett v. Finlay* (1891) 29 L. R. Ir. 156.—**FORTESCUE, MR.**, *affirmed*, C.A.

Claydon v. Finch (supra) and *Hyde v. Hyde, discussed*, *Hood-Barrs v. Cathcart* (1894) 63 L. J. Q. B. 602; [1894] 2 Q. B. 559.—C.A. (post, col. 1290).

Glavin, In re, distinguished, **Pike v. Fitzgibbon, commented on**, *Cox v. Bennett* (1891) 60 L. J. Ch. 651, [1891] 1 Ch. 617, 64 L. T. 380, 39 W. R. 401.—C.A.

LINDLEY, L.J.—Since this case was argued yesterday I have looked at *Glavin, In re*, a little more closely. It appears to me that that case, and the reasoning on which it is based, do not apply to the present case at all. In the first place, in *Glavin, In re*, no proceedings had been taken by the lady under the Act [Married Women's Property Act, 1882]. She sued by her next friend. In the second place, there was no order on the married woman to pay the costs. In the third place, the order of Bacon, V.-C. which was appealed against, authorised the trustees to retain the costs out of future accruing separate estate—and to that extent it was obviously wrong. But there was this further point raised in that case. There was a small sum of 36l., which was said to be arrears, and it was contended that this might be impounded or retained by the trustees. But when we look at the judgment we find that this small sum of 36l., accrued after the order on further consideration, which did not order her to pay the costs, but ordered her next friend to pay them, and the Court there came to the conclusion that even that sum could not be attached. There is language in the judgment that goes the length of intimating an opinion that the only arrears that could be attached were arrears that had accrued at the time of the institution of the suit. The main controversy was obviously not about that sum, which was merely a small item in the matter; the main controversy was the propriety of the V.-C.'s order entitling the trustees to retain the costs out of the subsequent income of the married woman, as to which she was restrained from anticipation. In *Hyde v. Hyde* (supra) the C.A., in dealing with a sequestration, allowed the sequestrator to attach and take in execution the arrears of a married woman's separate estate which were due at the time the sequestration issued, and they made no reference there to any earlier time. But apart from that it appears to

me that what we have to deal with is, not *Glanville, In re*, but the Married Women's Property Act. I confess I am not at all disposed to extend the decision in *Glanville, In re*, to a case which arises under that Act, for several reasons. In the first place, the Court itself, in *Glanville, In re*, declined to say what would be right in a case arising under the Act. Fry, L.J., is pointed upon that. He says "The action was begun in 1882, before the passing of the Married Women's Property Act, 1882. How the case would have stood if the plaintiff had been suing without a next friend, under the provisions of that Act, I give no opinion; the question is one of some difficulty, and is not now before us." That is precisely the question which we have to deal with. The Married Women's Property Act, s. 1, enables a married woman to sue without a next friend; and, what is far more important to my mind is this, that the Act departs from the principle upon which *Pike v Fitzgibbon* was decided, and which was taken as the foundation of the decision in *Glanville, In re*. The Act, as I understand it, alters the whole law as laid down in *Pike v Fitzgibbon*—p. 632.

KAY, L.J., to the same effect.

And see Married Women's Property Act, 1882 (56 & 57 Vict. c. 63), s. 2.

Pike v Fitzgibbon, Glanville, In re, and Cox v Bennett, discussed.

Hood-Barra v Calhoun (1894) 63 L. J. Q. B. 602, [1894] 2 Q. B. 559.—C.A. (post, col. 1290).

Glanville, In re, discussed and not applied.
Dowd v Dowd [1898] 1 Ir. R. 244.—CHATTER-TOUS, V.-C.

Shakespeare, In re, Deakin v Leakin (1885) 55 L. J. Ch. 11, 30 Ch. D. 169; 58 L. T. 145, 135 W. R. 744.—FRANKSON, J., approved.
Palliser v Gurney (1887) 56 L. J. Q. B. 546; 19 Q. B. 519, 35 W. R. 760, 61 J. P. 520.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ. And see Married Women's Property Act, 1883 (56 & 57 Vict. c. 63), s. 1.

Palliser v Gurney, applied.
Trotter v Gilgith (1888) 57 L. T. 673, 36 W. R. 96.—CHITTY, J.; *Leak v Driffield* (post).

Palliser v Gurney, referred to.
Biddowes v Argentine Loan and Mercantile Agency Co. (1890) 62 L. T. 602.—KIRKWHICH, J. And see post.

Palliser v Gurney, approved and followed.
Stoddon v Lee (1891) 60 L. J. Q. B. 669; [1891] 1 Q. B. 661.—C.A. (supra, col. 1261).

Palliser v Gurney, not applied.
Ann, In re, Wilson v Ann (1898) 63 L. J. Ch. 334; [1894] 1 Ch. 549, 70 L. T. 273.—KIRKWHICH, J.

Palliser v Gurney, referred to.
Hood-Barra v Calhoun (1894) 63 L. J. Q. B. 602; [1894] 2 Q. B. 559.—C.A. (post, col. 1290).

Palliser v Gurney and Tetly v Griffith (supra), discussed.
Sotlaw v Welch (1899) 68 L. J. Q. B. 940, [1899] 2 Q. B. 419.—C.A. (post, col. 1267).

Harrison v Harrison (1888) 58 L. J. P. 28; 18 P. D. 180, 60 A. T. 39; 35 W. R. 478.—C.A. COTTON, BOWEN and FRY, L.JJ., applied.

Leak v Driffield (1889) 59 L. J. Q. B. 89, 24

Q. B. D. 98; 61 L. T. 771; 38 W. R. 93.—MATHEW AND WILKS, L.JJ.

Leak v Driffield, commented on.
Bonner v Lyon (1890) 38 W. R. 541.—GRANTHAM and v WILLIAMS, JJ.

Bonner v Lyon and Harrison v Harrison (supra), discussed.
Everett v Paxton (1891) 65 L. T. 383, 7 Times L. R. 467.—A. L. SMITH, J., GRANTHAM, J., dissenting.

Biddowes v Argentine Loan and Mercantile Agency Co. (supra), referred to in part. (1890) 62 L. T. 361.—C.A. COTTON, BOWEN and FRY, L.JJ.

Roper, In re, Roper v Doncaster (1888) 58 L. J. Ch. 215, 39 Ch. D. 482; 59 L. T. 208, 36 W. R. 750.—KAY, J. (see judgment, where all the earlier cases are reviewed), referred to.
Parkin, In re, Hill v Schwarz (1892) 62 L. J. Ch. 55, [1892] 3 Ch. 810, 67 L. T. 77, 41 W. R. 120.—STIRLING, J.

Roper, In re, not applied.
Ann, In re, Wilson v Ann (1893) 63 L. J. Ch. 334, [1894] 1 Ch. 549, 70 L. T. 273.—KIRKWHICH, J.

Roper, In re, distinguished.
Hughes, In re, Brandon v Hughes (1898) 67 L. J. Ch. 279, [1898] 1 Ch. 529, 78 L. T. 432, 46 W. R. 502.—C.A., affirming KIRKWHICH, J.

LINDLEY, M.R.—When we bear in mind that the protection order was obtained in February, 1880, and that Mrs Walker then became under ss. 21, 25, and 26 of the Matrimonial Causes Act, 1857, in the position of a *jure uxoris* as regards her property, and capable of contracting debts and obligations, we can see that the case does not come within the principle of the decision in *Roper, In re*, the *ratio decidendi* in which was that the married woman there concerned was not capable of contracting debts and obligations within the meaning of the Married Women's Property Act, 1882—p. 282. RIGBY and VAUGHAN WILLIAMS, L.JJ. concurred.

Holtby v Hodgson (1889) 59 L. J. Q. B. 46, 24 Q. B. D. 103, 62 L. T. 154, 38 W. R. 68.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ., applied.
Aylesford (Countess) v Great Western Ry. [1892] 2 Q. B. 626, 41 W. R. 42, 57 J. P. 70.—WRIGHT and BRUCE, JJ.

Pelton Bros. v Harrison (No. 2) (1891) 61 L. J. Q. B. 144, [1892] 1 Q. B. 118; 65 L. T. 845.—C.A. LOPES and KAY, L.JJ., referred to.

Lynes, In re, Lester & Co, Ex parte (1893) 62 L. J. Q. B. 872, [1893] 2 Q. B. 113, 4 Ir. 416, 68 L. T. 739, 41 W. R. 488; 41 Morrell 124, 38 J. P. 5.—C.A. ESHER, M.R., LOPES and A. L. SMITH, L.JJ.

Lynes, In re, Lester, Ex parte, applied.
Holtby v Hodgson (supra), dictum doubted.
Hewitt, In re, Lovene, Ex parte (1894) [1895] 1 Q. B. 328, 64 L. J. Q. B. 185, 15 Ir. 162, 72 L. T. 60; 48 W. R. 237.

v. WILLIAMS, J.—Reliance was placed upon the doctrine of Lindley, L.J., in *Holtby v Hodgson* to the effect that upon the death of the husband such an execution could issue. He says "Suppose her husband were to die the restraint would

is gone, the judgment would bind her, and execution could be issued upon it." If that is right, I agree that Mr Mackenzie's contention would be sound. But I think it is not right. It seems to me that *Beckett v Tasker* (post, col 1268) and *Pelton v Harrison* (No. 1), (post, col 1268) are both authorities to show that the death of the husband does not convert a judgment in the form in *Scott v Morley* (post, col 1287) into a judgment upon which the widow can be possibly called upon to pay —p. 382 KENNEDY, J. concurred

Lynes, in re; Hewett, in re, Levene, Ex parte, and Frances Handford & Co., in re, Frances Handford, Ex parte (1890) 68 L. J. Q. B. 386 [1890] 1 Q. B. 566; 80 L. T. 125, 47 W. R. 391, 6 Manson 131 —C.A. LINDLEY, M.R., MIBBY and V WILLIAMS, L.J., *approved*.
Elliot, in re [1900] 2 Ir R. 439 —BOYD, J.

Holtby v Hodgson (supra), *explained*.
Softlaw v Welch (supra) 68 L. J. Q. B. 910; [1899] 2 Q. B. 419, 81 L. T. 64; 47 W. R. 626 —C.A.

V WILLIAMS, L.J. (after discussing *Scott v Morley* (post, col 1287), *Pelton v Harrison*, (No. 1) (post), *Beckett v Tasker* (post), *Fallier v Gwynne* (supra, col 1266), and *Pelley v Griffith* (supra, col 1267), continued). The only authority which at all conflicts with this continuous line of decisions is *Holtby v Hodgson*, or, rather, the *dictum* of Lindley, L.J., in his judgment in that case, to the effect that separate property that she (the wife) is restrained from anticipating, which cannot be got at in any way while her husband is living, becomes immediately subject to the judgment as soon as he is dead. The judgment itself in *Holtby v Hodgson* involved no such proposition. The husband in that case was alive, and the only question in the case was whether a judgment obtained against a married woman in her husband's lifetime, substantially in the *Scott v Morley* form, in an action on a contract made by her during coverture, could be enforced by a garnishee order under Ord. XLV. 1.1, attaching a judgment debt due on a judgment recovered by her in an action for malicious prosecution brought by her during coverture. The Court held that the judgment created an attachable debt. There is nothing in this judgment, or in the finding that a married woman is under such a contract a personal debtor, inconsistent with the limitation of the contracting power of a married woman, or with the limitation of the satisfaction of damages recovered against her to separate property coming to her possession during coverture, which seem to me to be the limitations established by the cases to which I have called attention. *Holtby v Hodgson* was followed in *Pelton v Harrison* (No. 2) (supra, col 1268). In which it was held that a judgment against a married woman is a personal one, although enforceable against her separate estate only, and that costs due to a married woman in respect of an interlocutory application might be satisfied by an order for set-off under Ord. LXV. r. 27, sub-r. 21, of costs due from the married woman under a judgment in the *Scott v Morley* form. *Pelton v Harrison* (No. 1) was cited, but neither Lopes, L.J., nor Kay, L.J., seem to have considered that case inconsistent with *Holtby v Hodgson*. It is further to be observed that both in *Pelton v Harrison* (No. 1) and in *Beckett v Tasker* the judgment in the *Scott v Morley* form was obtained in actions brought after the death

of the husband.—p. 941. A. L. SMITH, L.J. concurred

Jay v Robinson (1890) 59 L. J. Q. B. 367, 25 Q. B. D. 467, 63 L. T. 171, 38 W. R. 550.—ESHER, M.R., VIVY and LOPES, L.J., *discussed*.

Beckett v Tasker (1887) 19 Q. B. D. 7, 56 L. T. 636, 36 W. R. 158.—DAVEY and WILLS, J., *approved*.

Pelton Bros v Harrison (No. 1) (1891) 60 L. J. Q. B. 712, [1891] 2 Q. B. 122; 65 L. T. 41, 39 W. R. 689.—C.A. LOPES and KAY, L.J., *approved*.

Pelton Bros v Harrison (No. 1), *referred to*.
Hood-Barrow v Cathcart (1891) 63 L. J. Q. B. 602.—C.A. (post, col 1290)

Beckett v Tasker and *Pelton Bros v Harrison* (No. 1), *discussed*.
Softlaw v Welch (supra) *And see* Married Women's Property Act, 1893 (36 & 37 Vict. c. 63), s. 1

Pelton Bros v Harrison (No. 1), *distinguished*.
Bud v Baistow (1891) 61 L. J. Q. B. 1; [1892] 1 Q. B. 94, 40 W. R. 71.—C.A. ESHER, M.R., VIVY and LOPES, L.J.

Pelton Bros v Harrison (No. 1), *observations of KAY, L.J. commented on*.
Wheeler's Settlement, in re, Biggs v Ryan (1890) 68 L. J. Ch. 663, [1890] 2 Ch. 717, 81 L. T. 172, 48 W. R. 10

COZENS-HARDY, J. (after referring to a number of cases, continued). It seems to me to follow, from the authorities I have cited, that separate estate may be said to exist notwithstanding discovery. It is "suspended" in this sense—that the widow's power of disposition over it is the same as if it had been given to her simply and without words creating a separate use. It is not extinct, because it becomes operative upon a second marriage. If the coverture ends by her death it is still regarded as her separate estate, and is applied in satisfaction of her debts and liabilities. If the coverture ends by her husband's death the same principle ought to apply. Unless, therefore, I am constrained by authority, I should hold that the combined effect of the two sections [sect. 1, sub sect. 5 and sect. 19] of the Act of 1882 to which I have referred was to vest in the trustee the whole of the life interest of Mrs. Ryan, subject only and except so far as it was protected by the restraint upon anticipation, and that directly the restraint upon anticipation ceased by Mr. Ryan's death, the title became free from impediment. But it has been strongly argued that I am not at liberty to take this view, in consequence of the decision of the C.A. in *Pelton Bros v Harrison* (No. 1). In that case judgment had been obtained against a married woman in the form settled in *Scott v Morley* (post, col 1287). This judgment was obtained after her husband's death, but in respect of a contract entered into during coverture, and the question was whether a receiver had been properly appointed of the property of the married woman as to which during the coverture she had been restrained from anticipating. The C.A. held that the judgment creditor could not attach this property, and Kay, L.J., in delivering the judgment of the Court, said: "The question is whether under this judgment the property which the married woman was restrained from anticipating can be affected, The

shortest answer is that the judgment expressly directs that there shall be no execution against such property, and in my opinion it is as completely excepted from the consequences of the judgment as if it had been specifically mentioned in it, and stated to be excepted because the married woman was restrained from anticipating it." This, of course, was a sufficient ground for the decision. But the Lord Justice proceeds to discuss the Act of 1882, s. 1, sub-s. 2 and 4, and uses language upon which great reliance is placed. "But it is argued that when the husband died this property was still separate property, and that by the death of the husband the restraint on anticipation was gone, and it may therefore be treated as separate property acquired upon the death of the husband. The answer to this argument is, that there is no such thing as separate property of an unmarried woman. Separate property means property held separately from the husband." This case turned upon sect. 1, sub-sect. 2, which may be called the contract section, and not upon sub-sect. 5, which is the bankruptcy section. But I have felt great difficulty in consequence of these weighty observations of Kay, L.J. They were not, however, necessary to the decision of the case, and they seem to me not to be consistent with the views expressed by the C.A. itself in *Pike v. Fitzgibbon* (*supra*, col. 1262), and by other judges in many cases, to some of which I have referred.—p. 667.

Equity to a Settlement

Macaulay v. Philips (1798) 4 Ves 15—ARDEN, M.R., *approved*.

Murray v. Milbank (Lord) (1804) 10 Ves 84—ELDON, L.C. See S.C. (1808) 14 Ves. 496; 7 R. R. 346—GRANT, M.R.

Milbank (Lady) v. Montolieu (1800) 5 Ves 797, 5 R. R. 161.—L.C. *referred to*, *Murray v. Milbank* (Lord) (1806) 13 Ves 1.—GRANT, M.R.; *discussed*, *Sturgis v. Champneys* (1839) 9 L. J. Ch. 10; 5 Myl & Cr. 97.—COTTREHAM, L.C. (who discusses the earlier cases), *Biant*, in re (*post*, col. 1271).

Sturgis v. Champneys, *followed*, *Newenham v. Pemberton* (1847) 17 L. J. Ch. 99; 11 Jur 1071, S. C. *non*. *Wortham v. Pemberton*, 1 De G. & Sm 644.—KNIGHT BRUCE, V.-C., *referred to*, *Ward v. Ward* (*post*).

Sturgis v. Champneys, *limited*

Gleaves v. Paine (1863) 32 L. J. Ch. 182, 1 De G. J. & S. 87; 7 L. T. 511; 11 W. R. 278. WESTBURY, L.C.—[In the course of the argument his lordship observed that if *Sturgis v. Champneys* had not been established so long he would not have been inclined to follow it. That, however, was a case in which the assignee was plaintiff. If the rule that equity should follow the law and that the analogy between legal and equitable estates should be strictly preserved in this Court had been adverted to, it would probably have been found that *Sturgis v. Champneys* did not admit of the decision that was made in that case. The decision, however, had been made, the doctrine had been established, and it had been too long recognised to be now altered, and he saw no reason to extend it in a singular particular.—p. 183.]

Wortham v. Pemberton (*supra*), *commented on*

Potter, in re (1869) L. R. 7 Eq. 484, 20 L. T. 855, 17 W. R. 347.

MALINS, V.-C.—With regard to *Wortham v. Pemberton*, the circumstances were very peculiar, and the conduct of the husband had been so grossly improper that Knight Bruce, V.-C., probably was induced to go farther than he otherwise would have done and to make an order which was not strictly within the powers of the Court. At any rate, I should not feel inclined to follow that decision under any circumstances which were not precisely similar.—p. 187.

Gleaves v. Paine (*supra*), *applied*

Alexander v. Barnhill (1888) 21 L. R. 11 511.—CHATTERTON, V.-C.

Alexander v. Barnhill, *commented on*

Clarke, in re, *Schultze*, Ex parte (1898) 67 L. J. Q. B. 769. [1898] 2 Q. B. 330, 78 L. T. 735A, 46 W. R. 678; 5 Manson 201.—C.A. A. L. SMITH, RIGBY and V. WILLIAMS, L.JJ.

Taunton v. Morris (1878) 47 L. J. Ch. 721.

8 Ch. D. 453; 38 L. T. 552; 26 W. R. 11 671.—MALINS, V.-C. *affirmed*, (1879) 48 L. J. Ch. 408, 11 Ch. D. 779, 37 W. R. 1 718.—C.A., *distinguished*.

Bryan, in re (*post*)

Atcheson v. Atcheson (1849) 18 L. J. Ch. 230, 11 Beav. 485; 13 Jur. 645.—M.R.

Bryan, in re, *Godfrey v. Bryan* (1880) 49

L. J. Ch. 504; 14 Ch. D. 516, 28 W. R. 761.—MALINS, V.-C., and *Ward v. Ward* (1880) 49 L. J. Ch. 409, 14 Ch. D. 506;

42 L. T. 523, 28 W. R. 943.—JENSEN, M.R., *explained*.

Chamner v. Tyrell [1894] 1 Ir. R. 267.—CHATTERTON, V.-C.

Bell v. Montgomery (1793) 2 Ves 191; 4

Bro. C. C. 39, 2 R. R. 197.—L.C.; and **Carr v. Eastbrooke** (1798) 4 Ves 146.—L.C., *applied*.

Barrow v. Barrow (1854) 24 L. J. Ch. 267; 5

De G. M. & G. 782, 3 Eq. R. 149; 3 W. R. 122.

—KNIGHT BRUCE and TURNER, LJJ, *varying* 18 Beav. 529.—ROMILLY, M.R.

Brett v. Greenwell (1838) 3 Y. & C. 230—

ALDERSON, B., *disapproved*, *Napier v. Napier* (1841) 1 Dr. & Wat. 410.—SCUDGER, L.C., *followed*, *Cutler's Trust*, in re (*post*)

Foden v. Finney (1828) 4 Russ. 128; 6 L. J.

(O.S.) Ch. 153.—LEACH, M.R., *not followed*.

Cutler's Trust, in re (1851) 20 L. J. Ch. 501,

14 Beav. 220, 15 Jur. 911.

ROMILLY, M.R.—I have made inquiries in other

branches of the Court to ascertain whether they

consider themselves bound by *Foden v. Finney*,

and I find that they do not, and I shall therefore

direct that the fund shall not be paid to the

assignees of the husband, but that the whole

shall be settled.—p. 604

Woollands v. Crowther (1806) 12 Ves. 174.—

GRANT, M.R., *followed*

Hornsby v. Lee (1816) 2 Madd 16.—PLUMER,

V.-C., *Osborn v. Morgan* (*post*)

Pickard v. Roberts (1818) 3 Madd 834—

LEACH, V.-C., *followed*.

Osborn v. Morgan (1852) 21 L. J. Ch. 818; 9

Hare 432.—TURNER, V.-C.

Baker v. Hall (1806) 12 Ves. 197.—M.R.;

and Wall v Tomlinson (1810) 16 Ves. 413; 10 R. R. 212.—M.R., explained.

Osborn v Morgan (*supra*), followed.
Knight v Knight (1874) 13 L. J. Ch. 611, L. R. 18 Eq. 487, 22 W. R. 792.

HALL, V.-O.—They [*Baker v Hall and Wall v Tomlinson*] only amount to this, that the Court when dealing with funds actually in existence, considers whether the funds came to the hands of the executor, or are in his hands as executor, or in his marital right—p. 611.

Osborn v Morgan, referred to.
Holland, in re, Gregg v Holland (1901) 70 L. J. Ch. 625, [1901] 2 Ch. 145, 85 L. T. 304, 19 W. R. 176; 8 Manson 266.—FARWELL, J.

Knight v Knight, distinguished.
Carr v Taylor (1805) 10 Ves. 874.—M. R.; and Batchelor, in re, Sloper v Oliver (1875) 43 L. J. Ch. 101; L. R. 16 Eq. 481, 21 W. R. 801.—SELWYN, L.C. (for M.R.), followed.

Briant, in re, Poulter v Shaekeel (1888) 39 Ch. D. 471, 57 L. J. Ch. 553, 59 L. T. 215, 36 W. R. 825.

KAY, J.—In *Knight v Knight* the debt which it was sought to set off was a debt due from the husband as executor. He himself was the executor, and received assets of the testator who had given the legacy to his wife. He being indebted as executor, the wife sought to have her legacy nevertheless settled upon her, and it was held that no equity to a settlement arose. These other cases were not cited there, but I cannot for a moment imagine that they were not present to the mind of such an accomplished judge as Hall, V.-C., and, therefore, I presume he thought that some difference must have arisen from the fact that the debt in that case was not a debt due to the testator in his lifetime, but was a debt due from the husband as executor of the testator. At present I do not appreciate the difference myself, but I cannot treat it at all as an authority which would in any way overrule *Carr v Taylor* and *Batchelor, in re*, both of which cases were decided before it.—p. 481.

Briant, in re, Poulter v Shaekeel, followed.
Howard in re, Howard v Howard (1894) 13 R. 283.—KEKEWICH, J.

Batchelor, in re (*supra*), applied, Jakeman's Trusts, in re (1888) 52 L. J. Ch. 363, 28 Ch. D. 844.—CHITTY, J.; Watson, in re, Turner v Watson (1896) 65 L. J. Ch. 553, [1896] 1 Ch. 925, 74 L. T. 463, 44 W. R. 571.—NORTH, J.

Steinmetz v Kalthin (1820) 1 Glyn & J. 64.—LEACH, V.-C., not followed, De La Gaudie v Lemprete (1843) 12 L. J. Ch. 471; 6 Beny 844.—LANGDALE, M.R., overruled, Wallace v Auldjo (1868) 32 L. J. Ch. 748, 1 De G. J. & S. 643; 2 N. R. 367; 8 L. T. 750, 11 W. R. 797, 972.—KNIGHT BRUCE and TURNER, L.J.: affirming KINDERSLEY, V.-O., who discussed the earlier cases.

Haigh, in re (1857) 26 L. J. C. P. 209, 2 C. B. (N.S.) 198, 8 Jur. (N.S.) 371, 5 W. R. 531.—C.P. discussed and explained.
Goodchild v Dougal (1876) 3 Ch. D. 650, 24 W. R. 960.—JESSEL, M.R., discussed.
Fowke v Draycott (1885) 54 L. J. Ch. 977, 29 Ch. D. 996; 52 L. T. 890; 33 W. R. 701.—NORTH, J.

Carter v Taggart (1852) 21 L. J. Ch. 216, 1 De G. M. & G. 286; 16 Jur. 800.—KNIGHT BRUCE and GRANWORTH, L.J.: varying 5 De G. & Sm. 19.—PARKER, V.-O., followed, Bagshaw v Winter (1852) 5 De G. & Sm. 466, 16 Jur. 561.—PARKER, V.-O. And see post.

Guy v Pearkes (1811) 18 Ves. 196; 11 R. L. 186, referred to.
Suggitt's Trusts, in re (1868) 37 L. J. Ch. 426, L. R. 3 Ch. 215, 16 W. R. 551.—CAIRNS and SELWYN, L.JJ.

Spirett v Willows (No 2) (1866) 35 L. J. Ch. 756; L. R. 1 Ch. 620.—CHAMBERS-FORD, L.C., S. C. (1869) L. R. 1 Ch. 407, 12 Jur. (N.S.) 638, 11 L. T. 720, 14 W. R. 941.—WOOD and SELWYN, L.JJ., distinguished.
Barnard v Ford, Garlick v Ford (1869) 38 L. J. Ch. 471; L. R. 4 Ch. 247, 20 L. T. 289, 17 W. R. 478.—SELWYN and GIFFARD, L.JJ.

Barnard v Ford, referred to.
Lush's Trust, in re (1869) 38 L. J. Ch. 660; L. R. 4 Ch. 531, 21 L. T. 376, 17 W. R. 971.—SELWYN and GIFFARD, L.JJ.

Lush's Trust, in re, explained, Arnold v Woodhams (1878) 42 L. J. Ch. 578, L. R. 16 Eq. 29 (*supra*, col. 1256), Cahill v Cahill (1883) 8 App. Cas. 420.—H.L. (IR) (*supra*, col. 1295).

Spirett v Willows (No 2) (*supra*), applied *Suggitt's Trusts, in re* (*supra*), and *Carter v Taggart* (*supra*), commented on.
Croston v May (1870) 39 L. J. Ch. 155, L. R. 9 Eq. 404; 22 L. T. 59, 18 W. R. 373.—JAMES, V.-O.

Carter v Taggart, applied *Suggitt's Trusts, in re*, discussed *Spirett v Willows (No 2)*, followed.
Wash v Wason (1879) L. R. 8 Ch. 482; 42 L. J. Ch. 576, 28 L. T. 157; 21 W. R. 544.—C.A., SELWYN, L.C.—The ultimate foundation to the husband is in accordance with the form of settlement which Lord Chelmsford adopted in *Spirett v Willows*, and which James, V.-O. adopted in *Croston v May* (*supra*). . . . The fund here is not a reversionary interest, and the husband has a right to reduce it into possession, which is intercepted by the wife's equity to a settlement. The only question is, therefore, whether that equity is to go beyond making a provision for the wife and her children. In my opinion that point was virtually decided by Lord Cranworth in *Carter v Taggart*, though down to that time a practice had crept in of giving the wife a power of appointment. In *Suggitt's Trusts, in re*, Lord Cairns held it inconsistent to interfere with the right of the husband any more than was necessary, and that to give a power of appointment to the wife did go beyond what was necessary. It appears to me, upon the same principle, that the Court would go beyond the necessity of the equity to a settlement if it in fact placed the fund in the position of a reversionary interest. . . . The same form must be used as was used in *Spirett v Willows*.—p. 483. MELLISH, J. concurred.

Spirett v Willows, L. R. 4 Ch. 407 (*supra*), referred to.
Gowan, in re, Gowan v Gowan (1880) 50 L. J. Ch. 248; 17 Ch. D. 772.—JESSEL, M.R.

Suggitt's Trusts, In re, discussed

Read v. Reid (1846) 55 L. J. Ch. 755, 33 Ch. D. 220; 55 J., T. 153; 34 W. R. 715

STIRLING, J.—The question is whether in the discretion of the Court, having regard to all the circumstances, the whole fund ought not to be settled. It is true that, technically speaking, it does not fall within the precise terms used by Lord Cairns in *Suggitt's Trusts, In re*, but it seems to me that, reading his judgment fairly, he was dealing there only with specific instances of conduct on the part of the husband which would lead the Court to settle the whole fund and it seems to me that these cases might be truly summed up in the term "aggravated misconduct on the part of the husband"—p. 757

Suggitt's Trusts, In re, discussed.

(Callow v. Callow (1886) 55 L. T. 154)

STIRLING, J.—It is true that the property is not very large, but in *Suggitt's Trusts, In re*, it was held that a smaller sum ought to be apportioned. No doubt in this case the husband is an undischarged bankrupt, and that might be a ground for settling the whole amount upon the wife. Looking, however, at the fact that the husband is earning 18s a week, and that that sum is not likely to be disturbed by his creditors, and looking also at the fact that in *Suggitt's Trusts, In re*, the husband was only earning 11s a week, I think I shall be properly exercising that discretion which, according to all the authorities, I possess, by directing two-thirds to be settled on the wife—p. 155.

Chosen in Action

Mitford v. Mitford (1803) 9 Ves. 87—M.R., followed, *Hornaby v. Lee* (1816) 2 Madd. 16—**PLUMER, V.-C.**; referred to, *Stanton v. Hall* (1836) 2 L. & M. 175, 84 R. R. 49—BROUGHAM, L.O., not applied, *Union Bank of Manchester, Ex parte, Jackson, In re* (1871) 40 L. J. Bk. 57, L. R. 12 Bq. 354, 24 L. T. 851; 19 W. R. 872—BACON, C.J.

Hornaby v. Lee, followed

Purdee v. Jackson (1824) 1 Russ. 1, 4 L. J. (O.R.) Ch. 1, 25 R. R. 1—**PLUMER, M.R.** See judgment at length

Rowland v. Oakley (1850) 14 Jur. 845—

KNIGHT BRUCE, V.-C.

Timothy v. Crown (1900) 82 L. T. 142—**COZENS-HARDY, J.**

Povey v. Brown (1711) Pre. Ch. 926; Gibb. 80, disapproved.

Like v. Beresford (1797) 3 Ves. 506.

SHWELL, M.R.—*Povey v. Brown* does not satisfy me. It is a strange case, and directly contradicted by the two cases before Lord Hardwicke and Northington (*Mason v. Wenman* (1765) and *Jewson v. Moulson* (1742) 2 Atk. 417)—p. 611.

McNeillage v. Holloway (1818) 1 B. & Ald.

221—K.B., commented on.

Richards v. Richards (1881) 9 L. J. (O.S.) K. B. 319, 2 B. & Ad. 447—K.B.

McNeillage v. Holloway, dictum disapproved.

Gaters v. Madeley (1840) 6 M. & W. 423, 9 L. J. Ex. 173; 3 Jur. 724.

PARKER, B.—The only doubt in this case arose from the observation of Lord Ellenborough in *McNeillage v. Holloway*, that a promissory note may be treated as a personal chattel in possession. Now in that respect, I think there was a mistake, and an incorrect expression used; but

it was unnecessary for his lordship to lay down such a doctrine, in order to decide the case then before him. In fact, the decision in . . . *Richards v. Richards* has qualified that position. In that case the Court of K. B. said that a promissory note was, in the ordinary course of things, a chose in action, and that there was nothing to take it out of the common rule, that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession—p. 427. **ARINGTON, C.B.**, **ALDERSON** and **ROLFES, B.B.** concurred.

McNeillage v. Holloway, dictum disapproved

Hart v. Stevens (or Stephens) (1845) 14 L. J. Q. B. 148, 6 Q. B. 937, 9 Jur. 225.

PATTERSON, J. (for the Court).—The decision in *McNeillage v. Holloway* is wholly inapplicable to this case here. The observations of Lord Ellenborough, in giving judgment, are undoubtedly too strong, and have been corrected and modified by this Court in *Richards v. Richards* (supra), and by the Court of Ex. in *Gaters v. Madeley* (supra). But even if they were in strict accordance with the law, they would not avail the defendant in this case, for they suppose a reduction into possession by the husband during his wife's life, of which his merely receiving interest in the way stated in this case is not even any evidence—p. 160.

Gaters v. Madeley and Richards v. Richards, followed.

Fleet v. Pettins (1869) 38 L. J. Q. B. 257, L. R. 4 Q. B. 500, 20 L. T. 814, 17 W. R. 862—**EX CH. KELLY, C.B.** and **CLEASBY, B.** dissenting; affirming (1868) 9 B. & S. 575.—**BLACKBURN** and **LUSH, JJ.**

Hart v. Stevens, distinguished

Rogers v. Bolton (1860) 8 L. R. 11, 69 PALLIS, C.B.—There a *fraus solis* was the cause of a note, married, and died during the husband's lifetime. An action was brought on the note by her administrator, who in that case happened not to be her husband. The question was, whether the note was barred by the Statute of Limitations, and the only mode by which the operation of the statute could be avoided was, by proof of payment of interest within six years. The note had never been reduced into possession—that was an admitted fact. The payment of interest had been to the husband. . .

Two questions arose in that case, which were very much mixed up with each other—one, whether the husband was a competent witness, the other, whether the payment of interest would take the case out of the statute. **Patterson, J.**, in giving judgment, after showing that the note had not been reduced into possession by payment of interest during the coverture, continues—“It was further argued that the husband's evidence did not avail for the purpose for which it was given—the taking of the note out of the Statute of Limitations, but it is clear that it did. If he received the interest, not in his own right, but as agent for his wife—which he clearly did—then the interest, of course, was paid to her.” I do not know that the expression, “paid to the husband as agent for his wife,” is perfectly accurate, but there is no doubt that it was paid to him in right of his wife, and I think the decision is no more than that, as the payment was one in right of the wife, her administrator was entitled to rely upon it, to take the case out

of the Statute of Limitations.—p. 73 **FITZGERALD**, B concurred

Huntley v Griffith (1596) F Moore 452; Goldsborough 159, *followed*.

Barber, In re, Dardier v. Chapman (1879) 11 Ch D 442; 40 L T. 649; 27 W. R. 818

REY, J.—This case has found its way into Rolle's Abridgment, Bacon's Abridgment, and other text books, and, so far as I know, it has never been impugned. In it, as in the present case, the husband and wife had appointed an agent to receive the money of the wife, he received it and did not pay it over, and it was held that his receipt operated as a conversion of the money. Does the fact that in the present case the wife was an administratrix and was entitled only to a distributive share of the fund make any difference? It appears that the debts of the intestate had been already paid, and therefore the shares of the next-of-kin under the Statute of Distributions were immediately receivable. The shares were present interests. But, further than that, I think the decision of the H L in *Cooper v Cooper* (1874) 44 L J. Ch. 6, L. R. 7 H L 53. See "ELECTION," col 970 shows that the fact that the wife was only an administratrix can make no difference — p. 446.

Gutteridge v Stowell (1838) 1 Myl & K 486, 36 R R 355—BROUGHAM, L.C., and **Loy v Duckett** (1841) Ch. & Ph 303—COTTENHAM, L.C., *observed on*

Partington v Att-Gen. (1869) 38 L J. Ex. 205, L. R. 4 H L 100; 21 L T. 370—H L (M.), *affirming* S C *nom* Att-Gen v Partington (1864) 38 L J. Ex. 281; 3 H & O 193, 10 Jur (N S) 825, 10 L T. 751; 13 W R. 54.—**EX CH HATHERLEY, L.C.**—We were referred to one case, in which Lord Brougham thought it proper that payment should be made to the administrator of the deceased wife without having any regard whatever to the position of those who were entitled to represent the interest of the deceased husband. It was *Gutteridge v Stowell*, in which Sir J. Leach had refused to direct any payment to be made to the representative of the deceased wife, except in the presence of the representative of the deceased husband. Lord Cottenham, on having that case called to his attention, in *Loy v Duckett*, intimated his opinion that the view of Sir J. Leach was the preferable view, and that the payment ought not to have been so made—p. 210 **LORDS CHELMSFORD, WESTBURY, COLONSAF and CAIRNS** concurred.

Darcy v Chute (1663) 1 Ch. Cas. 21, 1 Eq. Cas. Abr. 63, pl. 1, Salk. 325, *questioned* **Cage (or Gage) v Acton** (1699) 1 Ld Raym. 515, 1 Salk. 325, S. C. *nom.* **Acton v Peirce** (1704) 2 Vern. 480; *Prec.* in Ch. 237, *discussed and followed*

Milbourn v. Ewart (1793) 5 Term Rep. 381.—**KENYON, C.J.**

Gage v Acton, dictum disapproved

Purdew v Jackson (1824) 1 Russ. 1, 4 L J. (O.S.) Ch. 1; 25 R. R. 1.—**FLUMER, M.R.**, *approved*.

Honner v Motton (1828) 3 Russ. 65, 27 R R 15 **ELDON, L.C.**—It is said that the husband may release the possibility of the wife, and reference is made to the *dictum* of Lord Holt in *Gage v Acton*, "that, when the wife has any right or duty, which by possibility may happen to accrue

during the marriage, the husband may by release discharge it." Whether that *dictum* be or be not accurately reported, I will not undertake to say; but in the judgment in which it occurs, Lord Holt differed from the rest of the Court, and the decision was contrary to his opinion. From the decision there was an appeal, which was afterwards abandoned. Lord Fenon (*Milbourn v Ewart (supra)*), when the case was cited before him, pronounced the opinion there delivered by Lord Holt to be "as repugnant to the rules of law as equity"—p. 87

See judgment at length

Purdew v Jackson and Heaner v. Merton, *followed*

Elwin v Williams (1848) 12 L J. Ch. 440, 7 Jur. 337; S. C. *nom* **Elison v Elwin**, 13 Sim. 309—**SHADWELL, V.-C.**

Gage v Acton, approved

Hore v Beecher (1842) 11 L J. Ch. 153, 12 Sim. 465, 6 Jur. 93—**SHADWELL, V.-C.**, *questioned*

Fitzgerald v Fitzgerald (1868) L R 2 P C. 83, 37 L J P C 44, 5 Moore F C (N S) 180 **WOOD, L.J.** (for self, **SIR W. ERLE, MELWYN, L.J., SIR J. COLVILLE** and **SIR J. WILLIAMS**)—The case of the plaintiff is at least as strong as that of the widow in *Gage v Acton*, upon which the Court below relied. That case was much converted in *Milbourn v. Ewart*, and was there alleged by counsel to have proceeded on a confusion of legal and equitable principles, and even to have gone beyond that relief which a Court of Equity would have accorded to the obligee. But Lord Kenyon and the other judges upheld *Gage v Acton* in the strongest terms, and Buller, J., referred to a case of *Foord v Foord* (*Hayes & Foord v Foord*, 79 Geo. 3, B. R. 5 Term Rep. 388, n.), where Lord Mansfield had, notwithstanding the marriage of the obligee with the obligor, held a bond to be subsisting at law after the coverture had determined.

Hore v. Beecher, relied upon by the appellants, can scarcely be reconciled with the doctrines of a Court of equity, as to the inalienable character of a wife's reversionary interest—p. 87

Hore v. Beecher, distinguished.

Nash v Nash (1817) 2 Madd. 138.—**V.-C.**, *discussed*.

Purdew v Jackson (supra), referred to.

Widgery v Topper (1877) 46 L J. Ch. 579; 5 Ch. D. 516—25 W. R. 726—**MALINS, V.-C.**; *affirmed*, 47 L J. Ch. 560, 7 Ch. D. 423; 38 L T. 434; 26 W. R. 546.—**C.A.**

Lachton v Adams (1836) 5 L J. Ch. 382—**L.C.**, and **Hall v. Hargolin** (1846) 16 L J. Ch. 14; 14 Sim. 595; 10 Jur. 940.

—**V.-C.**, *overruled*

Whittle v Henning (1848) 18 L J. Ch. 51; 2 Ph. 731, 12 Jur. 298, 1097.—**COTTENHAM, L.C.**, *affirming*, 17 L J. Ch. 151; 11 Beav. 22.—**LANGDALE, M.R.**

Whittle v Henning, referred to, Robinson v Wheelright (1856) 26 L J. Ch. 385; 6 De G. M. & G. 535; 2 Jur (N S) 554, 4 W. R. 427.—**ORANWORTH, L.C., KNIGHT BRUGG and TURNER, L.J.**; *discussed*, **Hanchett v. Biscoe** (1856) 22 Beav. 496.—**BOMILLY, M.R.**, **Southwell v. Scotter** (1880) 49 L J. Ex. 856; 44 J. F. 376.—**C.A.** **BAGGILLAY, BRAMWELL and THESIGHER, L.J.**; *referred to*, **Onslow, In re, Plowden v. Gayford** (1885) 57 L J. Ch. 940; 39 Ch. D. 622; 59 L. T.

308, 36 W. R. 883.—STIRLING, J.; Hale v. Sheldrake (1883) 60 L. T. 292, 5 Times L. R. 276.—KEKEWICH, J., *not applied*, Davenport, in re (*post*)

Hanchett v. Briscoe (*supra*), *followed*
Shute v. Hogg (1888) 58 L. T. 546.—KAY, J.

Hanchett v. Briscoe, *referred to*
Davenport, in re, Turner v. King (1891) 64 L. J. Ch. 252, [1895] 1 Ch. 361, 13 R. 167; 71 L. T. 875, 43 W. R. 217.—KEKEWICH, J.

Winter v. Easum, 10 Jur. (N.S.) 625, 10 L. T. 446.—ROMILEY, M.R., *reversed*, (1864) 33 L. J. Ch. 665, 10 Jur. (N.S.) 759; 10 L. T. 773, 12 W. R. 1018.—KNIGHT BRUCE and TURNER, L.JJ.

Brudnell v. Price (1678) Finch 365, and
Paget v. Paget (1682) 2 Ch. Cas. 101, *quintained*.

Richardson v. Chambers (1805) 10 Ves. 580, 8 R. R. 44.

GRANT, M.R.—I have found two cases in the time of Lord Nottingham, to which it is proper to advert, though from the reports, in which they are found, and the position they affirm, they are not entitled to any great attention. Those cases are *Brudnell v. Price* and *Paget v. Paget*. In each of them Lord Nottingham is represented to have directed part of the property, settled, or agreed to be settled, upon the wife and children, to be laid out in the purchase of an office for the husband upon the consent of the wife. The proposition that the interest of the children could be affected by her consent, could not be decided or contended. Of *Paget v. Paget* no mention is made in Lord Nottingham's MS. notes, in the possession of M. Hargrave, *Brudnell v. Price* is mentioned, but in a way quite different from that represented by the report. According to the MSs. she merely consented that part of her unsettled property should be paid to her husband.—p. 582.

See judgment at length where the authorities are discussed.

Mortgages and Charges

Tate v. Austin (1714) 1 P. Wms. 264; 2 Vern. 689.—L.C.; and **Clinton v. Hooper** (1791) 1 Ves. 173; 8 Bro. C. C. 201.

1 R. R. 102.—L.C., *disapproved*.

Hudson v. Carmichael (1854) 23 L. J. Ch. 899, Kay 618, 18 W. R. 861.

WOOD, V.-C.—The point had never been actually decided as between the other creditors and the wife's estate; but in *Tate v. Austin*, Lord Cowper said that the wife had the right of a surety, except as against onerous creditors of the husband, and that against them she had not such right. In *Clinton v. Hooper*, Lord Thurlow noticed that *dictum* and said, that he regarded the doctrine as then settled. The decision in *Tate v. Austin* was affirmed by the H. L., but this doctrine having been only stated there as a *dictum*, the appeal did not make the *dictum* stronger.—p. 864.

Hudson v. Carmichael, *applied*.

Feigson v. Gibson (1872) 41 L. J. Ch. 640; 1 L. R. 14 Eq. 379.—WICKENS, V.-C.

Broad v. Broad (1683) 2 Ch. Cas. 161.

Rowel v. Whalley, 1 Ch. R. 111; **Huntingdon (Earl) v. Huntingdon (Countess)** (1702) 2 Bro. P. C. 1, *reversing* 2 Vernon 437, **Lewis v. Nangle** (1752) Amb. 160;

2 P. Wms. 664, n, and **Corbett v. Barker** (1793—1796) 1 Anst. 138; 3 Anst. 755, 4 R. R. 856, *discussed*.

Jackson v. Innes (1819) 1 Bligh 104; 20 R. R. 46. See *post*, col. 1283.

Huntingdon (Earl) v. Huntingdon (Countess); **Lewis v. Nangle**, **Kinnoull (Earl) v. Money** (1767) 3 Swanst. 202, **Clinton v. Hooper** (*supra*) and **Hudson v. Carmichael** (*supra*), *discussed*.

Paget v. Paget (1898) 67 L. J. Ch. 266, [1898] 1 Ch. 170; 78 L. T. 806, 46 W. R. 472.—O.A.; *affirming on other grounds* (1897) 67 L. J. Ch. 1, [1898] 1 Ch. 47; 77 L. T. 490.—KEKEWICH, J.

LINDLEY, M.R. (for self, RIGBY and WILLIAMS, L.JJ.).—The authorities bearing on the subject, beginning with *Huntingdon (Earl) v. Huntingdon (Countess)*, and coming down to *Hudson v. Carmichael*, show that if a married woman charges her property with money for the purpose of paying her husband's debts, and the money raised by her is so applied, she is *primæ facie* regarded in equity, and as between herself and him, as lending him and not giving him the money in trust on her property, and as entitled to have her property exonerated by him for the charge she has created. This doctrine is purely equitable, and the authorities which establish it show that it is based on an inference to be drawn from the circumstances of each particular case; the *primæ facie* inference being in such a case as that supposed that both parties intended that the wife's assistance should be limited to the necessity of the case, and should not go beyond such necessity. But even where the wife charges her property with money to pay her husband's debts incurred without reference to her, there may be circumstances which prevent any inference from arising in her favour. Thus, if a settlement is made by the husband on his wife at the time she charges her estate, he is regarded as purchasing her assistance, and the inference that the parties intended that the wife's property should be exonerated by the husband does not arise.—*Lewis v. Nangle*, *Clinton v. Hooper* is the leading authority to show that the doctrine in question is based on an inference to be drawn in each case from all the facts of that particular case. It was long ago settled that although under the old law a husband became liable for the antenuptial debts of the wife, she had no right in equity to compel him to exonerate property of hers charged with those debts, even although he had expressly covenanted to pay them.—See *Lewis v. Nangle* and *Kinnoull (Earl) v. Money*.—p. 270.

5 HUSBAND'S LIABILITIES.

Blades v. Free (1820) 9 B. & C. 167; 4 M. & Ry. 282, 7 L. J. (O.S.) K. B. 211.—K.B., *discussed*.

Smout v. Ilbery (1842) 12 L. J. Ex. 367, 10 M. & W. 1.—EX. And see "PRINCIPAL AND AGENT."

Etherington v. Parrot (1704) 1 Salk. 118; 2 Ld. Raym. 1006, *discussed*.

Jolly v. Rees (1864) 33 L. J. Q.P. 177; 15 C. B. (N.S.) 628, 10 Jur. (N.S.) 319; 18 L. T. 299, 12 W. R. 383.—C.F., BYLES, J. *dissenting*.

Holt v. Brien (1821) 4 B. & Ald. 252, *observed on*.

Renaux (or Renaux) v. Teakle (1853) 22

L J Ex 241, 8 Ex. 680; 17 Jur 351, 1 W. R. 312—*ex. discussed*
 Debenham v. Mellon (1880) 6 App. Cas. 21, 50 L. J. Q. B. 158, 43 L. T. 678, 29 W. R. 141, 15 J. P. 252—H. (2). SELBURN, L.C., LORDS BLACKBURN and WATSON.
 [Counsel having urged that in *Holt v. Brien* the husband was treated as not liable because the tradesman had full notice of the facts.]
 LORD BLACKBURN.—The marginal note in that case is defective—p. 27 [Their lordships approved of *Jolly v. Hoes* (*supra*)].
And see "SALE OF GOODS," vol. II.

Thomond (Earl) v. Suffolk (Earl) (1718) 1 P. Wms. 461—L.C., and Heard v. Stamford (1755) 3 P. Wms. 409, Cas. t. Talb. 173

—L.C., referred to
 Parkin, in re, Hull v. Schwab (1892) 62 L. J. Ch. 35; [1892] 5 Ch. 510, 67 L. T. 77, 41 W. R. 120—STIRLING, J. *And see* Bell v. Stockell (1883) 52 L. J. Q. B. 40; 10 Q. B. D. 129, 47 L. T. 624, 31 W. R. 183, 47 J. P. 8—FIELD, J., and Beck v. Pierce (*supra*, col. 1260)

Govier v. Hancock (1796) 6 Term Rep. 603; 3 R. R. 271.—K.B., adapted, Wilson v. Goswop (1887) 56 L. J. Q. B. 434, 19 Q. B. D. 379, 34 W. L. R. 61 J. P. 805.—MATHEW and GAYE, JJ.; affirmed, (1888) 57 L. J. Q. B. 161, 20 Q. B. D. 854, 58 L. T. 707, 36 W. R. 296, 52 J. P. 246—CA., Simpson v. Wood (1886) 57 L. J. Q. B. 484, 50 L. T. 218, 36 W. R. 734, 52 J. P. 822—MANTIST and STEPHAN, JJ.

Freestone v. Butcher (1810) 9 C. & P. 618, *unplanned*.

Lane v. Ironmonger (1844) 14 L. J. Ex. 35; 13 M. & W. 368

PARKER, B.—There may be a trifling inaccuracy in the report, in *Freestone v. Butcher*, in stating the judge's direction to have been, that the extravagance of the bill would *alone* repel the inference of agency; but the law laid down by the learned judge is substantially correct—p. 36.

Norton v. Fasan (1798) 1 B. & P. 226, 4 R. R. 785, *considered*.

Cooper v. Lloyd (1859) 6 C. B. (NS) 519—WILLES and BYLES, JJ.

Johnson v. Sumner (1858) 27 L. J. Ex. 841, 3 H. & N. 261, 4 Jur. (NS) 462, 6 W. R. 374—*EX. discussed*.

Biffin v. Bignell (1862) 31 L. J. Ex. 189, 7 H. & N. 877, 3 Jur. (NS) 647, 6 L. T. 248; 10 W. R. 322—*EX.*, Debenham v. Mellon (*supra*)

May v. Skeay (1849) 18 L. J. Ch. 306, 16 Sim. 588, 13 Jur. 594—V.C., *discussed*, Hurst v. Tolson (1849) 18 L. J. Ch. 308, 16 Sim. 620—V.C.; affirmed, (1850) 19 L. J. Ch. 441; 2 Mac. & G. 134, 3 Hall & Tw. 359—OTTENHAM, L.C.; commented on, Jenner v. Morris (*post*); held *reversed*, Deane v. Sutton (1870) 18 W. R. 205, L. R. 9 Eq. 161; 21 L. T. 523.—ROMILLY, M.R.

Harris v. Lee (1718) 1 P. Wms. 482, Pre Ch. 502, *discussed and approved*

Jenner v. Morris (1821) 30 L. J. Ch. 361; 3 De G. F. & J. 45; 7 Jur. (NS) 875, 8 L. T. 871; 9 W. R. 391.

CAMPBELL, L.C.—One adverse case was cited, which I must notice, *May v. Skeay* (*supra*), the marginal note being, "A having gone abroad, and left his wife unprovided for, the plaintiff lent her money to purchase necessaries, and she applied

it accordingly—Held, that the plaintiff could not sue A. for the money in a Court of equity." But it appears that the V.C. who decided that case, not holding that there was not a debt due from A. to the plaintiff which might be recovered, proceeded upon the notion that this was a legal debt, the payment of which could not be directed by a Court of equity. His honour more fully explains that as his *ratio decidendi* in the subsequent case of *Holt v. Brien* (*supra*). But this is clearly erroneous: that no action at law could be maintained for such a demand was considered too clear for argument in the recent case of *Kumar v. Bushell* ((1867) 3 C. B. (NS) 334)—p. 363.

TURNER, L.J. to the same effect.

Horwood v. Haffer (1811) 3 Taunt. 421, *disapproved*.

Houlston v. Smyth (1825) 3 Bing. 127; 3 L. J. (OS) C. P. 208; 10 Moore 482; 2 Car. & P. 22, 28 R. R. 609.

BEST, C.J.—The doctrine in that case cannot be law—p. 130

PARK, J.—I am surprised at the language ascribed to the Court in *Horwood v. Haffer*, because it is abhorrent from every feeling of a man and a Christian. It is not to be endured that the mistress of a house should confine herself to a chamber with bare necessaries, when a prostitute is sitting at the same table with her husband. That cannot be the law of England, because it is not the law of morality and religion.—p. 131

BREBROUGH and GASLIER, JJ. declined to express any opinion on *Horwood v. Haffer*

Grindell v. Godmond (1836) 6 L. J. K. B. 31; 5 A. & E. 755, 1 N. & P. 108; 2 H. & W. 339.—K.B.; and Shepherd v. MacKoul (1813) 3 (Amph. 326, 14 R. R. 762, *discussed*.

Brown v. Ackroyd (1856) 25 L. J. Q. B. 193; 6 EL. & BL. 819, 2 Jur. (NS) 283; 4 W. R. 229.—Q.B.

Brown v. Ackroyd, *discussed*, Hooper, in re, Baylis v. Watkins (1864) 33 L. J. Ch. 300; 10 Jur. (NS) 114, 9 L. T. 741; 42 W. R. 321.—J.J., Wilson v. Ford (1868) 37 L. J. Ex. 60; L. R. 3 Ex. 63, 17 L. T. 606, 16 W. R. 482—*EX.*, Beale v. Arabin (1877) 36 L. T. 249—GROVE and DENMAN, JJ.; *approved*, Ottaway v. Hamilton (1878) 47 L. J. C. P. 725; 3 C. P. D. 393, 38 L. T. 925; 26 W. R. 788—CA.

Rawlins v. Vandyke (1800) 3 Esp. 250, *distinguished*

Bazeley (or Bazeley) v. Forder (1868) L. R. 3 Q. B. 559, 37 L. J. Q. B. 287, 9 B. & S. 599; 18 L. T. 756—Q.B., COCKBURN, C.J. *dissenting* TUST, J.—In *Rawlins v. Vandyke* Lord Eldon said it was a question for the jury whether a husband, living apart from his wife, and allowing the children to remain with her, did not constitute her his agent, and authorise her to contract debts for clothing and necessaries for them. But here it is against the defendant's will that the child remains with the wife.—p. 561

Moore, Ex parte (1845) 14 L. J. Bk. 19; De Gex 173; 9 Jur. 604.—KNIGHT BRUCE, C.J.; Wilson v. Ford (*supra*); and Bazeley v. Forder, commented on Meccredy v. Taylor (1873) 7 O. L. R. II. 256—*EX. CH.*, FITZGERALD and BARRY, JJ. and

FITZGERALD and DRASBY, JR.; WHITESIDE, C.J.,
PIGOT, C.B. and O'BRIEN, J. *dissenting*, reversing
6 Ir. R. C. L. 342, 20 W. R. 252—C.P. See
judgments at length.

Cooper v Witham (1698) 1 Lev. 247; 1 Sid
375; 3 Keb. 399, *followed*

Fairhurst v Liverpool Adelphi Loan Association
(or Liverpool Adelphi Loan Association v
Fairhurst) (1854) 23 L. J. Ex. 163, 9 Ex. 422, 2
C. L. R. 512, 13 Jun. 191 p. 2 W. R. 288—EX.

Fairhurst v Liverpool Adelphi Loan
Association, *applied*

Wright v Leonard (1861) 30 L. J. Ex. 865, 11
C. B. (N.S.) 258, 8 Jur. (N.S.) 415, 5 L. T. 110,
9 W. R. 914.—EARLE, C.J. and BYLES, J., WILLIAMS
and WILLIS, JJ. *dissenting*; EARLE, J. Kingscote
(*post*).

Wright v Leonard, *referred to*, Dartlett v
Wells (1802) 31 L. J. Q. B. 573; 1 B. & S. 836,
8 Jur. (N.S.) 742; 5 L. T. 607, 10 W. R. 229—
Q.B. *followed*, EARLE, J. Kingscote (*post*)

Seroka v Kattenburg (1886) 55 L. J. Q. B.
375, 17 Q. B. D. 177, 54 L. T. 819; 31
W. R. 513.—MATHEW and A. L. SMITH, JJ.,
approved.

EARLE v Kingscote (1900) 69 L. J. Ch. 725,
[1900] 2 Ch. 585; 83 L. T. 877, 49 W. R. 3.—
C.A. ALVERSTON, M.R., HIRBY and COLLINS,
L.JJ. See judgments.

G. CURTESY

Roberts v Dixwell (1738) 1 Atk. 607,
followed.

Hearle v Greenbank (1749) 3 Atk. 715; 1
Ves. sen. 298, and Bennett v Davis
(1725) 2 P. Wms. 816, *discussed*.

Morgan v Morgan (1820) 5 Madd. 498—
LEACH, V.-C.

Morgan v Morgan, *followed*, Follett v. Tyrer
(1844) 13 M. & W. J. Ch. 411; 14 Sim. 125, 8 Jun.
528.—MADGWELL, V.-C., Cooper v Macdonald
(*post*)

Hearle v Greenbank, *discussed*

Moore v Webster (1866) 36 L. J. Ch. 421.
L. R. 3 Ex. 267, 15 L. T. 460; 15 W. R. 167—
STUART, V.-C.

Moore v Webster, *not followed*.

Appleton v Rowley (1869) 38 L. J. Ch. 689,
L. R. 8 Ex. 139; 2 L. T. 600—MALINS, V.-C.

Roberts v Dixwell, Follett v. Tyrer, and
Appleton v Bowley, *followed*

Hearle v Greenbank and Moore v Webster,
commented on and not followed

Cooper v Macdonald (1877) 47 L. J. Ch. 873,
7 Ch. D. 288; 38 L. T. 191, 28 W. R. 377.—
JESSEL, M.R.; *affirmed*, C.A. JAMES, BAGGALLAY
and THESIGER, L.JJ.

Gibbins v Byden (1860) 38 L. J. Ch. 377;
L. R. 7 Eq. 371; 20 L. T. 616, 17 W. R.
481.—MALINS, V.-C., and Cooper v Mac-

donald, *referred to*
Eager v. Fumivall (1881) 50 L. J. Ch. 587;
17 Ch. D. 115; 44 L. T. 164; 29 W. R. 649—
JESSEL, M.R.

Cooper v Macdonald, *applied*, Jakeman's
Trusts, in re (1883) 52 L. J. Ch. 363, 23 Ch. D.

344—CHITTY, J.; *referred to*, Lambert's Estate,
in re, Stanton v Lambert (1888) 57 L. J. Ch.
927; 39 Ch. D. 626, 59 L. T. 429—STIRLING, J.,
applied, Hope v Hope (1891) 61 L. J. Ch. 111,
[1892] 2 Ch. 336, 60 L. T. 522, 40 W. R. 322—
STIRLING, J.

7. DOWER AND FREEBENCH.

Accey v Simpson (1842) 5 Dent. 85—LANG-
DALE, M.R., *followed*
Roper v Roper (1876) 3 Ch. D. 714, 35 L. T.
156; 24 W. R. 1913.—MALINS, V.-C.

Roper v Roper, *dictum dissented from*,
Greenwood, in re, Greenwood v Greenwood
(1892) 61 L. J. Ch. 558, [1892] 2 Ch. 293, 67
L. T. 76, 40 W. R. 681.

CHITTY, J.—The meaning of sect. 12 of the
[Dower] Act was considered by Malins, V.-C., in
Roper v Roper. He held that the widow had
no priority over other legacies in respect of an
annuity bequeathed to her by her husband in
satisfaction of dower where the only real estate
of the testator had been conveyed to him with a
declaration against dower (see sect. 6). The deci-
sion appears to me to be right; but in the report
of his judgment there is attributed to the V.-C. a
dictum that if the dower had been barred by the
will she would have been entitled to priority.
With this *dictum* I find myself unable to agree.
The statute makes no difference between the
effect of a bar by deed and a bar by will—p. 569

Rowland v Cuthbertson (1860) L. R. 8 Eq.
466; 20 L. T. 938, 17 W. R. 907—
ROMILLY, M.R., *dicta dissented from*.

Lacey v Hill, Leney v Hill (1875) 44 L. J. Ch.
216; L. R. 19 Eq. 346; 32 L. T. 48; 23 W. R. 285

JESSEL, M.R.—I certainly must respectfully
dissent from some of the observations in Rowland
v. Cuthbertson. . . All that his lordship said
was this, "that dealing with the 4th section
[Dower Act] I am not sure that that is conclusive
on this case, because, in order to dispose of the
land the testator must point it out specifically or
designate it in some way." But surely that is
a mistake, with the greatest possible deference,
a testator disposes of his lands by the gift of "all
my real estate." His lordship says you cannot
dispose of land except by designating it, but
will anybody doubt that a gift of "all my real
estate" disposes of his lands? I confess I am
utterly unable to accede to that view. I think it
desirable to express my opinion plainly because
this case may be cited hereafter, and may lead to
similar difficulties to those which have occurred
here. I think the 9th section applies to this case.
It is this, "Where a husband shall devise any
land." The odd part of the matter is this, that
[Rowland v. Cuthbertson] his lordship held
that the 9th section applied, although the words
are "any land," the same words as in the 4th
section, and the gift there was of "all his real
estate," but if he was right as to any doubt about
the 4th section, it appears to me that his doubt
would have extended to the 9th section. The
words are the same. If it required a specific
description, I do not understand how he came to
the conclusion that the 9th section applied. It
appears to me that if his attention had been
drawn to that he would have seen, his own
decision shows it, that "any land," being the
words in the 4th section, there was no reason to

a gift of certain articles not expressed to be for her separate use.—*p. 492 MORRIS, C.J. concurred.*

Graham v. Londonderry (Lord); Northey v. Northey (1740) 2 Atk 77, 9 Mod. 270—*r. c.*; and **Jervoise v. Jervoise** (1858) 23 L. J. Ch 703, 17 Beav 566, 2 W. R. 9—*M.R., discussed.*

Tasker v. Tasker and Lowe (1895) 64 L. J. P. 36, [1895] P. 1, 11 R. 619, 71 L. T. 779, 43 W. R. 255—*SECOND, P.*—In that case [Vanvittart, *in re*, *Brace, Ex parte* (1892) 62 L. J. Q. B. 277; [1893] 1 Q. B. 181, *see* "BANKRUPTCY" col 137]. It was held that such a gift [of jewels] was a settlement within sect. 17 of the Bankruptcy Act, 1883, on the ground that the donor contemplated the retention by his wife of the presents that he gave her. But the inference which I draw from that case is the reverse of that suggested to me. It may well be that a voluntary settlement, voidable by creditors, was created, because the jewels were given, not as some small sums might be given, for immediate expenditure, but to constitute a permanent possession of the wife. But the jewels became the property of the wife, and no doubt she could have given a good title had she sold them. And therefore the inference drawn by the learned judge from the facts, which, as to the occasions of the gifts, were very like those in the present case, was not that the wife took the jewels as paraphernalia, but rather as settled to her separate use. Indeed, it does not seem to have occurred to anyone to think of paraphernalia in connection with the case, though such a view would have been conclusive in favour of the creditors.—*p. 40*

Ridout v. Lewis (1738) 1 Atk. 269.—*L.C., distinguished*

Thrupp v. Harman (1834) 3 Myl & K. 513—*M.R.*

Thrupp v. Harman, applied

Alexander v. Marshall (*supra*, col. 1270)

9. GRANTS AND GIFTS.

Warrington v. Warrington (1812) 2 Hare 54; 6 Jur. 87a.—*v. c.*; and **Paine v. Wagner**

(1841) 12 Sm 184.—*v. c., commented on*
Bricker v. Whatley (1684) 1 Vern 233, *applied.*

Wylde's Estate, In re (1852) 22 L. J. Ch. 87, 2 De G. M. & G. 724; 16 Jur 1029, 1 W. R. 9—*KNIGHT BRUCE and GRANWORTH, L.JJ.*

Warrington v. Warrington, Paine v. Wagner, and Wylde's Estate, In re, referred to.

Dias v. De Livera (1879) 49 L. J. P. C. 26, 5 App. Cas 123; 42 L. T. 267.—*P.C. SIR J. COLVILLE, SIR B. PHAEOCK, SIR M. SMITH and SIR R. COLLIER*

Bricker v. Whatley and Wylde's Estate, In re, followed.

Butler v. Butler (1885) 14 Q. B. D. 831—*WILLS, J.; affirmed, O.A. (col. 1287), approved.*

March, In re, Mander v. Harris (1883) 52 L. J. Ch 690; 24 Ch. D. 222, 31 W. R. 885—*CHITTY, J., reversed on another ground*, (1884) 54 L. J. Ch 143; 27 Ch. D. 166; 51 L. T. 380; 32 W. R. 941.—*O.A. LINDLEY, COTTON and BAGGALLAY, L.JJ., reasoning of CHITTY, J. disapproved.*

Jupp, In re, Jupp v. Buckwell (1888) 57 L. J.

Ch 774; 39 Ch. D. 148; 59 L. T. 129; 36 W. R. 712—*KAT, J. See judgment at length*

March, In re [C.A.], *discussed*
Turnbull v. Forman (*post*, col. 1289)

Warrington v. Warrington (*supra*), *followed*
Bricker v. Whatley and Wylde's Estate, In re, discussed.

Jupp, In re, commented on
Dixon, In re, Byrne v. Tull (1889) 42 Ch. D. 306, 61 L. T. 718, 38 W. R. 91

NORTH, J.—In that case [Jupp, *In re*] Kay, J. proceeds to deal with cases in which the words are different from those in **Warrington v. Warrington**, professing to follow those cases. I find in those cases the proposition recognised that a slight difference of language is sufficient to prevent the application of the rule of law on which they are founded. Kay, J. decided that case at variance with what I am deciding. But I do not find that **Warrington v. Warrington** was referred to by him in his judgment, and he cites two cases as supporting the view he took which I find not only do not support that view, but do not support **Warrington v. Warrington**, which I must follow.—*p. 311*

Mews v. Mews (1852) 15 Beav 529—*M.R.*; and **Walter v. Hodge** (1818) 2 Swans. 92, 1 Wils 445—*M.R., distinguished*
Grant v. Grant (1865) 31 L. J. Ch 641, 34 Beav. 623, 11 Jur. (N.S.) 787; 13 L. T. 721; 13 W. R. 1057.—*ROMILLY, M.R.*

Mews v. Mews, referred to.

Parker v. Lechmere (1879) 12 Ch. D. 256; 28 W. R. 48—*FRY, J.*

Slanning v. Style (1734) 3 P. Wms. 334

—*L.C., discussed and principle applied.*

Walter v. Hodge, referred to

Ashworth v. Outham (1877) 46 L. J. Ch 687, 5 Ch. D. 923, 37 L. T. 85, 25 W. R. 896—*MALINS, V.-C., affirmed, C.A.*

Slanning v. Style, commented on.

Parry, In re, Scott v. Leak (1889) 42 Ch. D. 570, 61 L. T. 380; 38 W. R. 226—*NORTH, J.*

Grant v. Grant (*supra*), *discussed from*
Blowne v. Collins (1879) 21 W. R. 232.

WICKENS, V.-C.—I should not go so far as to say with the M.R. in the recent case of **Grant v. Grant** that the evidence of that defendant in his own behalf was no evidence at all upon which the Court would act, for as at present advised I consider it admissible evidence.—*ib.*

Grant v. Grant, approved, Baddeley v. Baddeley (1878) 9 Ch. D. 113, 38 L. T. 906—*MALINS, V.-C., commented on, Breton's Estate, In re, Breton v. Woollven (1881) 50 L. J. Ch 869, 17 Ch. D. 416, 44 L. T. 337; 29 W. R. 777—*HALL, V.-C.**

10. ACTIONS BY AND AGAINST.

Nurse v. Wills (1833) 4 B. & Ad 739; 1 N. & M. 765—*K.B., affirmed, nom. Wills v. Nurse (1834) 1 A. & E. 63—*EX. CH.**

Wills v. Nurse, considered

Bigwood v. Way (1778) 2 W. Bl 1236—*EX. CH.*; and **Serres v. Dodd** (1807) 2 B. & P. (N.R.) 105—*C.P., applied*
Johnson v. Lucas (1858) 22 L. J. Q. B. 174; 1 Bl. & Bl 659, 17 Jur 1065—*Q.B.*

Wills v. Nurse and Biddood v. Way (*supra*)
dismissed.

Fleet v. Perrins (1869) 38 L. J. Q. B. 237,
L. R. 4 Q. B. 500.—EX. CH. (*supra*, col. 1274).

Fleet v. Perrins, *dismissed*.

Lloyd v. Pughes (1872) 42 L. J. Ch. 282; L. R. 8 Ch. 88; 28 L. T. 250, 21 W. R. 346.—L. G. AND L.J., Jones v. Cuthbertson (1873) 42 L. J. Q. B. 221, L. R. 8 Q. B. 504, 28 L. T. 673, 21 W. R. 919.—EX. CH.

Davis v. Prout (1841) 7 Beav. 288.—M. R., and **Wake v. Parker** (1865) 7 L. J. Ch. 93, 2 Keen 50.—M. R., *principle applied*.

Harroft v. Oadwallader (1841) 2 Russ. & M. 545.—LEACH, M. R., *explained*.

Earl v. Ferris (1851) 24 L. J. Ch. 20; 19 Beav. 67; 1 Jur. (N.S.) 5; 8 Eq. R. 57, 3 W. R. 36.—ROMILLY, M. R.

Earl v. Ferris, *applied*.

Butler v. Butler (1885) 55 L. J. Q. B. 55, 16 Q. B. D. 374, 51 L. T. 591; 34 W. R. 182.—C. A. **SHER, M. R., COTTON and BOWEN, L.J.**

Draycott v. Harrison (1886) 17 Q. B. D. 147, 81 W. R. 516.—MATHEW AND A. L. SMITH, JJ., *approved*.

Scott v. Morley (1887) 20 Q. B. D. 120, 57 L. J. Q. B. 43, 57 L. T. 919; 36 W. R. 67, 4 Morrell 286; 52 J. P. 230.—C. A.

SHER, M. R.—It appears to me that sect. 5 of the Debtors Act, 1869, does not apply to the judgment which can be recovered against a married woman by virtue of the Married Women's Property Act, 1882. On these grounds I agree with the decision in *Draycott v. Harrison*, though not with all the reasons given by the learned judges.—p. 126.

BOWEN and FRY, L.J., to the same effect.

Draycott v. Harrison, *adopted*.

Morgan v. Eyre (1887) 20 L. R. Ir. 541.—**HARRISON and HOLMES, JJ.**

Morgan v. Eyre and Draycott v. Harrison, *applied*.
Bank of Scotland v. Cunningham [1899] 2 D. R. 78.—Q. B.

Scott v. Morley (*supra*), *applied*, **Gardiner, J.** in *re Coulson*, Ex parte (1887) 57 L. J. Q. B. 119, 20 Q. B. D. 249, 58 L. T. 119; 36 W. R. 142; 5 Morrell 1.—**CAVE and A. L. SMITH, JJ.**, *not applied*, **Morgan v. Eyre** (*supra*).

Scott v. Morley, *distinguished*, **Hyde v. Hyde** (1888) 57 L. J. P. 89; 13 F. D. 166; 59 L. T. 529, 36 W. R. 708.—C. A. **COTTON, BOWEN and FRY, L.J.** (*see supra*, col. 1218), *applied*, **Downe v. Fletcher** (1888) 21 Q. B. D. 11, 59 L. T. 180, 36 W. R. 694, 52 J. P. 375.—**COLERIDGE, C. J. and MATHEW, J.**, *Foster v. Wheeler* (1888) 57 L. J. Ch. 871; 38 Ch. D. 180, 59 L. T. 15, 37 W. R. 40.—C. A. **COTTON, LINDLEY and BOWEN, L.J.**, *Galmoye v. Cowan* (1889) 58 L. J. Ch. 769.—**CHITTY, J.**; *disapproved*, **Holtby v. Hodgson** (1889) 24 Q. B. D. 103; 38 W. R. 68.—C. A. (*supra*, col. 1266). **Hemmings v. Benthall** (1889) 61 L. T. 224.—**MATHEW and GRANTHAM, J.**, **Jay v. Robinson** (1890) 59 L. J. Q. B. 367; 25 Q. B. D. 467.—C. A. (*supra*, col. 1266). **Pelton Bros v. Harrison** (No. 1) (1891) 60 L. J. Q. B. 742; [1891] 2 Q. B. 422; 65 L. T. 514, 39 W. R. 689.—C. A. **LOPES and KAY, L.J.**, *explained*, **Hill v. Alesbury** (Lady) (1894) 10 Times L. R. 487.—**STIRLING, J.**; **Hood-Barrs v. Cathcart** (1894) 63 L. J. Q. B. 602, [1894] 2

Q. B. 559.—C. A. (*post*, col. 1296); *not applied*, **Allen** (Elizabeth) in *re* (1894) 63 L. J. M. C. 207; [1894] 2 Q. B. 924; 10 R. 514; 43 W. R. 141, 59 J. P. 229.—**MATHEW and KENNEDY, JJ.**; *disapproved and followed*, **Molony v. Hartley** (1894) [1895] 2 Ir. R. 169.—Q. B.

Scott v. Morley, *referred to*, **Hewett, J.** in *re* **Levine**, Ex parte (1891) 61 L. J. Q. B. 185; [1891] 1 Q. B. 328 (*supra*, col. 1266). *disapproved*, **Francis Handford & Co.** in *re* **Frances Handford & Co.**, Ex parte (1899) 68 L. J. Q. B. 386, [1899] 1 Q. B. 566.—C. A. (*supra*, col. 1247), *applied*, **Softlow v. Welch** (1899) 68 L. J. Q. B. 910, [1899] 2 Q. B. 419.—C. A. (*supra*, col. 1267), *referred to*, **Wheeler's Settlement**, in *re* **Briggs v. Ryan** (1899) 68 L. J. Ch. 663; [1899] 2 Ch. 717 (*supra*, col. 1268), **Barnett v. Howard** (1900) 69 L. J. Q. B. 956, [1900] 2 Q. B. 784; 83 L. T. 301.—C. A. **A. L. SMITH, L.J.**, **WILLIAMS, L.J.**, **Donning, Elliott**, in [1900] 2 Ir. R. 394.—**BOYD, J.**

Scott v. Morley, *explained and distinguished*, **Bell v. Hyde** (1711) Free Ch. 828, and

Outway v. Wing (1841) 10 L. J. Ch. 208; 19 Sim. 70.—**SHARVELL, V. C.**, *followed*.

Tunbull, J. in *re* **Tunbull v. Nicholas** (1899) 69 L. J. Ch. 187; [1900] 1 Ch. 180; 81 L. T. 439, 43 W. R. 186.

STIRLING, J.—What was decided in *Scott v. Morley* was, that there was no power under sect. 5 of the Debtors Act, 1869, to commit to prison a married woman for her default in paying a sum for which judgment had been recovered against her in a Court of law, and which, under sect. 1, sub-sect. 2 of the Married Women's Property Act, 1882, was payable out of her separate estate, and not otherwise. The proper form of judgment in such a case was settled by the C. A. in *Scott v. Morley*. That decision, which relates to the application of sect. 5 of the Debtors Act, 1869, does not govern the present case; but it is necessary to consider the reasons on which it was based, and to ascertain how they apply. Put shortly, the ratio decidendi appears to be this: sect. 1, sub-sect. 2 of the Married Women's Property Act, 1882, conferred on a married woman the capacity of entering into, and rendering herself liable on, any contract as a *separate sole*, but her liability was strictly limited to her separate estate. And in the event of her dying, or being sued, in which respect she was also put in the position of a *separate sole*, then, whether the action was in contract or in tort, the damages and costs recovered against her in any action or proceeding were to be payable out of her separate estate, and not otherwise. This enactment, in the words of **Bowen, L.J.**, created only a proprietary and not a personal liability. On the other hand, sect. 5 of the Debtors Act, 1869, only authorises a commitment where there is a debt due from the defendant; and a debt payable out of the separate estate of a married woman is not a debt due from her. The order in the present case is not an order for payment of a sum of money to a particular person, but for payment of a sum into Court. The distinction between the two was pointed out and explained in *Greer, J.* in *re* **Greer v. Parnham** (1895) 64 L. J. Ch. 620; [1895] 2 Ch. 217, 13 R. 508, 72 L. T. 865, 43 W. R. 547, 2 Watson 350; 59 J. P. 441.—**CHITTY, J.** . . . Previously to the passing of the Married Women's Property Act, 1882, the husband was liable, and orders would be naturally

sought for and made against him and not against the wife. *DeV. v. Hyde* and *Ottway v. Wing* appear to show that attachment might, in a proper case, issue against a married woman.—p. 188

Weldon v. Winslow (1884) 53 L. J. Q. B. 528, 13 Q. B. D. 781, 51 L. T. 613, 33 W. R. 219.—C.A. BRETT, M.R., BOWEN and FRY, L.J., *explained*

Symonds v. Hallett (1883) 53 L. J. Ch. 60; 21 Ch. D. 316; 49 L. T. 380, 32 W. R. 103.—C.A. BRETT, M.R., COTTON and BOWEN, L.J., *adhered to*
Weldon v. De Bathe (1881) 51 L. J. Q. B. 118, 11 Q. B. D. 339, 53 L. T. 520, 33 W. R. 324.—C.A. BRETT, M.R., COTTON and LINDLEY, L.J.

Bursill v. Tanner (1884) 13 Q. B. D. 691, 50 L. T. 589, 32 W. R. 827.—FIELD and MANISTY, JJ., *followed*

Holland v. Smithies (1884) 1 Times L. R. 141, —MATHEW and DAY, JJ.

Bursill v. Tanner, *questioned*

Conolan v. Leyland (1884) 54 L. J. Ch. 123, 27 Ch. D. 632, 51 L. T. 895.—CHITTY, J., *approved and followed*

Weldon v. Winslow, *explained*

Tunhill v. Pommor (1885) 15 Q. B. D. 234, 54 L. J. Q. B. 489, 53 L. T. 128; 33 W. R. 768, 49 J. P. 708.—C.A.

BRETT, M.R. stated the old and well-known rule with regard to the construction of enactments affecting rights, viz., that, unless the language used is clear to the contrary, it must be construed prospectively only, and not retrospectively so as to affect rights acquired before the Act passed. Sub-section 4 of sect. 1 of the Married Women's Property Act, 1882, clearly affected rights, and gave to the party with whom a contract was made by a married woman a greater right than he would have had before the Act. [His lordship continued.] The rule, therefore, applies that, unless the words are clear, the enactment is not to be construed retrospectively. It was agreed that the decision of this Court in *Weldon v. Winslow* is contrary to the view we are now taking, it being there held that the 2nd sub-section of the 1st section was to be construed retrospectively. But the ground of the decision in that case was that no right was affected or altered by the construction there applied to the 2nd sub-section. It was there pointed out that, the action being in tort for personal injuries, and the wife being the meritorious cause of action, the plaintiff could have sued before the Act passed precisely as she did after the Act, subject only to the liability to a plea in abatement, upon which she would have been forced to join the husband for conformity only. It was held, therefore, that there was no question of alteration of a right, but only one of procedure, the effect of sub-section 2 being only to prevent the defendant from objecting that the husband was not joined for conformity. When an Act deals with procedure it affects all subsequent procedure, but it cannot rightly be said therefore to be retrospective, because it is only the subsequent procedure that it affects; it cannot be said to affect any right which existed before the Act. The case of *Weldon v. Winslow* is, therefore, altogether distinguishable from the present, and is no authority with regard to the construction of a section that affects rights. For these reasons, it appears to me that the judgment

of Chitty, J., in *Conolan v. Leyland* was correct, and that, if the judgment in *Bursill v. Tanner* was to the contrary, it cannot be supported. The order must be therefore modified so as to be in conformity with the law as it existed previously to the passing of the Married Women's Property Act, 1882.—p. 236

BAGGALLAY, L.J.—I agree. The substantial question we have to decide is whether the 4th sub-section of the 1st section of the Married Women's Property Act, 1882, is retrospective. There appear to have been conflicting decisions on this question in *Conolan v. Leyland* and *Bursill v. Tanner*. In *Bursill v. Tanner*, the Div. Court seems to have proceeded on the assumption that the sub-section was retrospective. But in *Conolan v. Leyland*, Chitty, J., took a different view, and held that the 4th sub-section was not retrospective. For the reasons given by the M.R., I agree that that construction was correct. It is not necessary for the purposes of the present case to go into the matter, but I desire to reserve for a future occasion the consideration of the question how far the judgment in *Bursill v. Tanner* is correct with regard to the form of order in cases to which the sub-section applies, as to which I entertain considerable doubt. A modified form of order seems to have since come into use, which was used in the present case, and with regard to the question whether that is entirely free from objection I also reserve my opinion.—p. 237

BOWEN, L.J. to the same effect

Weldon v. Winslow, *referred to and approved*
Earle v. Kingscote (1900) 69 L. J. Ch. 725; [1900] 2 Ch. 585; 83 L. T. 377; 49 W. R. 3.—C.A. ALVERSTONE, M.R., RIGBY and COLLINS, L.JJ.

Dillon v. Cunningham (1872) 42 L. J. Ex. 11, L. R. 8 Ex. 23, 27 L. T. 330.—EX., *distinguished*.

Menger v. Pellew (1885) 14 Q. B. D. 973; 53 L. T. 67; 33 W. R. 573.—C.A.

BRETT, M.R.—The question of anticipation does not seem to have been dealt with there.—p. 975
BOWEN, L.J.—It is only a decision that, on an application by a judgment creditor under sect. 5 of the Debtors Act for an order for payment by instalments by the defendant, proof of the defendant's means need not be given. And in that case the defendant had not pleaded coverture. I take it that the judgment was in the ordinary form of judgment against a defendant who was not a married woman.—p. 975. **BAGGALLAY** concurred

And see post, col. 1291.

Dillon v. Cunningham, *referred to*, *Morgan v. Eyle* (1887) 20 L. R. 11 541.—HARRISON and HOLMES, JJ.; *Mitchell v. Simpson* (1889) 58 L. J. Q. B. 425, 23 Q. B. D. 873, 61 L. T. 218, 37 W. R. 798, 53 J. P. 518, 694.—DINMAN and CHARLES, JJ., *affirmed*, 59 L. J. Q. B. 355; 35 Q. B. D. 183, 63 L. T. 495, 38 W. R. 565, 65 J. P. 36.—C.A. *applied*, *Buckley v. Crawford* (1892) 62 L. J. Q. B. 87, [1893] 1 Q. B. 105, 5 R. 125; 67 L. T. 681; 41 W. R. 239; 57 J. P. 89.—COLBRIDGE, C.J. and WILKS, J.

Whittaker v. Kershaw (1890) 60 L. J. Ch. 9; 45 Ch. D. 320; 63 L. T. 203; 39 W. R. 23.—COTTON, FRY and BOWEN, L.JJ., *commented on*

Hood-Barrs v. Cathcart (1894) 63 L. J. Q. B.

602, [1894] 2 Q. B. 559, 9 R. 802; 70 L. T. 865, 42 W. R. 628.—C.A. *ESHER*, M.R., KAY and A. L. SMITH, L.JJ.

Hood-Barrs v Cathcart, *followed*, Lumley, In re, **Hood-Barrs v Cathcart** (1894) 63 L. J. Ch. 897, [1891] 3 Ch. 135, 7 R. 400, 71 L. T. 7, 42 W. R. 632.—C.A. LINDLEY and DAVY, L.JJ. Pillers v Edwards (1894) 11 R. 290, 71 L. T. 788.—C.A. LINDLEY and A. L. SMITH, L.JJ.

Hood-Barrs v Cathcart and Pillers v Edwards, *overruled*

Hood-Barrs v Heriot (1896) 65 L. J. Q. B. 352, [1896] A. C. 174, 74 L. T. 353, 44 W. R. 181; 65 L. J. Q. B. 412.—L.L. (E) LORDS HERSHELL, MACNAGHTEN, MORRIS and SHAND, *reversing* 8 C. *non liquet* v. Heriot, 64 L. J. Q. B. 717, [1895] 2 Q. B. 212; 44 R. 310; 73 L. T. 167.—C.A. *ESHER*, M.R., KAY and A. L. SMITH, L.JJ. See judgments of LORDS HERSHELL and MACNAGHTEN

Hood-Barrs v Heriot, *discussed and distinguished*

Lumley, In re, **Hood-Barrs v Cathcart**, *judgment of DAVY, L.J. adhered to* Whiteley v Edwards (1896) 65 L. J. Q. B. 457, [1896] 2 Q. B. 18, 74 L. T. 729, 44 W. R. 530.—C.A. *ESHER*, M.R. and A. L. SMITH, L.JJ.

Hood-Barrs v Heriot, *distinguished* **Hood-Barrs v Cathcart and Whiteley v Edwards**, *followed*

Lumley, In re, **Hood-Barrs**, Ex parte (1896) 65 L. J. Ch. 837, [1896] 2 Ch. 690, 75 L. T. 236, 45 W. R. 147.—C.A. LINDLEY and LOPES, L.JJ.

Mauger v. Fellow (*supra*, col 1290), and **Hood-Barrs v Heriot**, *discussed* Bank of Scotland v Cunningham [1899] 2 J. R. 78.—Q. B. D.

Lumley, In re, **Hood-Barrs**, Ex parte, *referred to*, **Lawender's Policy**, In re (1897) [1898] 1 Ir. R. 175.—C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ.

Hood-Barrs v Cathcart (1894) 63 L. J. Ch. 798, [1894] 3 Ch. 378, 7 R. 411, 71 L. T. 11.—C.A. LINDLEY, LOPES and DAVY, L.JJ., *approved and followed*. And see *post*

Hood-Barrs v Heriot (1897) 66 L. J. Q. B. 356, [1897] A. C. 177, 76 L. T. 299; 45 W. R. 507.—L.L. (E) LORDS HERSHELL, MACNAGHTEN, MORRIS and SHAND

Hood-Barrs v Heriot (1897) 66 L. J. Q. B. 356; and **Moran v Place** (1896) 65 L. J. P. 83; [1896] P. 214, 74 L. T. 661, 44 W. R. 593.—C.A., *distinguished* Nunn & Co v Tyson (1901) 70 L. J. K. B. 854; [1901] 2 K. B. 487; 85 L. T. 123.

RIDLEY, J.—**Hood-Barrs v Heriot** merely decided that an appeal by a married woman was not a "proceeding instituted" by her (within sect. 2 of the Married Women's Property Act, 1893). The case must be in favour of the claimant is **Moran v Place** where it was decided that a married woman who had entered a *curat* in respect of a will had not "instituted the proceedings" in the probate action. But in such a case the entry of the *curat* merely claims that if anything is done to set up the will, the lady shall have notice of it. (The proceedings are

instituted afterwards.) The *curat* only says in effect "Let me know what ~~is~~ done." The person entering it can only be a defendant, and it is difficult to contend that a defendant has instituted proceedings. In this case it is very difficult for the lady claimed the goods as heiress, and gave notice to the high bailiff that they were hers—p. 855.

BIGHAM, J. to the same effect.

Hood-Barrs v Cathcart (1894) 63 L. J. Ch. 793 (*supra*), *principles applied*

Moran v Place, *explained*.

Cuckitt v. Cuckitt (1902) 71 L. J. P. 65, [1902] P. 177, 86 L. T. 635, 18 Times L. R. 584.—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.

Lowe v Fox (1885) 54 L. J. Q. B. 561, 15 Q. B. D. 607; 58 L. T. 886, 81 W. R. 144; 50 J. P. 214.—C.A. *ESHER*, M.R. and BOWEN, L.J. *discussed and distinguished*

Smith's Estate, In re, Clements v. Wad (1887) 56 L. J. Ch. 726; 35 Ch. D. 589 (*supra*, col. 1250)

Ringsted v Lanesborough (Lady) (1783)

8 Dougl. 197.—K.B., *discussed* Baiwell v. Brooks (1784) 8 Dougl. 371.—K.B.

Ringsted v Lanesborough (Lady) and **Barwell v. Brooks**, *discussed*, Corbett v. Poelnitz (1785) 1 Term Rep. 86.—K.B.; Baird v. Webb (1800) 2 B. & P. 93.—K.B.; commented on, Marshall v. Rutton (1800) 8 Term Rep. 515, 5 K. R. 418.—K.B.

Marshall v. Rutton, *referred to*, Kay v. De Pienne (Duchess) (1811) 3 Campb. 123.—K.B.; Bairden v. De Keverberg (*post*)

Corbett v. Poelnitz and **Marshall v. Rutton**, *discussed*

Murray v. Barles (1831) 3 L. J. Ch. 181, 3 Myl. & K. 209, 41 R. R. 52.—BROUGHAM, L.C.

Kay v. De Pienne (Duchess), *questioned*

Derry v. Mazarine (Duchess) (1696) 1 Ld. Raym. 147, *explained*

Bairden v. De Keverberg (1836) 2 M. & W. 61, 4 L. J. Ex. 66, 2 Gale 201

[In **Kay v. De Pienne (Duchess)**, Lord Ellenborough, differing from Lord Kenyon, expressed an opinion that the wife might be sued as a *feme sole*, if the husband was an alien, and had never been in this country.]

PARKER, B.—There must have been some misapprehension of what Lord Ellenborough said in that case, on his lordship may have been in error, because he refers to **Derry v. Mazarine (Duchess)** in support of his proposition, whereas that was the case of the wife of an alien enemy, who could not be in England lawfully—analogue to the case of the wife of a person transported—p. 65.

Andrews, In re, Edwards v. Dewar (1885)

54 L. J. Ch. 1049, 30 Ch. D. 159; 53 L. T. 422, 34 W. R. 62, *adhered to*.

Pyling, In re (1885) 53 L. T. 465.—PEARSON, J.

Andrews, In re, *observed on*

Glanville, In re, Ellis v. Johnson (1886) 31 Ch. D. 532; 55 L. J. Ch. 525, 54 L. T. 411; 34 W. R. 399, 50 J. P. 662.—C.A.

COTTON, L.J.—I am not sure whether Pearson, J. intended to decide **Andrews, In re**, under the Married Women's Property Act, 1882, but whether that Act will support his order or not,

the Act has no bearing on the present case; for it has not been resorted to, the suit having been commenced before the Act, and the married woman suing according to the old practice by her next friend —p. 537. *BOWEN, L.J.* concurred.

FRY, L.J.—I am of opinion that an order attaching subsequent income cannot be sustained. There is no precedent for such an order except *Andrews, ex re*. That action was commenced in 1884, after the Married Women's Property Act, 1882, came into operation. Pearson, J. may have relied on that Act, though I do not say so. I give no opinion on the effect of that Act, but I cannot follow the reasons which he gave for his judgment —p. 511.

And see supra, col. 1264.

INDUSTRIAL SOCIETY.

Burton v. Tannahill (1856) 25 L. J. Q. B. 135, 5 El. & Bl. 797, 2 Jur. (N.S.) 184; 1 W. R. 205.—*Q.B.*, followed.

Myers v. Rawson (1860) 29 L. J. Ex. 217; 5 H. & N. 99; 1 L. T. 405, 8 W. R. 417.—*EX.*

Myers v. Rawson, referred to.

Toutill v. Douglas (1863) 33 L. J. Q. B. 66, 8 J. T. 426.—*COCKBURN, C.J.* and *WIGHTMAN, J.* explained.

Dean v. Mellard (1863) 32 L. J. C. P. 282; 15 (1) B. (N.S.) 19; 10 Jur. (N.S.) 816, 11 W. R. 913.—*C.P.*

Dean v. Mellard, followed.

Linton v. Blakeney Joint Co-operative Industrial Society (1866) 34 L. J. Ex. 211, 3 H. & C. 853, 13 L. T. 39; 13 W. R. 843.—*EX.*

Dean v. Mellard and Linton v. Blakeney Joint Co-operative Industrial Society, distinguished.

Queensland Industrial Society v. Pickles (1865) 35 L. J. Ex. 1; L. R. 1 Ex. 1, 11 Jur. (N.S.) 877; 13 L. T. 296, 14 W. R. 30.—*EX.*

United Patriots' National Building Society and Holt, In re (1875) 48 L. J. M. C. 55, 4 Q. B. D. 29, 39 W. R. 622.—*MELLOR and MANISTY, JJ.* See now Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26).

Warburton v. Huddersfield Industrial Society (1892) 61 L. J. Q. B. 422; [1892] 1 Q. B. 817, 67 L. T. 43; 40 W. R. 846, 56 J. P. 463.—*C.A.* *LORD HERSHELL, LINDLEY and KAY, L.JJ.* See Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 89), s. 10.

INFANT.

1. RIGHTS AND LIABILITIES.
2. WAIVER OF COURT.
3. PROPERTY.
4. SETTLEMENTS ON MARRIAGE.
5. ADVANCEMENT AND SATISFACTION.
6. MAINTENANCE.
7. PROCEEDINGS.
8. CUSTODY AND EDUCATION.

1. RIGHTS AND LIABILITIES.

Zouch v. Abbot v. Parsons (1765) 3 Burr 794, 1 W. Bl. 575.—*MANSFIELD, C.J.*, followed.

—*r. Hancock* (1810) 17 Ves. 333.—*KLDON, L.C.* approved. *Allen v. Allen* (1843) 2 Dr. & War. 307, 1 C. & L. 437.—*SUGGESS, L.C.* [see judgment at length dealing also with cases on *quasi entails*], referred to. *Speckman v. Evans* (1868) 37 L. J. Ch. 752, L. R. 3 H. L. 171, 244, 19 L. T. 151.—*H.L.* (2); *Bunnaby v. Equitable Reversionary Interest Society* (1885) 54 L. J. Ch. 466, 28 Ch. D. 416, 52 L. T. 350, 33 W. R. 639.—*PEARSON, J.*, applied. *Carter v. Silber* (post).

Wilson v. Kearse (1800) 2 Peake 106.—*KENYON, C.J.*, followed.

Holmes v. Blogg (1817—1818) 8 Taunt. 85, 508, 1 Moore 266, 2 Moore 552; 19 R. R. 445.—*C.P.*; *Taylor, Ex parte*, *Burrows, In re* (1856) 25 L. J. Bk. 35; 8 De G. M. & G. 251; 2 Jur. (N.S.) 220; 4 W. R. 305.—*KNIGHT BRUCE and TURNER, L.JJ.*

Holmes v. Blogg, distinguished.

Corpe v. Overton (1839) 3 L. J. C. P. 24, 10 Brev. 252, 3 M. & Sc. 738, 35 R. R. 422.—*C.P.*

Corpe v. Overton, applied.

Everett v. Wilkins (1874) 29 L. T. 846.—*EX.*

Holmes v. Blogg, *principle* applied.

Taylor, Ex parte (supra), *Carter v. Silber* (1892) 61 L. J. Ch. 404, [1892] 2 Ch. 278, 66 L. T. 473.—*C.A.* *LINDLEY, BOWEN and KAY, L.JJ.*

Holmes v. Blogg and Taylor, Ex parte (supra), distinguished.

Corpe v. Overton, applied.

Hamilton v. Vaughan-Sherin Electrical Engineering Co (1894) 63 L. J. Ch. 795; [1894] 3 Ch. 689, 8 R. R. 750; 71 L. T. 325; 43 W. R. 126.

STIRLING, J. (after discussing *Holmes v. Blogg, Taylor, Ex parte* and *Corpe v. Overton*) continued. It is to be observed that all the learned judges [in *Corpe v. Overton*] who deal with the case, distinguish it from *Holmes v. Blogg*, on the ground that there had been actual enjoyment of the demised premises in *Holmes v. Blogg*. They did not say that the mere demise itself in default of occupation would have been sufficient, and it seems to me that the true rule to be drawn from the cases is to consider whether the infant has derived any advantage under the contract. In the present case there was no advantage to the infant. She took no part in the management of the company, and did not attend any meetings. The only advantage she has had is the allotment of shares, and the fact of having her name placed on the register. It seems to me that that is not an advantage within the rule of *Corpe v. Overton* —p. 796.

Bainbridge v. Pickering (1779) 2 W. Bl. 1325; and *Brayshaw (or Bradshaw) v. Easton* (1830) 8 L. J. C. P. 163, 5 Bing. (N.C.) 251, 7 Scott 187; 1 Arn. 466, 3 Jur. 222.—*C.P.*, followed. *Foster v. Redgrave* (1867) L. R. 4 Ex. 85, n.—*BLACKBURN and MELLOR, JJ.*, discussed. *Ryder v. Wombwell* (post, col. 1295).

Foster v. Redgrave, followed.

Barnes v. Toye (post, col. 1295).

Burghart v. Hall (1839) 8 L. J. Ex. 235, 4 M. & W. 727.—*EX.*, followed. *Peters v. Fleming* (1840) 9 L. J. Ex. 80; 6 M. & W. 46.—*EX.* And see post, col. 1295.

Peters v. Fleming (*supra*), *approved*
Brooker v. Scott (1843) 11 M. & W. 67 —EX.,
explained and approved

Wharton v. Mackenzie (1844) 13 L. J. Q. B. 130, 5 Q. B. 612; Day & M. 545, 8 Jur. 466
 —Q. B., *Bryant v. Richardson* (1866) 12 Jur. (N.S.) 300; 14 L. T. 24, 14 W. R. 401 —EX.

Peters v. Fleming, *approved*.

Ryder v. Wombwell (1868) 38 L. J. Ex. 8, L. R. 4 Ex. 32, 19 L. T. 491; 17 W. R. 167 —EX. CH.; *reversing, on one point*, 37 L. J. Ex. 48; 17 L. R. 3 Ex. 70; 17 L. T. 609, 16 W. R. 615 —EX.; *Hewlings v. Graham* (*post*, col. 1296)

Ryder v. Wombwell, *commented on*, *Jenner v. Walker* (1868) 19 L. T. 898 —COCKBURN, C.J., *approved*, *Giblin v. McMullen* (1869) 38 L. J. P. C. 25, L. R. 2 P. C. 317, 5 Moore P. C. (N.S.) 434; 21 L. T. 214, 17 W. R. 445 —P.C.; *distinguished*, *Gora v. Beadon* (1880) 20 L. T. 40.

HALES, J., *approved*, *Steward v. Young* (1870) 39 L. J. C. P. 85; L. R. 5 C. P. 122, 22 L. T. 168, 18 W. R. 492 —C.T., *applied*, *Gee v. Metropolitan Ry.* (1873) 12 L. J. Q. B. 105, L. R. 8 Q. B. 161, 28 L. T. 282, 21 W. R. 584 —EX. CH.; *distinguished*, *Hill v. Arbon* (1876) 34 L. T. 125 —Q. B.D.; *discussed*, *Metropolitan Ry. v. Jackson* (1877) 47 L. J. C. P. 303; 3 App. Cas. 198, 37 L. T. 679, 26 W. R. 175 —H. (B.)
 (See "CARRIERS," *supra*, col. 289), *Dublin, Wicklow and Wexford Ry. v. Slattery* (1878) 3 App. Cas. 1155, 39 L. T. 365, 27 W. R. 191 —H. (B.), *Hall v. Jupe* (1880) 49 L. J. C. P. 721, 48 L. T. 411, 4 Asp. M. C. 328 —C.P.D.

Ryder v. Wombwell, *discussed from*.

Barnes (or Barnes) v. Toye (1884) 13 Q. B. D. 410; 53 L. J. Q. B. 567, 51 L. T. 292; 33 W. R. 15, 43 J. P. 664

LOPES, J.—In this particular case evidence as to the amount of clothes the defendant possessed at the time when the order relied on was given was admissible, and the jury should have been told that in arriving at a conclusion whether the goods supplied by the plaintiffs were necessary or not, they should consider whether the defendant was already sufficiently supplied. Against this view the authority of *Ryder v. Wombwell* has been cited, and it has been suggested that this Court is bound by the decision in that case, being that of a Court of co-ordinate jurisdiction, and also the last decision on the point. I agree, however, entirely with my brother Field, that, looking at the conflict of authority, and the fact that the judges who reviewed that case in the Exchequer Chamber carefully, as it seems to me, kept open the point now raised, it is open to us to use our own judgment. Under these circumstances I think that we ought to act upon the decision in *Foster v. Radgrave* (*supra*, col. 1294), and the long chain of authorities on which it was founded —p. 414.

FIELD, J., to the same effect.

MASTERY, J. concurred, but doubted whether *Ryder v. Wombwell* was not binding upon the Court.—p. 413

Ryder v. Wombwell, *discussed from*.

Barnes v. Toye, *approved*.

Johnstone v. Mailes (1887) 57 L. J. Q. B. 6; 19 Q. B. D. 609; 35 W. R. 806.—C.A. *ESHER, M.R., LINDLEY and LOPES, J.J.*

Ryder v. Wombwell, *rule laid down by WILLES, J.* *approved*:

Hiddle v. National Fire and Marine Insurance

Co. of New Zealand (1896) 65 L. J. P. C. 24; [1896] A. C. 372; 74 L. T. 201.—P. C. LORDS WATSON, HOBHOUSE, DAVEY and SIR H. COUCH.

Ryder v. Wombwell and *Jenner v. Walker* (*supra*, col. 1295), *discussed*
Hewlings v. Graham (1901) 70 L. J. Ch. 568; 84 L. T. 497 —JOYCE, J.

Law v. Wilkin (1837) 6 L. J. K. B. 166, 6 A. & E. 718, 1 N. & P. 697, W. W. & D. 235 —K. B., *commented on*

Blackburn v. Mackey (1833) 1 Car. & P. 1. —K. B., *distinguished*
Mortimore v. Wright (1840) 9 L. J. Ex. 198, 6 M. & W. 482, 4 Jur. 405 —EX.

Blackburn v. Mackey, *commented on*.
Law v. Wilkin and *Baker v. Keen* (1819) 2 Stark 501, *overruled*

Mortimore v. Wright, *approved*
Shelton v. Springett (1831) 11 C. B. 452 —C.P.

Hearle v. Greenbank (1749) 3 Atk. 695 —HARDWICKE, L.C., *discussed*
Cadours' Settlement, In re (1878) 47 L. J. Ch. 327; 7 Ch. D. 728, 38 L. T. 778, 26 W. R. 389 —JESSEL, M.R.

Hearle v. Greenbank, Limited
D'Angibau, In re, *Andrews v. Andrews* (1880) 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. 135; 28 W. R. 980 —C.A.

JAMES, L.J.—According to my own view an infant may be an agent. An infant may be the donee of a power of attorney. *Hearle v. Greenbank*, which is the only decision on the subject, no doubt decided that an infant could not exercise a power over real estate; but the judgment was expressly and carefully limited to real estate, and is—if not an implication that it was otherwise as to personal estate and probably otherwise as to gavelkind estates in Kent—at least no authority to the contrary.—p. 246.

BRETT, L.J. to the same effect
COTTON, L.J. dissented on this point.

Gullin v. Gullin (1835) 7 Sim. 236.—SHADWELL, V.C., *overruled*

Stubbs v. Sargon (1830) 2 Beav. 496; 3 Jur. 1118 —LANGDALE, M.R., *followed*
Abraham v. Newcombe (1842) 12 Sim. 556; 6 Jur. 438.—SHADWELL, V.C.

Stubbs v. Sargon and *Abraham v. Newcombe*, *approved*.

Shipway v. Ball (1881) 50 L. J. Ch. 263, 16 Ch. D. 378; 41 L. T. 49; 29 W. R. 302.—MALINS, V.C.

D'Angibau, In re (*supra*), *commented on*, *Shipway v. Ball* (*supra*), *discussed*, *Newcastle's (Duke) Estates, In re* (1883) 52 L. J. Ch. 645; 24 Ch. D. 139; 48 L. T. 779; 31 W. R. 752.—FRANKSON, J., *distinguished*, *Flavell, In re*, *Murray v. Flavell* (1883) 53 L. J. Ch. 185; 25 Ch. D. 89, 49 L. T. 690, 32 W. R. 102.—NORTH, J.; *affirmed*, C.A.; *referred to*, *Pouey v. Hodera* (1900) 69 L. J. Ch. 231, [1900] 1 Ch. 492, 82 L. T. 61.—FARWELL, J.

Coxhead v. Mullis (1878) 47 L. J. C. P. 761; 3 C. P. D. 489, 39 L. T. 849, 27 W. R. 186.—COLLIERIDGE, C.J. and LOPES, J., *distinguished*

Northcott v. Doughty (1879) 4 C. P. D. 385.—DENMAN and LOPES, JJ.

Coxhead v Mullis and Northcote v Doughty,*commented on*

Ditcham v Worrall (1880) 49 L. J. C. P. 688; 5 C. P. D. 110; 13 L. T. 286, 29 W. R. 59, 44 J. P. 799.

LINDLEY, J.—*Coxhead v. Mullis*. must be taken as binding on us—p. 689.

DENMAN, J.—It was decided by this Court in *Coxhead v. Mullis* that sect. 2 of the Infants' Relief Act, 1871 (37 & 38 Vict. c. 62) applies to actions for breach of promise of marriage. By that decision I am bound. That case further decided that, where there has been an express promise of marriage during the infancy of a defendant, and the only evidence subsequently is evidence of mere conduct on the part of the engaged couple, consisting of their treating one another as an engaged couple and keeping company as such, without any evidence of words capable of being construed as a fresh promise, such conduct must be referred to the promise made during the infancy of the defendant, and held to be mere evidence of ratification within the meaning of the above clause. But it has also been held in *Northcote v. Doughty*, by which I am also bound, that where there is evidence not only that after the defendant's coming of age the defendant and the plaintiff behaved as before, but that the defendant used language capable of being considered as a fresh promise, it is for the jury to find whether the words so used amount merely to evidence of a ratification of the promise made during infancy, or whether they prove a fresh promise—p. 691.

CONFERENCES, C. J. (dissenting).—In *Coxhead v. Mullis*, my brother Lopes and I held that the Infants' Relief Act applied to the contract of marriage. That case has never been overruled; but in the later case of *Northcote v. Doughty*, and again in his judgment in the present case, my brother Denman does not concur in opinion that it was not well decided. It is true that my brother Lindley accepts the case, and in a sense so does my brother Denman; but if it is not law, the sooner it is overruled the better, and, as the only judgment actually pronounced in it is mine, I ought, if on consideration I think it wrong, to say so, and to give every facility for having it reviewed in the C. A. If it is not law, there is a short and summary end to the case before us, because I do not question that, but for 37 & 38 Vict. c. 62, the verdict in this case ought to be entered for the plaintiff—p. 692.

Coxhead v. Mullis, commented on.

DUNCAN v. DIXON (1890) 59 L. J. Ch. 487; 44 Ch. D. 211, 62 L. T. 919, 38 W. R. 700—*KEKEWICH, J.*

Ditcham v Worrall (supra), distinguished

HOLMES & BENNETT (1888) 36 W. R. 693, 795—C. A.; reversing 59 L. T. 70, 52 J. P. 711—HUDDLESTON, B. and CHARLES, J.

ESHER, M. R.—In a case like this I am of opinion that the right question for the jury, if there is evidence in support of it, is the question stated by Lopes, L. J. in *Northcote v. Doughty* (supra)—viz., did the defendant intend to make a new absolute promise or merely to re-affirm the old promise? I wish to add that the only question of law decided in *Ditcham v. Worrall* was that there was evidence to go to the jury—*ib.* LINDLEY and LOPES, L. JJs. concurred.

Ditcham v. Worrall, applied.

FOULKES, in re, *Foulkes v. Hughes* (1898) 3 R. 682, 69 L. T. 183—ROMER, J.

Nelson v Stooker (1859) 28 L. J. Ch. 760,

4 De G. & J. 458, 5 Jur. (N.S.) 751, 7 W. R. 608—L. J.; reversing 5 Jur. (N.S.) 262—STUART, V. C., *referred to*.

BURTON v. LEVEY (1891) 7 Times L. R. 218.—WRIGHT, J.

Cory v Gerteken (1816) 2 Madd. 40, 17 R. R.

180—PLUMER, V. C., *followed*.

CHUBB v. GRIFFITHS (1865) 35 Beav. 127—ROMILLY, M. R.

Chubb v Griffiths, distinguished

JONES, Ex parte, *Jones, In re* (1881) 50 L. J. Ch. 673; 18 Ch. D. 109; 45 L. T. 193; 29 W. R. 747—C. A. JESSEL, M. R., BAGGALLAY and LUSH, L. JJs. *And see post*.

Chubb v. Griffiths and Lemprière v Lange

(1879) 12 Ch. D. 675; 41 L. T. 878, 27 W. R. 879—JESSEL, M. R., *followed*.
Woolf v Woolf (1898) 68 L. J. Ch. 82, [1899] 1 Ch. 343, 79 L. T. 725; 17 W. R. 181.

KEKEWICH, J.—*Chubb v. Griffiths* is not very satisfactory, as the record has been looked at by the registrar, and notwithstanding that the decree bears on the face of it the name of a most careful registrar, it does not appear from the documents that the defendant was an infant, still less that a guardian *ad litem* was defending. Mr. Archibald Smith appeared as counsel "for the infant," according to the report, and urged that it was "not a case for costs as against an infant." The judgment also is a little puzzling, because the M. R. says: "In such a case, I am of opinion, upon the principle laid down in *Cory v. Gerteken* (supra), that infancy cannot protect him from paying the costs of this suit." . . . I do not find that the case helps me much. It does not give the principle on which the defendant had to pay the costs, so that if I only had *Chubb v. Griffiths* to go upon, I might hesitate to order the payment in the present case. . . . No doubt the question argued there [*Lemprière v. Lange*] was a question of fraud. It was an action against an infant who had obtained the lease of a furnished house by representing that he was of full age. The main point decided was this. It was held that the lease must be declared void and possession given up, and the defendant restrained by injunction from parting with the furniture, but that he was not liable for use and occupation. . . . *Cory v. Gerteken*, which was cited in *Chubb v. Griffiths*, was also cited in *Lemprière v. Lange*. When the M. R. eventually gave judgment on the main point, he said that the injunction must go, and "the defendant must pay the costs of the action." . . . In *Jones, Ex parte, Jones, In re* (supra), *Chubb v. Griffiths* was referred to by Sir G. Jessel, and he remarks that it was a case of tort. He does not take that opportunity of saying that the defendant did not appear, or ought not to have been held liable to pay costs. That, however, does not go very far; but it shows that the case was at least brought under his attention, so that he had the opportunity of correcting it if he considered that it was wrong. *Lemprière v. Lange* is mentioned in Seton on Judgments (5th ed.), pp. 837 and 1028, but it does not give the form of the order as to payment of costs. 1

am also told that *Chubb v Griffiths* has been referred to in several of the text books on practice.
—p 83

WARD OF COURT.

Hodges' Settlement, in re (1857) 3 K & J 213, 8 Jur (N.S.) 800 —CRAWFORTH, L.C. and KNIGHT BRUCE and TURNER, L.J., *explained*.
De Pereda v De Mancha (1861) 51 L. J. Ch. 204, 19 Ch. D 461, 30 W. R. 226 —HALL, V.-C.

De Pereda v De Mancha, *reversed on*
Hodges' Settlement, in re, *disallowed*.
Brown v Collins (1888) 58 L. J. Ch. 868; 25 Ch. D 56; 49 L. T. 329

KAY, J.—Now, *De Pereda v De Mancha*—the reasoning of which, I confess, I have some difficulty in following—certainly makes it very difficult for me to say that, if the infant were a British subject, she would not be a ward of Court. The only distinction between that case and the present is that in the former the fund was standing to an account the title of which included the name of the infant, and therefore it was practically standing in the infant's name. Here it is standing to an account which includes the class of which the infant is one, but does not mention her name. However, looking at the decision in *De Pereda v De Mancha*, I am afraid that I could not, if there were the case of a British subject, say that there is any essential difference between the two cases, because the reasoning of that decision, as I understand it, is this. If there be a fund in Court under its administration standing to the account of an infant, or to an account under which an infant is entitled, then, inasmuch as the Court is bound to administer that fund, the infant will be treated as a ward of Court to the same extent as an infant who is a party to an action for the administration of property belonging to that infant. Undoubtedly we use the words "ward of Court" in such a case in rather a special sense. Without at all intimating any opinion that *De Pereda v De Mancha* has been wrongly decided (which, of course, I should not venture to say), it seems to me very doubtful whether, even if rightly decided, it could be intended to include a case like this. In this case the money paid into Court was a mere legacy, the infant was not a party, and would not have been properly a party to the action under which the money was paid in, even under the old practice. The money was only paid in because it was subject to a trust for one for life with remainder over, and it was not at the moment distributable. I should hesitate very long before I held that that made an infant, who was entitled in reversion to a share of that money, a ward of Court.—pp 370, 371.

Brown v Collins, *discussed and explained*, 6 Grith. in re (1882) 61 L. J. Ch. 549, (1882) 2 Ch. 496 (*post*, col. 1820), Magee, in re (1895) 31 L. R. Ir. 613.—PORTER, M.R.

3. PROPERTY

Gardner v Cowles (1876) 4 Ch. D. 304, 24 W. R. 920 —HALL, V.-C., *followed*.
Findlay, in re (1886) 55 L. J. Ch. 396; 32 Ch. D. 221, 641 —NORTH, J.

Harwood, in re (1882) 51 L. J. Ch. 578, 20 Ch. D. 636, 30 W. R. 595 —HALL, V.-C., *followed*.

Barnett, in re, *Foster v. Barnett* (1889) 61 L. T. 676.—STIRLING, J.

Blake v. Concannon (1870) 19 R. & C. L. 328. —PIGOT, C.B., *distinguished*.

Kirtin v. Elliott (1814) 2 Buls. 69, 8 C. C. nom. *Ketley's Case*, 1 Brownl. 120, nom. *Ketsey's Case*, Cro. Jac. 320, *explained*.

Jones, Ex parte, *Jones*, in re (1881) 50 L. J. Ch. 673, 18 Ch. D. 109 (*supra*, col. 1298).

Crowther v. Crowther (1857) 26 L. J. Ch. 702, 23 Beav. 305; 6 W. R. 23.—BOMILLY, M.R., *disapproved*.

Wyllie v. Ellice (1848) 6 Hare 505.—WIGRAM, V.-C., *approved*.

Howard v. Shewsbury (Earl) (1871) 43 L. J. Ch. 495, L. R. 17 Eq. 378, 29 L. T. 862, 22 W. R. 290

JESSE, M.R. said a bill in equity might be filed by an infant to recover land under a legal title. That was established by many early cases, and though there was a recent decision to the contrary, *Crowther v. Crowther*, the earlier authorities were not cited in that case, and it was in fact an erroneous decision. The law was laid down correctly by *Wyllie v. Ellice*, and the authorities cited in *Boddy v. Lefevre* (1842) 1 Hare 602, n.—WIGRAM, V.-C. —p 498.

Goodtitle d. Newman v. Newman (1774) 3 Wils. 516; *Thomas v. Thomas* (1855) 25 L. J. Ch. 155; 2 K. & J. 79, 1 Jur. (N.S.) 1169, 4 W. R. 135.—WOOD, V.-C., and *Howard v. Shewsbury* (Earl) *referred to*.

Blomfield v. Byre (1815) 14 L. J. Ch. 200; 8 Beav. 250, 9 Jur. 717.—LANGDALE, M.R.; and *Morgan v. Morgan* (1837) 1 Atk. 489.—HARDWICKE, L.C., *commented on*.

Wall v. Stanwick (1887) 56 L. J. Ch. 501; 84 Ch. D. 763; 56 L. T. 509, 35 W. R. 101.—KEKEWICH, J.

Thomas v. Thomas, *explained and followed*.

Wall v. Stanwick and Hobbs, in re, *Hobbs v. Wade* (1887) 57 L. J. Ch. 184, 36 Ch. D. 553; 58 L. T. 9; 36 W. R. 445.—NORTH, J., *referred to*.

Tinker v. Rodwell (1893) 8 R. 1, 69 L. T. 591.—ROMER, J.

Evans, in re (1895) 2 Myl. & K. 818.—PEPPES, M.R., *followed*.

Lagh, Ex parte (1846) 15 Sim. 445.—SHADWELL, V.-C.

Evans, in re, *distinguished*.

Clark, in re (1866) 35 L. J. Ch. 314; L. R. 1 Ch. 292; 15 L. T. 732; 14 W. R. 878

CRAWFORTH, L.C., was not prepared to say that, in his opinion, the judgment of Lord Cottonham was wrong in *Evans*, in re; but that case was different from the present, inasmuch as the estate of the pensioners might at any time be defeated by the birth of a brother. They had not an indefeasible estate, and did not represent the whole fee, but that could not be so here, because in any event the whole fee simple was before the Court.—p 315.

Clark, in re, *followed*.

Spenser's Estates, in re (1867) 37 L. J. Ch. 18 17 L. T. 200.—MALINS, V.-C.

Spenser's Estates, In re, followed

Evans, In re, and Leigh, Ex parte, commented on
Letchford, In re (1876) 45 L. J. Ch. 530, 2 Ch. D. 719; 35 L. T. 466—MALINS, V.-C.

Glover, In re [1899] 1 Ir. R. 337—PORTER, M.R., followed.

Cowley, In re (1900) 70 L. J. Ch. 88, [1901] 1 Ch. 38, 83 L. T. 739.—COXENS-HARDY, J., *Tutill v. Tutill* [1902] 1 Ir. R. 429—PORTER, M.R.

4. SETTLEMENTS ON MARRIAGE.

Att.-Gen. v. Lucas (1848) 18 L. J. Ch. 100, 2 Ph. 753; 12 Jur. 1011—COTTENHAM, J.C., *reversing* 17 L. J. Ch. 382.—WIGRAM, V.-C., followed.

Att.-Gen. v. Clements (1871) 40 L. J. Ch. 678; 11 R. 12 Eq. 32; 21 L. T. 384.—BACON, V.-C., *Att.-Gen. v. Rowl* (1871) L. R. 12 Eq. 38; 24 L. T. 494.—BACON, V.-C.

Att.-Gen. v. Read, explained.

Att.-Gen. v. Teather (1881) 43 L. T. 749; 29 W. R. 317.

JENSHILL, M.R.—The object in the case referred to of the separate appearance of the Att.-Gen. was to see that a proper settlement was executed. It was a petition by the relator for a compromise, and therefore of course the Att.-Gen. was duly served, and appeared separately. Here it is an action by the Att.-Gen. and not by the relator at all, and therefore there is no occasion for separate appearance.—*b*

Cohen v. Armstrong (1813) 1 M. & S. 724.—

• K.B., followed.

HUTCHINSON v. Wall (1847) 16 L. J. Ex. 270, 1 Ex. 122.—EX.

Harris v. Wall, approved, Rowe v. Hopwood (1868) 38 L. J. Q. B. 1, 1 L. R. 4 Q. B. 1, 19 L. T. 261, 17 W. R. 28—Q.B., *discovered*, *Hodson's Settlement, In re* (post).

Rowe v. Hopwood, applied

Maccord v. Osborne (1876) 45 L. J. C. P. 727; 1 C. P. D. 568, 35 L. T. 161; 25 W. R. 9—C.P.D.

Mewson v. Elane (1851) 23 L. J. Ex. 342;

10 Ex. 206, 2 W. R. 688—EX., followed.

Hodson's Settlement, In re, Williams v. Knight (1891) 63 L. J. Ch. 609, [1891] 2 Ch. 421, 8 R. 346; 71 L. T. 27; 42 W. R. 531—CHITTY, J.

Anon. (1828) 4 Rns. 478, 28 R. R. 155.—LEACH, M.R., followed.

De Stacpoole v. De Stacpoole (1887) 57 L. J. Ch. 463, 37 Ch. D. 139; 58 L. T. 382, 36 W. R. 820—NORTH, J. *And see Dowd v. Dowd* [1898] 1 Ir. R. 244—OKEATTEY, V.-C.

Powell v. Oakley (1865) 34 Beav. 375.—M.R., *discovered*, *Potter, In re* (1869) L. R. 7 Eq. 484, 20 L. T. 365, 17 W. R. 347.—MALINS, V.-C., *Sampson and Wall, In re* (see Wall, In re) (1884) 53 L. J. Ch. 457; 25 Ch. D. 482, 50 L. T. 436, 32 W. R. 617.—O.A. SELBORNE, L.C. and PRY, L.J., *COTTON, L.J. doubting*, affirming *KAY, J.*, who had followed *Powell v. Oakley*.

Sampson and Wall, In re, applied, Phillips, In re (1887) 56 L. J. Ch. 337; 34 Ch. D. 467, 56 L. T. 114, 35 W. R. 284—CHITTY, J., *distinguishing*, *Buckmaster v. Buckmaster* (post), referred to, *Scaton v. Scaton* (post); *Leigh, In re* (post).

Murray, In re (1842) 3 Dr. & Writ. 83; 2 Cou. & L. 134, 5 Ir. Eq. R. 266.—

SCODEN, L.C.; and **Field v. Moore** (1855) 25 L. J. Ch. 66, 7 De G. M. & G. 691, 2 Jur. (N.S.) 145; 4 W. R. 187—KNIGHT

BRUCE and TURNER, L.J., applied
Buckmaster v. Buckmaster (1887) J. 56 L. J. Ch. 379; 35 Ch. D. 21, 56 L. T. 795, 35 W. R. 438.—O.A. COTTON, LINDLEY and LOPES, *reversing* (1886) 55 L. J. Ch. 826, 33 Ch. D. 482—BACON, V.-C., 55 L. T. 279; 35 W. R. 25—O.A., *affirmed, post*.

Buckinghamshire (Earl) v. Drury (1762) 2 Eden 60, 8 Bro. P. C. 492, *discovered*, *Caruthers v. Caruthers* (1794) 4 Bro. C. C. 500, *commented on*, *Field v. Moore* (supra).

Buckinghamshire (Earl) v. Drury, explained

Scaton v. Scaton and Buckmaster (1888) 57 L. J. Ch. 661; 13 App. Cas. 61, 58 L. T. 565, 56 W. R. 865.—H. L. (B.) LORDS HERSHELL, WATSON, FITZGERALD and MACNAGHTEN; *affirming* 5 C. W. R. *Buckmaster v. Buckmaster* (supra).

LORD HERSHELL.—That case [*Buckinghamshire (Earl) v. Drury*] has given rise to a great deal of criticism since the time when the decision in it was pronounced, and much disapproval has been expressed of it. I do not think it necessary to say much with regard to it, for this reason. That case decides this, and this alone, that it was competent for an infant, by means of a marriage settlement, to bar his right to obtain by virtue of the marriage an interest in her husband's property, and in the opinion expressed by Lord Mansfield he distinctly says, "I approve the distinction taken by Wilmot, J. between infants contracting for conveying away something of their own and barring themselves of a right which is a third person's." It is quite unnecessary to inquire whether that distinction is one which can be supported by reasoning or not. It is sufficient to say that, whatever be the validity of the decision in that case, it cannot be relied upon as an authority beyond this, that in certain cases an infant may deprive herself of rights which she would otherwise have possessed in the property of her husband. . . In *Sampson and Wall, In re*, the majority of the C. A. came to the conclusion that those words ["It shall be lawful for every infant upon or in contemplation of his or her marriage"] ought to be construed so as to include a post-nuptial as well as an ante-nuptial settlement, if the post-nuptial settlement was made on the occasion of the marriage, so as to be connected with that event. I do not propose to express any opinion with regard to that decision one way or another. It is unnecessary, in the view which I take, to do so. But certainly those who pronounced the decision do not appear to have contemplated as a logical consequence of it that which the learned counsel for the appellants have contended does logically follow—namely, that the statute not only applies to post-nuptial as well as to ante-nuptial settlements, but, because it applies to them, indicates an intention that an infant, though married, should have the full powers which the statute confers.—p. 664.

Scaton v. Scaton and Buckmaster, referred to.

Phillips, In re (supra), doubted.

Leigh, In re, Leigh v. Leigh (1888) 58 L. J. Ch. 306, 40 Ch. D. 200; 60 L. T. 404, 37 W. R. 241.—O.A. COTTON, LINDLEY and BOWEN, L.JJ.

Seaton v Seaton and Buckmaster (supra), distinguished, *Greenhill v North British Insurance Co* (1893) 42 L. J. Ch. 918, [1893] 3 Ch. 171, 3 R. 674, 49 L. J. 526; 42 W. R. 91—STIRLING, J.; *discussed* Haile v. Jarman (1895) 64 L. J. Ch. 779; [1895] 2 Ch. 419, 13 R. 610, 73 L. T. 20, 43 W. R. 618—NORTH, J.

5. ADVANCEMENT AND SATISFACTION

Aldridge, In re, Abram v Aldridge, 54 L. T. 827—KAY, J., *reversed*, (1886) 55 L. T. 854.—C.A. COTTON, L.J., SIR J. HANNEN and FRY, L.J.

Holt v Prodenok (1726) 2 P. WMS 856—L.C.; *referred to*, *Boyd v Boyd* (post), *Bennet v Bennet* (post)

Boyd v Boyd (1837) 36 L. J. Ch. 877; L. R. 4 Eq. 305; 16 L. T. 600, 15 W. R. 1071—V.C., *explained*.

Taylor v Taylor (1875) 44 L. J. Ch. 718, L. R. 20 Eq. 165—JESSEL, M.R.

Boyd v Boyd, *approved*

Boyd v Taylor, *discussed from*
Blockley, In re, Blockley v Blockley (1885) 51 L. J. Ch. 722, 39 Ch. D. 250, 33 W. R. 777, PEARSON, J.—Mr. Cookson has argued that an advancement by a father to a son to enable him to pay his debts is under no circumstances an advancement by potition within the statute, and is relied upon what was said by Jessel, M.R. in *Taylor v Taylor*. With all deference to the M.R. I cannot agree in his views. I think that a sum of money given by a father to his son to pay his debts is, or may be, an advancement, as much as a sum of money given him for any other purpose. In *Boyd v Boyd*, Wood, V.C. said, "Wherever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing—the Court does not look to the application. As to the debt, suppose the young man had represented to his father that it was extremely important they should be paid, in order that he might keep his position in the army, and the father had paid these sums in order to assist him, it would have been clearly an advance." I cannot conceive stronger language than that. In my opinion, if a sum of money is paid by a father for the benefit of his son, it is an "advancement by potition"—p. 723

Taylor v Taylor, *referred to*, *Lacon, In re, Lacon v Lacon* (1891) 60 L. J. Ch. 408; [1891] 2 Ch. 482, 64 L. T. 428, 39 W. R. 514—C.A. LINDLEY, BOWEN and KAY, L.J.; *followed*, *Jones, In re, Christmas v Jones* (1897) 66 L. J. Ch. 439; [1897] 2 Ch. 190; 76 L. T. 434; 45 W. R. 698—KEENEWICH, J.

Taylor v Taylor, *adopted in preference to* *Boyd v Boyd and Blockley, In re* (supra). *Scott, In re, Langton v Scott* (1902) 73 L. J. Ch. 20; [1903] 1 Ch. 1, 87 L. T. 574, 51 W. R. 182—C.A. V. WILLIAMS, STIRLING and COZZENS-HARDY, L.J.

Grey (Lord) v Grey (Lady) (1677) 2 Swanest. 594; Finch 338; 1 Ch. C. 296; 19 R. L. 150; and *De Vissem, In re* (1868) 33 L. J. Ch. 382; 2 De G. J. & S. 17, 9 L. T. 666; 12 W. R. 140—L.J., *discussed*

Sayre v Hughes (1848) 37 L. J. Ch. 401; L. R.

5 Eq. 376, 18 L. T. 347; 16 W. R. 662.—STUART, V.C.

Sayre v Hughes, *applied*.

Hepworth v Hepworth (1870) 40 L. J. Ch. 111; L. R. 11 Eq. 10, 33 L. T. 888, 19 W. R. 46—MALINS, V.C.

Sayre v Hughes, *commented on*

De Vissem, In re, *explained*

Bennet v Bennet (1879) 10 Ch. D. 171, 10 L. T. 378, 27 W. R. 573

JESSEL, M.R.—In *Sayre v Hughes* the V.C. says thus: "It has been argued that a mother is not a person bound to make an advancement to her child, and that a widowed mother is not a person standing in such a relation to her child as to raise a presumption that in a transaction of this kind a benefit was intended for the child. But the case of a stranger who stands in loco parentis seems not so strong as that of a mother."

That is not the question, there is no rule upon the point of strength, but the question is one of equitable obligation. Then the V.C. proceeds: "In *De Vissem, In re*, it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. The question in that case arose on a petition in lunacy, and it seems to have been taken for granted that no presumption of benefit arises in the case of a mother. But maternal affection, as a motive of bounty, is, perhaps, the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation, not a legal one." That is quite quite right. It is a moral obligation known to Courts of equity. All the C.A. decided was that there was no such moral obligation in the case of a mother as the Court could take notice of as such. That being so, the argument of the V.C. falls to the ground. The only question in such cases is whether the presumption is a presumption of law. I may say I should have no hesitation in deciding *Sayre v Hughes* in the same way as the V.C. did, having regard to the evidence; though I should not have arrived at the same conclusion irrespective of the evidence—p. 179.

Sayre v Hughes and Bennet v Bennet, *discussed*.

Oime, In re, Evans v Maxwell (1883) 50 L. T. 31—KAY, J.

Childers v Childers (1857) 26 L. J. Ch. 643, 743, 1 De G. & J. 482; 3 Jur. (N.S.) 1277; 5 W. R. 798.—L.J., *reversing* 3 K. & J. 810.—V.C.; *referred to*, *Infant v Kaye* (1872) 41 L. J. Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675, 20 W. R. 597.—L.J.; *Blakely Ordinance Co, In re, Coates's Case* (1876) 46 L. J. Ch. 867; 35 L. T. 617, 25 W. R. 111—MALINS, V.C.; *followed*, *Goodrich v Goodrich* (1890) 62 L. T. 381.—KAY, J.

England v Downs (1810) 2 Beav. 523.—

LANGDALE, M.R., *followed*.

Winfletley v Spooner (1857) 3 K. & J. 542.—WOOD, V.C.

Whateley v Spooner; Kirk v Edlowes (1844) 13 L. J. Ch. 492; 3 Hae 509; 8 Jur. 1024—WIGGAM, V.C., and *Quinhampton v Going* (1876) 24 W. R. 917.—JESSEL, M.R., *considered*.

Smith v Conder (1878) 47 L. J. Ch. 878; 9 Ch. D. 170; 27 W. R. 110.

HALL, V.-C.—The V.-C. there said [*Kirk v Eddowes*] that declarations of the testator made at any other time than contemporaneously with the advance were inadmissible. I do not think that the marginal note accurately represents Wood, V.-C.'s judgment. At all events, there is no such reference in the will in the present case to a statement as there was in the will in that case. In *Quinhampton v. Goung* (in which it was held that the entries in the ledger were conclusive) the entries were read as incorporated into the will, but the entries were all made previously to the date of the will—p. 879.

Quinhampton v. Goung and Whateley v Spooner, referred to.

Coyte, In re, Coyte v. Coyte (1887) 56 L. T. 510.—CHITTY, J.

Grave v. Salisbury (Earl) (1785) 1 Bro. C. C. 425—THURLOW, L.C., distinguished.

Kirk v Eddowes, explained and applied. Turner, In re, Turner v. Turner (1885) 53 L. T. 379 KAY, J.—The effect of the decision there [*Grave v. Salisbury (Earl)*] was that a grant of a beneficial farming lease by a person *in loco parentis* to his natural son did not afford any presumption of an advancement, that kind of gift and the legacy not being *ejusdem generis*. . . That [*Kirk v Eddowes*] is a distinct decision which has been followed in numerous cases since. It shows that, where a transaction between a father and son took place after the date of the will, parcel evidence of the father's intention was admissible, not as the evidence of revocation or alteration of any part of the will, but as evidence of an independent transaction, whereby the legatee received a portion of his legacy by anticipation.—p. 380.

Kirk v. Eddowes, discussed.

Griffith v. Bouque (1887) 21 L. R. Ir. 92.—PORTER, M.R. And see "PORTION."

Andrews v. George (1830) 3 Sim. 398—

V.-C.; **Hilton v. Hilton (1872) L. R. 14 Eq. 468—MALINS, V.-C., Field v. Seward (1877) 5 Ch. D. 338—BACON, V.-C., and Poole v. Poole (1871) L. R. 7 Ch. 17; 23 L. T. 770, 20 W. R. 133—L.J., discussed.** Rees, In re, Rees v. George (1881) 50 L. J. Ch. 328; 17 Ch. D. 701; 11 L. T. 241; 29 W. R. 301.—JESSEL, M.R.

Poole v. Poole, referred to.

Milnes, In re, Milnes v. Sherwin (1885) 53 L. T. 531, 33 W. R. 927.—NORTH, J.

Rees, In re, Rees v. George; Hilton v. Hilton, and Field v. Seward, discussed.

Dallmeyer, In re, Dallmeyer v. Dallmeyer (1895) 65 L. J. Ch. 201, [1896] 1 Ch. 372, 73 L. T. 671; 44 W. R. 375.—CA. LORD HERSCHELL and A. L. SMITH, L.J., RIGBY, L.J. *descending on one point*

Rees, In re, principle applied.

Dallmeyer, In re, discussed.

Lambert, In re, Moore v. Middleton (1897) 66 L. J. Ch. 624, [1897] 2 Ch. 169, 76 L. T. 752, 45 W. R. 661.—STIRLING, J.

Lambert, In re, and Rees, In re, discussed.

Hargreaves, In re, Hargreaves v. Hargreaves (1902) 86 L. T. 43.—JOYCE, J.

6. MAINTENANCE.

Fentiman v. Fentiman (1847) 16 L. J. Ch. 436;

13 Sim. 171.—SHADWELL, V.-C., followed. Howarth, In re (1878) 42 L. J. Ch. 516, L. R. 8 Ch. 415; 23 L. T. 54; 21 W. R. 410.—JAMES and MELLISH, L.J.

Howarth, In re, discussed.

Martin v. Gale (1876) 46 L. J. Ch. 84, 4 Ch. D. 428, 46 L. T. 337, 25 W. R. 406.—JESSEL, M.R.

Howarth, In re, and Ring v. Jarman (referred to in De Witte v. Palm (1872) L. R. 14

Eq. 261, 26 L. T. 825, 20 W. R. 853.—MALINS, V.-C. The will is given L. R. 11 Eq. 857, held inapplicable. Hamilton, In re (1885) 51 Ch. D. 201, 53 L. J. Ch. 282, 53 L. T. 840; 31 W. R. 208.—CA.

LINDLEY, L.J.—We have every wish to give effect to an arrangement which would provide maintenance for the infants, but we cannot see our way to making an order for that purpose. We hoped at first that *Howarth, In re*, might help us. In that case the Court charged the expenses of the past maintenance of an infant on the corpus of an estate to which he was entitled in fee simple in possession. This was done on the principle that any one who maintained the infant could obtain a judgment against him which would charge his real estate, and that the order made substantially came to the same thing. We thought at first that by a subtle application of the same principle we could find a way of creating a charge in the present case. But we cannot make an order having a wider effect than a judgment at law against the infant would have. Now, though an action could be brought for necessities supplied to the infants, no actions would lie against them for the premiums on the policy of insurance, and those premiums form a part of the sum which it is sought to charge. This objection appears to me to be fatal—p. 294. RAY, L.J.—In addition to what Lindley, L.J. has noticed, there is another objection. The theory is that the charge could be enforced against the estate of the child who first becomes entitled in possession. But the amount of his liability in the supposed action would be very different from the 18,600*l.* which it is now sought to charge. He would be liable only for what had been expended for his own maintenance. The principle of *Howarth, In re*, therefore, does not cover the case *Ring v. Jarman*, the orders in which have been furnished to us, does not appear to me to help the application.—p. 295.

Howarth, In re, commented on.

Cadman v. Cadman (1886) 55 L. J. Ch. 833; 33 Ch. D. 397, 55 L. T. 569; 35 W. R. 1.—CA. COTTON, L.J.—In that case [*Howarth, In re*] the estate was an estate in possession, and the whole foundation of that case fails unless there is an estate in possession. . . I must not be considered as acceding to the views which the judges took in that case. I do not see what authority the Court had in that case, and I do not see what authority the Court would have in this case, if there were a claim on the part of the mother here, to make such an order as was there made effectually to charge the freehold estates.—p. 834.

LINDLEY, L.J. to the same effect.

LOPES, L.J.—Speaking for myself. I do not think I could have arrived at the conclusion arrived at in that case. But assuming that to be

good law, there is a vast distinction between that and the present case. In *Zouarth, In re*, the infant was entitled to a fee simple in possession. There was only one infant, the application was in respect of past maintenance, and the Court thought that, inasmuch as an action might be brought against the infant for necessaries, the Court might charge the property for maintenance.

Here the estate is an entailed estate, here there are five infants, the oldest of whom is tenant in tail, who, if he attains twenty-one, on the death of the protector of the settlement can bar the estate and become absolutely entitled.—p 835

Hamilton, In re (supra) and Cadman v Cadman (supra), followed.

Harrison and Hottenley, In re (1899) 68 L. J. Ch. 208, [1899] 1 Ch. 405, 80 L. T. 29, 47 W. R. 397.—*A. LINDELEY, J. 2*, *HUGHES* and *V. WILLIAMS, L.J.*; *affirming NORTH, J.*

Cavendish v. Mercer (1776) 5 Ves 195, b. 5 Ves 195; and *Fendall v. Nash* (1779) 5 Ves 197, a, followed.
Greenwell v. Greenwell (1800) 5 Ves 191—*ROBERTSON, J. C.*

Cavendish v. Mercer, explained.

Fendall v. Nash, questioned.
Ernst v. Barlow (1807) 14 Ves 202; 9 R.R. 273 *RESON, L.C.*—That case [*Cavendish v. Mercer*] therefore is an authority only, that, where the Court sees that it is for the benefit of the infants, the chance of surviving being equal, and can procure the consent of all persons interested, the Court will take the chance of controverting the will. I cannot bring myself to think that case [*Fendall v. Nash*] properly decided; as upon certain contingencies both the principal and the interest would have gone to individuals who, not only did not, but could not, consent, not being then in existence. In the event of the death of a child under the age of twenty-one, leaving issue, the accumulated property would have gone to that issue; and how the Court could give to the infants that property, which in that event would belong to others, I cannot conceive.—p 203

Ernst v. Barlow, followed.
Turner v. Turner (1831) 4 Sim. 430—*SHADWELL, V.-C.*

Chambers v. Goldwin (1805) 11 Ves. 1; 8 R. R. 61.—*RESON, J. C., followed.*

Kime v. Welfitt (1830) 3 Sim. 533, 81 R. R. 211—*SHADWELL, V.-C. not followed.*
Martin v. Martin (1860) L. R. 1 Eq. 369, 35 L. J. Ch. 281; 14 L. T. 129, 14 W. R. 421.

WOOD, V.-C.—The V.-C. of England, in deciding *Kime v. Welfitt*, does not appear to have had before him *Chambers v. Goldwin*, which was decided by one of our highest authorities, and is a very strong case.—p 371

Chambers v. Goldwin, referred to.
Cotton's Trusts, In re (1876) 45 L. J. Ch. 201; 1 Ch. D. 232, 83 L. T. 720, 24 W. R. 243.—*JESSEL, M.R.*

Cotton's Trusts, In re, and George, In re (1877) 47 L. J. Ch. 118, 5 Ch. D. 837; 37 L. T. 204; 26 W. R. 6.—*A. JAMES, MELLISH* and *BAGGALLAY, L.J.*, *reversing* 25 W. R. 182.—*HALL, V.-C. dissented.*
Dickson, In re, Hill v. Grant (1884) 23 Ch. D.

291, *affirmed*, [1885] 20 Ch. D. 381; 54 L. J. Ch. 510; 52 L. T. 707, 53 W. R. 67.—*G. A. COTTON, BOWEN* and *FREY, L.J.*

KAY, J.—Sect. 48 of the Act of 1881 was intended to replace a provision in Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 26), which has been repealed by sect. 71 of the Act of 1881. Lord Cranworth's Act only enabled trustees to apply for maintenance the income to which the infant "may be entitled in respect of such property," and it was decided by the O. A. in *George, In re*, that in the case of a contingent legacy which did not carry interest, the income of a fund paid into Court to the contingent legacy account could not be so applied, because even if he attained twenty-one the legatee would not become entitled to any of the intermediate income. The decision was in 1877, and the Conveyancing and Law of Property Act was passed in 1881. In *Whitetholme and Turner's Trusts* (2nd ed., p. 86; 3rd ed., p. 93), it is stated in a note that this section (48) "is so worded as to avoid the question raised in 'George, In re.' In the same note the learned editors say that 'if no interest is payable on the legacy till the infant attains twenty-one, there is no income to which the section can apply, and the residuary legatee takes the income of the residue without deduction till the legacy becomes vested. The short effect of the section seems capable of being stated thus: Where the income will go along with the capital if and when the capital vests, then the income is applicable under the section for the benefit of the infant, otherwise not.' But if that is the effect of the Act it does not avoid the question raised in *George, In re*. The precise question in *George, In re*, was whether Lord Cranworth's Act applied to income to which the infant never could become entitled, and if the Act of 1881 was passed to avoid the effect of *George, In re*, the intention must have been to enable the trustees to maintain the infant out of income of a contingent legacy, which income at first the Act would belong to someone else and not to the infant even though he should attain twenty-one. I have communicated with Mr. Wolstenholme, who tells me, and allows me to state, that the note in question is erroneous. The reference should have been to *Cotton's Trusts, In re*. In that case the income of the legacy would belong to the legatee if he attained twenty-one, and the question was whether Lord Cranworth's Act applied to such income, or was only applicable to income actually vested in the infant. The Court said that the more apt expression would have been "may become" than "may be," yet held the Act applicable. Now the difficulty is, first, that there was no necessity after that decision to alter the language of the statute to make it applicable to income of that kind, and secondly, if altered for that purpose, the proper alteration would have been to make that phrase "may be or become," as suggested in that judgment. But the law was altered after that case, and after *George, In re*, by striking out altogether any reference to the title of the infant to the income, and dealing with the income of any property to which he is contingently entitled, as it would seem, *prout facie*, to whomsoever such income may belong.—p 295.

George, In re, and Cotton's Trusts, In re, discussed.

Judkin's Trusts, *In re* (1884) 58 L. J. Ch. 496; 25 Ch. D. 743; 30 L. T. 200; 82 W. R. 407.—KAY, J.

Otton's Trusts, *In re*, discussed, Malcomson v. Malcomson (1885) 17 L. R. Ir. 89.—C.A. (*post*, col. 1811), Moody, *In re*, Woodroffe v. Moody (1893) 64 L. J. Ch. 174, [1895] 1 Ch. 101, 15 R. 18; 72 L. T. 190, 13 W. R. 463.—KIRKICHOFF, J.

Dickson, *In re* (*supra*, col. 1807), referred to, Mellock, *In re*, Ruffie v. Mellock (1886) 55 L. J. Ch. 738, 34 L. T. 828.—KAY, J., Scott, *In re*, Scott v. Scott (1902) 71 L. J. Ch. 475; [1902] 1 Ch. 918 (*post*), applied, Jeffery, *In re*, Burt v. Arnold (1890) 60 L. J. Ch. 470; [1891] 1 Ch. 671; 61 L. T. 622, 30 W. R. 234.—NORTH, J. Clements, *In re*, Clements v. Pearsall (1894) 63 L. J. Ch. 326; [1895] 1 Ch. 665; 70 L. T. 682, 42 W. R. 374.—CHITTY, J.

Jeffery, *In re*, Burt v. Arnold (*supra*), distinguished and doubted, Barton's Will, *In re*, Banks v. Heaven (1892) 61 L. J. Ch. 702; [1892] 2 Ch. 58; 67 L. T. 221.—CHITTY, J.

Jeffery, *In re*, adhered to, Burton's Will, *In re*, Banks v. Heaven, considered, Adams, *In re*, Adams v. Adams (1892) 62 L. J. Ch. 266; [1893] 1 Ch. 329; 3 R. 222, 63 L. T. 376; 41 W. R. 320.—NORTH, J.

Burton's Will, *In re*, approved, Jeffery, *In re*, referred to, Holford, *In re*, Holford v. Holford (1894) 63 L. J. Ch. 637; [1891] 3 Ch. 30, 7 R. 304; 70 L. T. 777, 42 W. R. 563.—C.A. LINDLEY, LOPES, and KAY, JJ.

Jeffery, *In re*, reconsidered, Holford, *In re*, Holford v. Holford, applied, Jeffery, *In re*, Arnold v. Burt (1895) 64 L. J. Ch. 890; [1895] 2 Ch. 577, 19 R. 867, 73 L. T. 392; 44 W. R. 61.—NORTH, J.

Arbuckle, *In re* (1866) 14 L. T. 538, 14 W. R. 695.—KINDERSELEY, V.-C.; order followed, Colgan, *In re* (1881) 61 L. J. Ch. 130, 19 Ch. D. 305, 46 L. T. 152; 30 W. R. 266.—FRY, J., Bruce, *In re* (1882) 30 W. R. 922.—KAY, J., Tanner, *In re* (1884) 63 L. J. Ch. 1108; 61 L. T. 507.—KAY, J.

Buckley's Estate, *In re* (1888) 52 L. J. Ch. 439; 22 Ch. D. 583; 48 L. T. 109, 31 W. R. 376.—FRY, J., and Lucas v. King (1863) 8 L. T. 628, 11 W. R. 818.—ROMILLY, M.R., applied, Wells, *In re*, Wells v. Wells (1880) 50 L. J. Ch. 113, 43 Ch. D. 281, 61 L. T. 806, 38 W. R. 827.—NORTH, J.

Wells, *In re*, Wells v. Wells, approved, Humphreys, *In re*, Humphreys v. Levett (1893) 62 L. J. Ch. 498, [1893] 3 Ch. 1; 2 R. 436, 68 L. T. 729, 41 W. R. 519.—C.A. LINDLEY, BOWEN and KAY, JJ.

Buckley's Estate, *In re*; Wells, *In re*, and Humphreys, *In re*, distinguished, Scott, *In re*, Scott v. Scott (1902) 71 L. J. Ch. 475; [1902] 1 Ch. 918, 86 L. T. 343, 50 W. R. 454.

BUCKLEY, J.—The decision of Fry, J. in *Buckley's Estate*, *In re*, decided upon sect. 26 of Lord Cranworth's Act, is only that that Act

applied to gifts absolute or contingent, and not to gifts vested liable to be divested. The decision of North J. in *Wells, In re*, is that a person entitled to a vested interest for life is, on attaining twenty-one, the person ultimately entitled to the property within sub-sect. 2 [of sect. 43 of the Conveyancing Act, 1881]. North, J., I think, thought as I do, that "property" means the income whose accumulations are being dealt with. The C.A. in *Humphreys, In re*, was again dealing with an immediate vested life interest. That decision approved *Wells, In re*, and, while I feel some difficulty by reason of the fact that the decision was rested upon finding in the will an expression of a contrary intention, within sub-sect. 3 of sect. 43, I do not think there is anything in it to preclude me from coming to the conclusion that "property" in sub-sect. 2 means that property whose accumulation has produced the fund. The Court in *Humphreys, In re*, left open the point which I have now to decide.—P. 478

Mundy v. Howe (Earl) (1793) 1 Bro. C. C. 221, applied, Mencher v. Young (1844) 2 Myl. & K. 480, 39 R. R. 250.—LEACH, M.R., Stocken v. Stocken (1838) 7 L. J. Ch. 305, 4 Myl. & Cr. 95.—COTTENHAM, L.C.; affirming (1837) 4 Sim. 152.—SHADWELL, V.-C., S.C. (1838) 1 L. J. Ch. 278; 2 Myl. & K. 489, 2 Jur. 693; commented on, Thompson v. Griffin (*post*, col. 1811), Ransome v. Burgess (1868) 36 L. J. Ch. 84, 1 R. 3 Eq. 773, 15 W. R. 189.—KINDERSELEY, V.-C.

Mundy v. Howe (Earl), Stocken v. Stocken, and Ransome v. Burgess, commented on, Kervison's Trusts, *In re* (1871) 40 L. J. Ch. 637; 1 R. 12 Eq. 422, 25 L. T. 57, 19 W. R. 967.—MALINS, V.-C.

Mundy v. Howe (Earl), commented on, Ransome v. Burgess, partly disapproved, Wilson v. Turner (1885) 22 Ch. D. 521, 52 L. J. Ch. 270, 48 L. T. 370, 31 W. R. 433.—C.A. JESSEL, M.R.—It is said that this is a contract with the father as part of the settlement, and that it has been so decided in *Mundy v. Howe* (Earl). The decision referred to went a step further. It laid down that it was not only a contract with the father, but it was a contract which entitled the father to get rid of the rule of equity which said that a power or trust for the maintenance of the infants was to be exercised and used with a view to the benefit of the infants, and not for the benefit of the father; and therefore, if the father were able to maintain the children, it was not intended to relieve him from the liability so to do. That was held no doubt in the first case under a will; the benefit that the testator meant was a benefit to the child on principle. But it is difficult to see how the construction of a marriage settlement can be different from that of a will. That decision has been commented on several times, notably by Kindersley, V.-C. in *Ransome v. Burgess*, and by Malins, V.-C. in *Kervison's Trusts, In re*, and I think their criticisms are well founded. On the other hand, considering the number of times *Mundy v. Howe* (Earl) has been recognised in this Court, it is quite impossible now for this Court to say that that case is not law and not binding upon it. But it does appear to me, having regard to the dissatisfaction of so many judges, and considering the effect of that decision, that it is not

part of our duty to carry it any further. In *Ransome v. Burgess*, as appears from the report, both in the authorised reports and in the Law Journal, this point was not argued, and was not decided by the judge, and, indeed, when he sums up the case, he states it thus (on p. 780): "If the language of the settlement is so framed as to express a trust to apply the income or any part of the income in maintaining the children, although the *quantum* of income to be so applied is left to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for the maintenance of his children applied for that purpose without reference to his ability to maintain them, but if the language of the settlement expresses merely a power so to apply the income or any part thereof to the maintenance of the children, then the father is not so entitled." So that, as he states it, he takes it to be clear in the case before him that it was a trust, as he had already stated in a former part of his judgment, exactly like the case of *Mundy v. Howe (Earl)*. Having, therefore, regard to this point having escaped notice, and to the decision of the Court, and having regard to the other points which I have mentioned, I think we are not bound to follow the decision in *Ransome v. Burgess*, and that decision is not supported by the authority of *Mundy v. Howe (Earl)*, and is not supported by any independent principle—pp. 524, 525.

LINDLEY, J.—Then when you come to the case before Kindersley, V.-C. (*Ransome v. Burgess*), I confess I am unable to distinguish that case from the present. But then he did this, he extended, and in my opinion erroneously extended, the previous decisions. Taking the principles correctly, he put a construction on the clause which I confess I do not think the word warranted, and I decline to be a party to extending the rule he followed—p. 528. BOWEN, J. concurred.

Wilson v. Turner (supra), distinguished.

• *Kerrison's Trusts, In re (supra)*, Thompson v. Griffin (1811) Cr. & Ph. 817, 5 Jun. 90.—GOTTENHAM, L.C., *Hawkins v. Watts* (1854) 7 Sim. 199; 40 R. R. 106—V.-C., and *Mundy v. Howe (Earl)*, discussed.

Malcomson v. Malcomson (1885) 17 L. R. Ir. 69—C.A. ASHBORNE, L.C., FITZGIBBON, HARRI and SAISH, L.Js.

Wilson v. Turner, considered and applied.

Bryant, In re, Bryant v. Hickley (1893) 63 L. J. Ch. 107; [1894] 1 Ch. 324; 8 R. 32; 70 L. T. 301, 42 W. R. 183—CHITTY, J.

7 PROCEEDINGS

Brooke v. Mostyn (Lord) 33 Beav. 457, 10 Jur. (N.S.) 554; 12 W. R. 616—ROMILLY, M.R., *reversed* (1864) 84 L. J. Ch. 65, 10 Jur. (N.S.) 1114; 2 De G. J. & S. 878; 11 L. T. 892, 18 W. R. 248—KNIGHT BRUCE and TURNER, L.Js., L.J. *reversed*, now *Mostyn v. Brooke* (1866) L. R. 4 H. L. 304—H. L. (E).

[The reversal in the H. of L. did not affect the law as laid down in the Court below.]

Brooke v. Mostyn (Lord), referred to, Fadelle v. Bernard (1871) 19 W. R. 555—ROMILLY, M.R.; distinguished, Conks v. Boswell (1886) 55 L. J. Ch. 761; 11 App. Cas. 232; 55 L. T. 82—H. L. (B.). EARL OF SELBORNE, LORDS BLACKBURN, WATSON, BRANWELL and FITZGERALD.

Evroy v. Nicholas (1733) 2 Eq. Ch. Abr. 188; S. O. nom. *Esvon v. Nicholas*, 1 De G. & Sm. 118, n., discussed.

Stikeman v. Dawson (1847) 16 L. J. Ch. 205; 1 De G. & Sm. 90, 4 Rail Cas. 585, 11 Jur. 214—KNIGHT BRUCE, V.-C. 8 v. judgment at length.

Bartlett v. Wells (1862) 31 L. J. Q. R. 57; 1 B. & S. 836; 8 Jur. (N.S.) 762, 5 L. T. 607; 10 W. R. 229—Q.B.; *De Roo v. Foster* (1862) 112 C. B. (S.S.) 372—C.P.; and *Stikeman v. Dawson*, followed.

Miller v. Blankley (1878) 38 L. T. 527.

GROVE, J.—Of the Chancery cases cited the strongest in favour of the defendant is the second of the two bankruptcy cases I have mentioned, viz., *Lynch, Ex parte, Lynch, In re* [(1876) 15 L. J. Bk. 48, 2 Ch. D. 227. See "BANKRUPTCY," col. 97]. In that case the facts were, that an infant trader gave two acceptances in respect of money due for goods sold and delivered to him, which were dishonoured. After he came of age the creditors in respect of such goods presented a bankruptcy petition against him, the act of bankruptcy alleged being, that he had, a fortnight before he came of age, filed a liquidation petition under which the creditors had failed to come to any resolution. And it was held that the petitioning creditors were entitled to an adjudication of bankruptcy. I am far from saying that this case is not distinguishable from the one we are deciding. But both the County Court judge, and the chief judge on appeal, decided on the ground which is based here, that if an infant has been held out and dealt with as a trader, he can be made a bankrupt in respect of a trade debt, although they also decided on another ground. We cannot, however, upon the authority of that case come to a decision wholly different from that arrived at in *Bartlett v. Wells* and *De Roo v. Foster*. No case has been cited which goes the length of saying that, to an action in respect of a debt contracted in the course of trading during infancy, the defence of infancy cannot be set up. All the Chancery authorities cannot be reconciled because *Stikeman v. Dawson* is an authority for deciding as we are doing. That case was a stronger one against the infant than this, in that the party dealt with him under the supposition that he was of full age, which is not stated in the plaintiff's evidence in this case. Yet there it was held that a man cannot be charged, after his majority, in respect of his dealings during his minority, merely because the other party, in consequence of such dealing, believed he was not a minor.

p. 529.

LINDLEY, J. to the same effect.

Plasket v. Beeby (1804) 4 East 489; 1 Smith 284—K.B.; *Uvedale v. Uvedale* (1744) 3 Ark. 117; *Chaplin v. Chaplin* (1786) 8 P. Wms. 365; *Fountain v. Osine* (1718) 1 P. Wms. 504; *Powell v. Robins* (1802) 7 Ves. 209; *Pope v. Gwyn* (1787) 8 Ves. 28, n.; 2 Dick. 683; and *Spencer v. Boyes* (1798) 4 Ves. 370, 4 R. R. 216, discussed.

Price v. Carver (1837) 3 Myl. & Cr. 157.—GOTTENHAM, L.C.

Price v. Carver, followed.

Williamson v. Gordon (1812) 10 Ves. 114; 12 R. R. 149, and *Wajah v. Trevannion*.

(1848) 16 Sim. 180; 12 Jur. 547.—SHADWELL, V.C., *referred to*.

Newbury v. Marten (1851) 15 Jur. 166.—CRANWORTH, V.-C. *discussed and applied*.
Mellor v. Porter (1832) 53 L. J. Ch. 178, 25 Ch. D. 188; 50 L. T. 49; 82 W. R. 271.—KAY, J.

Pennington v. Alvin (1828) 1 Sim. & S. 264; 1 L. J. (O.S.) 202.—LEACH, V.-C., *questioned*.

Nalder v. Hawkins (1838) 2 Myl. & K. 243, Coop. t. Brough 175, 39 R. R. 100.

BROUGHAM, L.C.—It is clear that the Court always expects a next friend to be a person of substance. Yet the language of the report of a late case, *Pennington v. Alvin*, would even give reason to suppose that if a person notoriously penniless, who had seduced the infant's mother, been for months in execution on the suit of the husband and father for adultery, and taken the benefit of the Insolvent Act, had come forward as next friend of the infant, and not of the mother, the Court would hardly have made him find security for costs.—pp. 248—249.

Pennington v. Alvin, *questioned*.
Dowden v. Hook (1846) 11 L. J. Ch. 383; 8 Beav. 399; 9 Jur. 544.—LANGDALE, M.R.

Pennington v. Alvin, *followed*.
Drinan v. Mannix (1842) 3 Dr. & War 154; 2 Con. & L. 87, 5 Ir. Eq. R. 162, 190.—SUGDEN, L.C.; Stevens v. Williams (*post*).

Dowden v. Hook, *discussed*. Coulling v. Coulling (1816) 11 L. J. Ch. 385, 8 Beav. 463; 9 Jur. 587.—LANGDALE, M.R.; McKeon v. Walsh (*post*).

Drinan v. Mannix (*supra*), *followed*.
Stevens v. Williams (1851) 21 L. J. Ch. 57; 1 Sim. (N.S.) 545.—CRANWORTH, V.-C.; McKeon v. Walsh (1851) 1 Ir. Ch. R. 608.—M.R.

Stevens v. Williams, *followed*.
Hind v. Whitmore (1856) 26 L. J. Ch. 394; 2 K. & J. 458; 4 W. R. 379.—WOOD, V.-C.

Hind v. Whitmore, *not followed*.
Payne, In re, Randle v. Payne (1883) 23 Ch. D. 288; 52 L. J. Ch. 544; 48 L. T. 194, 81 W. R. 500.—G.A.

COTTON, L.C.—There is no case in point except *Hind v. Whitmore*, in which there is an expression of opinion by Wood, V.-C., that the rule ought not to be extended to such a case as we have before us. But a married woman stands now on a different footing from that on which she stood at that time. She can sue without a next friend by leave of the Court under Ord. XVI. r. 8, with or without security for costs, as the Court may direct. Therefore it cannot be said that she is prevented from suing because she cannot find a next friend. We must, therefore, lay down the rule that a married woman cannot be allowed to bring a fresh action till the costs of the former suit are paid. She must take care to select a next friend who is a responsible person.—p. 290.

LINDLEY, J. to the same effect.

Furtado v. Furtado (1842) 6 Jur. 227.—LYNDHURST, L.C., *explained*.
Cox v. Wright (1863) 2 N. R. 436.

KINDERSLEY, V.-C.—*Furtado v. Furtado* was an appeal, on the ground of irregularity, from an order removing a next friend on a motion by a

former solicitor for the infant in that suit. The next friend had appeared, by counsel, on the motion, and, as the Chancellor remarked, might have consented to the removal. The dismissal of the appeal in *Furtado v. Furtado* depended, therefore, on the peculiar circumstances of the case, and did not set aside the general rule.—ib.

Lindsay v. Tyrrell (1857) 2 De G. & J. 7, 5 W. R. 482, 617.—CRANWORTH, L.C., KNIGHT BRUCE and TURNER, L.J., *affirming* 24 Beav. 124, 3 Jur. (N.S.) 1014.—ROMILLY, M.R., *referred to*.
A. B. (an infant), In re (1885) 1 Times L. R. 657.—CHITTY, J.

8. CUSTODY AND EDUCATION.

Hartley v. Smith, 6 L. T. 681; 10 W. R. 750.—STUART, V.-C., *reversed*, (1892) 6 L. T. 734; 10 W. R. 763.—KNIGHT BRUCE and TURNER, L.J.

Logan v. Fairlee (1821) Jacob 193; 23 R. R. 28.—ELDON, L.C., *followed*.
Stephens v. James (1833) 1 Myl. & K. 627; 36 R. R. 402.—BROUGHAM, L.C.

Logan v. Fairlee and Stephens v. James, *referred to*.
Hope v. Hope (1854) 23 L. J. Ch. 682, 4 De G. M. & G. 328; 2 W. R. 608.—CRANWORTH, L.C.

Hope v. Hope, *referred to*, Brown v. Collins (1833) 53 L. J. Ch. 368, 25 Ch. D. 5b (*supra*, col. 1289), *applied*, Willoughby, In re (1885) 54 L. J. Ch. 1122, 30 Ch. D. 324.—KAY, J., *affirmed*, G.A. *See post*, col. 1313.

Dawson v. Jay (1854) 3 De G. M. & G. 764.—CRANWORTH, L.C.; and Johnstone v. Beattie (1843) 10 Cl. & F. 424; 7 Jur. 1023.—H.L. (E.). LYNDHURST, L.C., LORDS COTTENHAM and LANGDALE, LORDS BROUGHAM and CAMPBELL *dissenting* (*see judgments at length*); *affirming* 8 C. non Beattie v. Johnstone (1841) 10 B. C. 300, 1 Ph. 17.—LYNDHURST, L.C., *explained*.

Stuart v. Stuart (*or* Moore), *or* Stuart v. Bute (Marquis) (1861) 4 Macq. H. L. 1; 9 H. L. Cas. 440; 7 Jur. (N.S.) 1129, 4 L. T. 382, 9 W. R. 356, 722.—H.L. (SC.), *affirming* 8 C. non Bute (Marquis) v. Stuart, 2 Giff. 582.—STUART, V.-C. CAMPBELL, L.C.—I must use the freedom to observe, that whatever opinion the Scotch judges may justly form of the decision of this House in *Johnstone v. Beattie*, they would have acted with more dignity and more magnanimously as well as more judicially, if they had calmly and promptly considered what was for the benefit of the infant, and had recollected that a Court may not only be consumed for exceeding its jurisdiction, but for declining to exercise its jurisdiction for the relief of a suitor, from the apprehension that in another cause its jurisdiction has been unjustifiably encroached upon by another Court. I can take upon myself to say, that *Johnstone v. Beattie*, whether properly or improperly decided, is no authority whatever for the interlocutor . . . appealed against . . . There is only one other case which I think I am called upon to notice—*Dawson v. Jay*, before Cranworth, L.C. As at first stated at the bar, it certainly seemed closely in point, and it alarmed me much, for we were told that an American

infant, who had a guardian regularly appointed by the Supreme Court at New York, having been fraudulently brought to England against the will of the guardian, Lord Cranworth had refused to interfere, and would not order the infant to be delivered up to the injured guardian. But the case being examined, it turns out that the infant came to England with the entire concurrence of the guardian originally appointed, who continued guardian at the time of the removal, and that it was another guardian, afterwards appointed, with doubtful regularity, who wished to get possession of the infant, and carry her back to America after she had been living several years in England. It further appeared that she was a British subject, although born in America, and the L.C. was thus called upon, without any offence being imputed to her, to sentence her to transportation to America by the decree of a Court of Equity.—pp. 63, 64.

LORD CRANWORTH.—I would make a passing observation upon *Johnstone v. Beattie*. Perhaps it might have been a decision more consonant with the principles of general law to have held there that every country would recognise the status of guardian in the same way as they would undoubtedly recognise the status of parent or the status of husband and wife. But supposing that not to have been the view taken by the House, then there is nothing in that decision of *Johnstone v. Beattie*, that could have been decided otherwise, or that could at all interfere with or touch the present question, for all that was decided there was, that the status of guardian not being a status recognised by the law of this country unless constituted in the country, it was not a matter of course to appoint a foreign guardian to be English guardian, but was only a matter to be taken into consideration. That was all that was decided in that case.—p. 67. LORDS WENSLEYDALE, CHILMSFORD and KINGSDOWN concurred.

Johnstone v. Beattie, discussed, *Ewing v. Orl-Ewing* (1883) 53 L. J. Ch. 485, 9 App. Cas. 31, 50 L. T. 401, 32 W. R. 573.—H. L. (H.), referred to, *Ewing v. Orl-Ewing* (1885) 10 App. Cas. 453, 53 L. T. 826.—H. L. (SC).

Dawson v. Jay (*supra*), discussed and explained, *Nugent v. Vetsera* (1866) 35 L. J. Ch. 777, L. R. 2 Eq. 704, 12 Jur. (N.S.) 781; 15 L. T. 38; 14 W. R. 960.—WOOD, V.-C., applied, *Magee*, in re (*post*).

Stuart v. Stuart (*supra*), discussed. *Nugent v. Vetsera* (1866) 35 L. J. Ch. 777, L. R. 2 Eq. 704, 12 Jur. (N.S.) 781; 15 L. T. 38; 14 W. R. 960.—WOOD, V.-C., applied, *Magee*, in re (*post*).

Nugent v. Vetsera, referred to, *Willoughby*, in re (1885) 54 L. J. Ch. 1122; 30 Ch. D. 324; 53 L. T. 926, 33 W. R. 850.—G.A. COTTON and LINDLEY, L.J., applied, *Magee*, in re (1888) 31 L. R. 518.—PORTER, M.R.

Whitlock v. Waltham (1709) 1 Salk. 157, distinguished.

Clyde River Trustees v. Duncan (1853) 17 Jur. 701.—H. L. (SC). CRANWORTH, L.C. See judgment, n. v.

Reg. v. Howes (1860) 30 L. J. M. C. 47, 3 El. & Bl. 332, S. C. nom. *Bawford*, Ex parte, 3 L. T. 467; 9 W. R. 99, 8 Cox C. C. 405.—Q.B., *followed*, *Cartledge v. Cartledge* (or *Cartledge v. Cartledge*) (1862) 31 L. J. Mat. 85, 2 Sw. & Tr. 567; 8 Jur. (N.S.) 493; 6 L. T. 397; 10

W. R. 692.—SIR C. CRESSWELL; *Mallinson v. Mallinson* (1866) 35 L. J. Mat. 84, L. R. 1 P. 221, 14 L. T. 686; 11 W. R. 973.—SIR T. WILDER, referred to, *Edwards*, in re (1878) 42 L. J. Q. B. 99, S. C. nom. *Andrews*, in re, L. R. 8 Q. B. 153 (*post*, col. 1317); *Reg. v. Pinca* (1875) 41 L. J. M. C. 122, L. R. 2 C. C. 151, 32 L. T. 700, 21 W. R. 76, 13 Cox C. C. 138, *Agar-Ellis*, in re (1883) 53 L. J. Ch. 10, 24 Ch. D. 317.—C.A. (*post*, col. 1320); *Thomasset v. Thomasset* (1891) 63 L. J. P. 140, [1891] P. 295.—C.A. (*post*, col. 1320).

Reg. v. Birmingham (1848) 13 L. J. M. C. 1; 5 Q. B. 210, 3 G. & D. 153; 7 Jur. 1011.—Q.B.; referred to, *Salford Union v. Manchester Overseas* (1882) 52 L. J. M. C. 84; 10 Q. B. D. 172, 48 L. T. 119, 31 W. R. 380; 47 J. P. 419.—HAWKINS and WATKIN WILLIAMS, JJ., not applied, *Reg. v. Barnett Union* (1888) 57 L. J. M. C. 39, 58 L. T. 247, 52 J. P. 611.—HUDDLESTON, B. and MANISTY, J.

Blisset's Case (1774) Loft 718.—K. R. *doubted*. *Skinner*, Ex parte (1824) 9 Moore 278, 27 L. R. 710, *discussed*.

McClellan, Ex parte (1831) 1 Dow 81.—PATTISON, J.

Skinner, Ex parte, referred to. *Edwards*, in re (1878) 42 L. J. Q. B. 99; S. C. nom. *Andrews*, in re, L. R. 8 Q. B. 153 (col. 1317).

McClellan, Ex parte, commented on. *Beatrice Taylor*, in re (1887) 3 Times L. R. 718.—COLERIDGE, C.J. and DART, J.

Shelley v. Westbrook (1817) Jacob 266, n., 23 R. R. 47.—L.C. *followed*, *Wards v. Wards* (1849) 2 Ph. 786.—COTTENHAM, L.C., referred to, *Agar-Ellis*, in re (*post*, col. 1319).

Wellesley v. Beaufort (Duke) (1827) 2 Russ. 1; 5 L. J. (OS) Ch. 85; 34 R. R. 159.—L.C.; *affirmed*, nom. *Wellesley v. Wellesley* (1828) 2 Bligh (N.S.) 124, 1 Dow & C. 152, 35 R. R. 15.—H. L. (H.); referred to, *Goldsworthy*, in re (1876) 46 L. J. Q. B. 187; 2 Q. B. D. 75.—COLERIDGE, C.J. and POLLOCK, B.; *Agar-Ellis*, in re (*post*, col. 1319), A. B. (an Infant), in re (1883) 1 Times L. R. 631.—CHITTY, J.; applied, *Wards v. Wards* (*supra*).

Wards v. Wards (*supra*), applied. *Halliday's Estate*, in re, *Woodward*, Ex parte (1852) 17 Jur. 86.—TURNER, V.-C.; *Taylor*, in re (*post*), *Smart v. Smart* (*post*).

Halliday's Estate, in re, applied. *Taylor*, in re (1876) 46 L. J. Ch. 399; 4 Ch. D. 157, 36 L. T. 169, 25 W. R. 69.—JESSEL, M.R.; *Elderton*, in re (*post*), *Smart v. Smart* (*post*).

Taylor, in re, discussed, *Agar-Ellis*, in re (*post*, col. 1319); applied, *Elderton*, in re (1883) 53 L. J. Ch. 258; 25 Ch. D. 220; 50 L. T. 26; 32 W. R. 227; 48 J. P. 341.—PEARSON, J.

Taylor, in re, and *Elderton*, in re, *discussed* and applied.

Smart v. Smart (1892) 61 L. J. P. C. 38; [1892] A. C. 423; 67 L. T. 510; 56 J. P. 678.—P.C. LORDS WATSON, HOBHOUSE and MORRIS, SIR R. COUCH and LORD SHAND.

Rex v. De Mannerville (1804) 5 East 221; 1 Smith 368; 7 R. R. 693. *Rex v. Johnson* (1721) 1 Str. 579; 2 Lord Raym. 1555; *Rex v. Greenhill* (1836) 4 A. & E. 624; 6 N. & M. 244, *Rex v. Smith* (1787) 2 Str.

- 982; *Rex v. Delaval* (1762) 1 W. Bl. 410, 3 Burr. 1487; *Rex v. Hopkins* (1806) 7 B&A 579, 3 Smith 577, 8 R. R. 696, and *Rex v. Preston* (or *Preston, Ex parte*) (1817) 17 L. J. Q. B. 21; 5 D. & L. 283, 2 B. C. Rep. 169; —PATTERSON, J., *discussed*.
- Reg. v. (Alako, Race, In re* (1857) 7 Bl. & L. 186, 8 C. nom. Race, In re, 26 L. J. Q. B. 169, 3 Jun (N.S.) 335, 339, n., 1 H. & M. 420, n., 5 W. R. 222.—CAMPBELL, C.J. (for the Court) *And see post*.
- Rex v. Hopkins, applied*, Ullee, In re, Nawab Nazim of Bengal's Infants (1885) 53 L. T. 711—OULTY, J., affirmed, 51 L. T. 286.—C.A. BAGGALLAY, BOWEN and FRY, L.J.; *discussed*, *Bainardo v. McHugh* (1891) 61 L. J. Q. B. 721, [1891] A. C. 488.—H. L. (E.) (*post*, col. 1318).
- Reg. v. Clarke, Race, In re* (*supra*), *approved and applied*.
- Turner, *Ex parte*, Turner, In re (1872) 41 L. J. Q. B. 112, 25 L. T. 907—Q. B.
- Reg. v. Smith, Boreham, In re* (1853) 22 L. J. Q. B. 116; 1 B. C. C. 132, 17 Jun 21; 1 W. R. 130—BEELE, J., *Rex v. Delaval, Reg. v. Clarke; Rex v. Greenhill; Rex v. Isley* (1836) 5 L. J. K. B. 253, 5 A. & E. 111, 6 N. & M. 730, 2 H. & W. 196, and *Hakewill, In re* (1852) 12 C. B. 228, *discussed*.
- Edwards, In re (1873) 42 L. J. Q. B. 99, 8 C. nom. Andrews, In re, L. R. 8 Q. B. 153, 28 L. T. 326; 21 W. R. 180.—MILLER, J. (for the Court).
- Reg. v. Clarke, discussed*.
- Scanlan, In re (1888) 57 L. J. Ch. 718; 40 Ch. D. 200 (*post*, col. 1320); *Reg. v. Gynghall* (1893) 62 L. J. Q. B. 559, [1893] 2 Q. B. 232.—C.A. (*post*, col. 1320).
- Lyons v. Blenkins* (1821) Jacob 215, 23 R. R. 38.—BLISS, L.C., *discussed and distinguished*, Curtis, In re (1859) 28 L. J. Ch. 458, 5 Jur (N.S.) 1117, 7 W. R. 474.—KINDERSLEY, V.C. (*and see post*); *approved*, *Andrews v. Helt* (1873) L. R. 8 Ch. 622 (*post*, col. 1319), *Plowley, In re* (*post*, col. 1318); *explained*, *Agar-Ellis, In re* (1883) 53 L. J. Ch. 10; 24 Ch. D. 317—C.A. (*post*, col. 1318); *referred to*, *Scanlan, In re* (1888) 57 L. J. Ch. 718, 40 Ch. D. 200 (*post*, col. 1320).
- Fynn, In re* (1848) 2 De G. & S. 457; 13 Jur 483.—KNIGHT BRUCE, V.C.; *referred to*, Curtis, In re (*supra*), Goldsworthy, In re (1876) 16 L. J. Q. B. 187, 2 Q. B. D. 75 (*supra*, col. 1316), *Brown v. Collins* (1883) 53 L. J. Ch. 368, 25 Ch. D. 56 (*supra*, col. 1299), *applied*, A. B. (an Infant), In re (1886) 1 Times L. R. 657.—CHITTY, J.; *commented on*, *Smart v. Smart* (1892) 61 L. J. P. C. 38; [1892] A. C. 426—P.C. (*supra*, col. 1316), *discussed and applied*, *Reg. v. Gynghall* (1893) 62 L. J. Q. B. 559, [1893] 2 Q. B. 232—C.A. (*post*, col. 1320).
- Curtis, In re (*supra*), *approved*, *Agar-Ellis, In re* (*supra*), *referred to*, *P. v. P.* (1902) 71 L. J. Ch. 415; [1902] 1 Ch. 698 (*post*, col. 1321).
- Matthews, In re* (1864) 13 Ir. C. L. R. 233, *explained*, *Reg. v. Barnardo* (1889) 58 L. J. Q. B. 553, 23 Q. B. D. 305, 61 L. T. 547, 37 W. R. 789; 51 J. P. 132—C.A. ESHER, M.R., COTTON and LINDLEY, L.J.; *Reg. v. Barnardo, Gossage's Case* (1890) 59 L. J. Q. B. 845; 24 Q. B. D. 283, 38 W. R. 315—C.A., ESHER, M.R. and FRY, L.J. *
- Knox, Ex parte* (1804) 1 B. & C. (N.R.) 148, 8 R. R. 72, *approved*, *Reg. v. Nash, Carey, In re* (1888) 52 L. J. Q. B. 442, 10 Q. B. D. 451, 43 L. T. 447; 31 W. R. 420—C.A. JESSUP, M.R., LINDLEY and BOWEN, L.J., *discussed*, *Barnardo v. McHugh* (*post*).
- Lloyd, In re (1841) 3 Man. & G. 547; 1 Scott (N.) 200, 5 Jur 1198, *commented on*, *Reg. v. Nash* (*supra*), *Llumphrys v. Polak* (*post*).
- Reg. v. Nash, Carey, In re* (*supra*), *applied*, Ullee, In re (1887) 53 L. T. 711—CHITTY, J. (*supra*, col. 1317), *followed*, *Kerr, In re* (*post*), *approved*, *Bainardo v. McHugh* (*post*).
- Ord v. Blackett* (1721) 9 Mod. 116, *applied*, *Kerr* (or *McWhineth*), In re (1889) 24 L. R. 1r 59—C.A. ASHBOURNE, L.C., FITZGIBBON, BARRY and NASH, L.J.
- Rex v. Moseley* (1798) 5 East 224, n., 7 R. R. 695, n., and *Rex v. Soper* (1793) 5 Term Rep. 278, 2 R. R. 597, *discussed*, *Bainardo v. McHugh* (1891) 61 L. J. Q. B. 721; [1891] A. C. 388; 65 L. T. 423, 40 W. R. 37, 55 J. P. 628.—H. L. (E.) HALSHURY, L.C., LORDS HERSCHELL and HANSEN, *affirming*, S. C. nom. *Reg. v. Barnardo, Jones's Case* [1891] 1 Q. B. 194.—C.A. ESHER, M.R., LINDLEY and LOPES, L.J. *And see* *Custody of Children Act*, 1891 (54 & 55 Vict. c. 3), s. 3.
- Bainardo v. McHugh, applied*.
- Humphrys v. Polak* (1901) 70 L. J. K. B. 752; [1901] 2 K. B. 385, 85 L. T. 103, 49 W. R. 612.—C.A. V. WILLIAMS and STIRLING, L.J.
- Plowley, In re, Vidler v. Collyer* (1849) 47 L. T. 283—BACON, V.C., *affirmed*, C.A., *approved*.
- Agar-Ellis, In re, Agar-Ellis v. Lascelles* (1883) 53 L. J. Ch. 10, 24 Ch. D. 317; 50 L. T. 161; 32 W. R. 1—C.A. BRETT, M.R., COTTON and BOWEN, L.J.
- Hopkins, Ex parte* (1732) 3 P. Wms. 152, *report commented on*, *Spence, In re* (1817) 16 L. J. Ch. 309, 2 Ph. 252, 11 Jur 399—GOTTENHAM, L.C., *discussed*, *Reg. v. Gynghall* (1893) 62 L. J. Q. B. 559; [1893] 2 Q. B. 232.—C.A. (*post*, col. 1320), O'Hara, In re (*post*, col. 1320).
- Spence, In re* (*supra*), *referred to*, *Brown v. Collins* (*supra*); *Rosenberg v. Lando* (1883) 48 L. T. 478—CHITTY, J., *applied*, A. B. (an Infant), In re (1885) 1 Times L. R. 657—CHITTY, J., *approved*, *McGrath, In re* (1892) 62 L. J. Ch. 205, [1893] 1 Ch. 143.—C.A. (*post*, col. 1320), *discussed*, *Magees, In re* (1893) 31 L. R. Ir. 513, —PORTER, M.R.
- Villars v. Mellish* (1737) 2 Swanst 533, *Talbot* (Lord) *v. Shrewsbury* (Earl) (1810) 9 L. J. Ch. 125, & Myl. & Cr. 672, & Jun 380—L.C., and *North, In re* (1847) 11 Jur. 7.—KINDERSLEY, V.C., *discussed*.
- Reg. v. Clarke* (1857) 7 Bl. & L. 186, 8 C. nom. *Ince, In re*, 26 L. J. Q. B. 169 (*col. 1317*).

Talbot (Lord) v. Shrewsbury (Earl) (*supra*), explained, Hill v. Hill (1862) 31 L. J. Ch. 505 (*post*); referred to, Scanlan, in re (1888) 57 L. J. Ch. 718 (*post*, col. 1320); Grey, in re (*post* col. 1321).

Meade, in re (1871) 1 R. 3 E. q. 98; 19 W. R. 313.—O'HAGAN, L.C. (see judgment), approved, Andrews v. Salt (1873) L. R. 8 Ch. 622—L. J. 53 (*post*), followed, Grimes, in re (1877) 1 R. 11 E. q. 465.—HALL, L.C., Agar-Ellis, in re (*post*), commented on, Magces, in re (*post*).

Grimes, in re, commented on Magces, in re (1893) 31 L. J. R. 11 513—PORTER, M. R.

Bligh v. Bligh (1836) Seton on Decrees (3rd ed.), vol. ii p. 714, followed. Newbery, in re (*post*, col. 1320).

Stourton v. Stourton (1857) 26 L. J. Ch. 354, 8 De G. M. & G. 790, 3 Jun. (N.S.) 527, 5 W. R. 418.—KNIGHT BRUCE and TURNER, L.J., commented on, Davis v. Davis (1862) 10 W. R. 245.—WOOD, V.-C.; explained, Hill v. Hill (1862) 31 L. J. Ch. 505; 8 Jur. (S.S.) 609, 6 L. T. 99; 10 W. R. 400.—WOOD, V.-C.; not applied, Newbery, in re (*post*), commented on, Hawksworth v. Hawksworth (*post*).

Stourton v. Stourton, commented on Agar-Ellis, in re, Agar-Ellis v. Lascelles (1878) 10 Ch. D. 49; 48 L. J. Ch. 1; 39 L. T. 380, 27 W. R. 117.—C.A., affirming, with a variation, MALLINS, V.-C. JAMES, L.J. (for self, BAGGALLAY and THESIGER, L.J.)—We are asked in this case ourselves privately to examine the children, and to satisfy ourselves by that examination that these children, of the ages I have mentioned, have, to use the language of *Stourton v. Stourton*, "received religious impressions to a depth and an extent rendering dangerous and improper any attempt at important changes in them," and so to satisfy ourselves that the father is about to abuse his parental authority by seeking to disturb such religious convictions. With all respect to the eminent judges who decided *Stourton v. Stourton*, we should decline to examine a child of such very tender years as the child there was.—p. 73.

And see *post*, col. 1320.

Anstin, in re, Anstin v. Anstin (1866) 34 L. J. Ch. 499, 4 De G. J. & S. 716, 1 Jun. (N.S.) 101, 535, 13 W. R. 332, 761.—WESTBURY, L.C., affirming 34 Beav. 257, 11 L. T. 616.—M. R. approved, Hawksworth v. Hawksworth (1871) 40 L. J. Ch. 534; L. R. 6 Ch. 589; 25 L. T. 115, 19 W. R. 735.—JAMES and MELLISH, L.J., referred to, Scanlan, in re (*post*, col. 1320).

Hill v. Hill (*supra*), approved Andrews v. Salt (1873) L. R. 8 Ch. 622, 28 L. T. 636; 21 W. R. 616.—JAMES and MELLISH, L.J. And see *post*, col. 1320.

Hawksworth v. Hawksworth (*supra*) and Hill v. Hill, referred to. Edwards, in re (1878) 42 L. J. Ch. 99; 8 C. non. Andrews, in re, L. R. 8 Q. B. 153 (*supra*, col. 1317); Agar-Ellis, in re (*supra*).

Hawksworth v. Hawksworth, Andrews v. Salt (*supra*), and Hill v. Hill, applied, Clarke, in re (1882) 51 L. J. Ch. 702; 21 Ch. D. 817; 47 L. T. 84; 31 W. R. 37.—KAY, J. and see *post*; discussed,

Scanlan, in re (1888) 57 L. J. Ch. 718; 40 Ch. D. 200 (*post*).

Agar-Ellis, in re (*supra*), referred to, Agar-Ellis, in re, Agar-Ellis v. Lascelles (1888) 53 L. J. Ch. 10, 21 Ch. D. 317; 50 L. T. 161, 32 W. R. 1.—C.A. BRETT, M.R., COTTON and BOWEN, L.J.

Agar-Ellis, in re, discussed Skinner v. Orde (1871) L. R. 4 P. C. 60; 8 Moore (N.S.) P. C. 291.—P.C. SIR J. COLVILE, JAMES and MELLISH, L.J., SIR M. SMITH and SIR R. COLLIER, referred to, Scanlan, in re (1888) 57 L. J. Ch. 718, 40 Ch. D. 200, 59 L. T. 599, 36 W. R. 842.—STIRLING, J.

Andrews v. Salt (*supra*, col. 1319), followed Nevill, in re (1891) 60 L. J. Ch. 542, [1891] 2 Ch. 299; 65 L. T. 85; 7 Times L. R. 240, 170.—C.A. LINDLEY, BOWEN and KAY, L.J.

Clarke, in re (*supra*, col. 1319), applied Walsh, in re (1894) 13 L. R. 11 269.—SULLIVAN, L.C.

Clarke, in re, and Agar-Ellis, in re (*supra*), explained McGrath, in re (1892) 61 L. J. Ch. 549; [1892] 2 Ch. 496, 66 L. T. 850, 40 W. R. 683.—ROUTH, J., affirmed (*post*).

Scanlan, in re (*supra*), approved, Hawksworth v. Hawksworth (*supra*, col. 1319), discussed and distinguished McGrath, in re (1892) 62 L. J. Ch. 208; [1893] 1 Ch. 143, 2 R. 187; 67 L. T. 636, 41 W. R. 173.—C.A. LINDLEY, BOWEN and A. L. SMITH, L.J. And see Grey, in re [1902] 2 Ir. R. 584.—K.B.D.

Hawksworth v. Hawksworth, applied, Walsh, in re, and Clarke, in re, referred to, Magces, in re (1893) 31 L. R. 11 513.—PORTER, M. R.

De Manneville v. De Manneville (1801) 10 Ves. 52, 7 R. R. 340.—MILTON, L.C., referred to Gyngall, in re (or Reg. v. Gyngall) (1898) 62 L. J. Q. B. 559, [1893] 2 Q. B. 232; 41 L. 418, 69 L. T. 481, 57 J. P. 773; 9 Times L. R. 171.—C.A. BISHOP, M.R., KAY and A. L. SMITH, L.J.

Agar-Ellis, in re (*supra*), referred to, Reg. v. Gyngall (*supra*), Thomasset v. Thomasset (1894) 63 L. J. P. 140, [1891] P. 235; 6 R. 637; 71 L. T. 148, 42 W. R. 658.—C.A. LINDLEY and LOPES, L.J. See "HUSBAND AND WIFE" (*supra*, col. 1217); applied, Newton, in re (*post*).

McGrath, in re (*supra*), principle applied, Reg. v. Gyngall (*supra*), Newton, in re (1896) 65 L. J. Ch. 641 [1896] 1 Ch. 740; 73 L. T. 692; 44 W. R. 470.—C.A. LINDLEY and KAY, L.J., Grey, in re (*post*).

Reg. v. Gyngall, followed, Elliott, in re (1893) 32 L. R. Ir. 604.—Q.B.D., discussed, O'Hara, in re (1899) [1900] 2 Ir. R. 232.—C.A.

Newbery, in re (1866) 35 L. J. Ch. 330; L. R. 1 Ch. 263, 12 Jur. (S.S.) 154, 13 L. T. 781; 11 W. R. 460.—L.J., affirming L. R. 1 Eq. 431.—STUART, V.-C., referred to, Scanlan, in re (1888) 57 L. J. Ch. 718, 40 Ch. D. 200 (*supra*).

- Newbery, In re, and Besant, In re** (1879) 48 L. J. Ch. 197, 11 Ch. D. 508; 40 L. T. 469; 27 W. 711—C.A. JAMES, BACON, LALAY and BUSHWELL, *in re*, *referred to*.
- X. In re, X. v. Y.** (1899) 68 L. J. Ch. 265; [1900] 1 Ch. 526; 80 L. T. 311; 17 W. R. 315—C.A. LARDY, M.R., RIGBY and V. WILKINS, *in re*, *explained*.
- F. v. F.** (1902) 71 L. J. Ch. 115; [1902] 1 Ch. 588.
- FAIRWELL, J.**—The principles on which the Court acts in cases of this class are well settled. First, the father's religion is *prima facie*, the infant's religion—*religio sequitur patrem*—and the guardian's duty is to see that the ward is brought up in that religion, and is safeguarded against disturbing influences by any one holding the tenets of a different faith—*Newbery, In re*, and *Besant, In re*. Secondly, the Court, in considering the question of guardianship has regard before all things to the infant's welfare. It has regard, of course, to the rights of the father and mother, but the essential requirements of the infant are paramount—*Christie, In re* (*supra*, col. 1317). Thirdly, it is by no means in cases of misconduct only that the Court interferes to remove a guardian. Thus, in *X. In re, X. v. Y.*, which was cited as an authority in favour of the guardian, which really has no application, the "A" held on the facts that there was nothing calculated to prejudice the infant in that case—p. 116.
- And see judgment at length*
- Newbery, In re, and F. v. F.** *discussed*.
- Grey, In re** [1902] 2 L. R. 684—K.B.D.

INJUNCTION.

- Morris v. Colman** (1812) 18 Ves. 437; 11 R. R. 230, *distinguished*.
- Clarke v. Price** (1819) 2 Wils. 157; 18 R. R. 159—L.C.
- Morris v. Colman and Clarke v. Price**, *discussed*.
- Kemble v. Kean** (1820) 6 Sim. 333; 38 R. R. 125—SHADWELL, V.-C. *And see post*, col. 1322.
- Morris v. Colman**, *explained*.
- Kimberley v. Jennings** (1886) 6 L. J. Ch. 115; 6 Sim. 340; 35 R. R. 130—SHADWELL, V.-C.
- Kimberley v. Jennings**, *explained*.
- Morris v. Colman and Clarke v. Price**, *applied*.
- Diétrichsen v. Cabburn** (1845) 2 Ph. 52; 1 Coop. t. Cott. 72; 10 Jur. 601—COTTENHAM, L.C.
- Kemble v. Kean and Kimberley v. Jennings**, *discussed*.
- Morris v. Colman**, *explained*.
- Clarke v. Price**, *not applied*.
- Martin v. Nutkin** (1724) 2 P. Wms. 266; 10 R. R. 214; 10 Jur. 601—COTTENHAM, L.C.
- Barret v. Blagrove** (1800) 5 Ves. 555; 10 R. R. 214; 10 Jur. 601—COTTENHAM, L.C.
- Collins v. Plumb** (1810) 16 Ves. 454; 10 R. R. 214; 10 Jur. 601—COTTENHAM, L.C.
- Froment** (1818) 2 Swanst. 330; 10 R. R. 214; 10 Jur. 601—COTTENHAM, L.C.
- Diétrichsen v. Cabburn** (1845) 2 Ph. 52; 1 Coop. t. Cott. 72; 10 Jur. 601—COTTENHAM, L.C.
- Lumley v. Wagner** (1859) 28 L. J. Ch. 87; 5 De G. M. & G. 880; 3 Eq. R. 153; 3 W. R. 133—L.J.; Merchants' Trading Co. v. Banner (*supra*).

- Clarke v. Price**, *applied*.
- Morris v. Colman**, *discussed*.
- Merchants' Trading Co. v. Banner** (1871) 40 L. J. Ch. 515; 18 L. T. 861; 19 W. R. 707—ROMILLY, M.R.
- Kimberley v. Jennings**, *discussed*.
- Cornwall v. Hawkins** (1872) 41 L. J. Ch. 135; 26 L. T. 607; 30 W. R. 652—WIGGERS, V.-C.
- Diétrichsen v. Cabburn** (*supra*), *explained*.
- Donnell v. Bennett** (1883) 52 L. J. Ch. 414; 22 Ch. D. 335 (*post*, col. 1324).
- Collins v. Plumb** (*supra*), *distinguished*.
- Catt v. Tomlin** (*post*).
- Hooper v. Brodrick** (*supra*), *discussed*.
- Nantwich Local Board v. General Sewage Co** (1875) 44 L. J. Ch. 561; 18 L. R. 20 Eq. 127—BACON, V.-C.
- Gervais v. Edwards** (1842) 2 Dr. & War. 80; 1 Com. & L. 242; 4 Tr. R. 653—SUGDEN, L.C.; *distinguished*, Rigby v. G. W. Ry. (1840) 15 L. J. Ch. 265; 10 Jur. 488; 1 Ind. Cas. 175, 190—WIGHAM, V.-C.; reversed, L.C. (*see* "RAILWAY"), *adhered to*, Lumley v. Wagner (*supra*, col. 1321), *approved*, Blackett v. Bates (*post*, col. 1323).
- Lumley v. Wagner** (*supra*), *not applied*, Johnson v. Shrewsbury and Birmingham Ry. (1853) 22 L. J. Ch. 921; 3 De G. M. & G. 914; 17 Jur. 1015—L.J.; *distinguished*, South Wales Ry. v. Wythes (1854) 24 L. J. Ch. 87; 5 De G. M. & G. 880; 3 Eq. R. 153; 3 W. R. 133—L.J.; Merchants' Trading Co. v. Banner (*supra*).
- Webster v. Dillon** (1857) 3 Jur. (N.S.) 432—WOOD, V.-C., *approved*.
- Heathcote v. North Staffordshire Ry.** (1850) 20 L. J. Ch. 82; 2 Mac. & G. 100—COTTENHAM, L.C., and Lumley v. Wagner, *referred to*.
- De Mattos v. Gibson** (1859) 28 L. J. Ch. 198; 4 De G. & J. 276; 5 Jur. (N.S.) 347; 7 W. R. 162—CHALMERS, L.C. *And see* 8 C. (1858) 28 L. J. Ch. 165—L.J.; *And post*, col. 1323.
- Webster v. Dillon**, *referred to*, Montague v. Flockton (*post*, col. 1324), Whitwood Chemical Co. v. Haxman (*post*, col. 1325).
- Heathcote v. North Staffordshire Ry.**, *referred to*, Steele v. North Metropolitan Ry. (1857) 36 L. J. Ch. 540; L. R. 2 Ch. 237; 16 L. T. 192; 15 W. R. 597—L.C.; *principle applied*, Fothergill v. Rowland (1878) 13 L. J. Ch. 252; L. R. 17 Eq. 132 (*post*, col. 1324), *commented on*, Manchester Ship Canal Co. v. Manchester Racecourse Co. (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37—C.A. (*post*, col. 1326).
- Hills v. Croll** (*supra*), *approved*.
- Blackett v. Bates** (1865) 35 L. J. Ch. 324; L. R. 1 Ch. 117—L.C. (*post*, col. 1323).
- Holmes v. Eastern Counties Ry.** (1857) 3 K. & J. 675; 3 Jur. (N.S.) 737—V.-C.; and Lumley v. Wagner, *principle applied*.
- Hills v. Croll**, *observed on and doubted*.
- Catt v. Tomlin** (1859) 38 L. J. Ch. 655; L. R. 4 Ch. 654; 21 L. T. 158.
- SELWYN, L.J.**—At some future period of this case, upon a motion, as in *Hills v. Croll*, or at the hearing of the cause, circumstances may be shown which render it improper for the Court to interfere; it may be shown either that the plaintiff has placed himself in such a situation that he ought not to be allowed to exercise his

right, or that the defendant had not notice of the covenant when he purchased the property, and then possibly *Hills v. Croll* may have some application, though, in my opinion, it is very difficult to reconcile that case with *Lumley v. Wagner*, which has been repeatedly followed, and if *Hills v. Croll* is to stand with that case at all, it can only be upon its particular circumstances — (p. 660)

GIPFARD, J. — With respect to *Hills v. Croll*, that case, as was said by Lord St. Leonards in his judgment in *Lumley v. Wagner*, was decided according to its particular circumstances. Unless it is to be taken as laying down that the Court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply, if it is taken as going that length, it is contrary to *Lumley v. Wagner*, and must be considered as overruled — (p. 662).

Holmes v. Eastern Counties Ry (*supra*), distinguished.

Greenhill v. Isle of Wight, &c., Ry. (1871) 23 L. T. 885; 19 W. R. 345. — MALINS, V.-C.

Hills v. Croll, referred to, Bowen v. Hall (1881) 60 L. J. Q. B. 805, 6 Q. B. D. 333, 44 L. T. 75, 29 W. R. 367; 45 J. P. 373 — C.A. (see judgment of KILBORNE, L.C.); distinguished. • Donnell v. Bennett (1883) 52 L. J. Ch. 414, 22 Ch. D. 835 (post, col. 1321)

Catt v. Tourle (*supra*), referred to, Luker v. Dennis (1877) 17 L. J. Ch. 174, 7 Ch. D. 227, 37 L. T. 827, 26 W. R. 167 — PRY, J., Zealand (Earl) v. Hyalop (1882) 7 App. Cas. 427 — H. L. (sc.); dismissed, Donnell v. Bennett (post, col. 1324), referred to, Metropolitan Electric Supply Co. v. Gindler (1901) 70 L. J. Ch. 862, [1901] 2 Ch. 799 (post, col. 1326)

Blackett v. Bates (1865) 35 L. J. Ch. 324; L. R. 1 Ch. 117, 12 Jur. (N.S.) 151, 13 L. T. 656, 14 W. R. 319 — GRANWORTH, L.C., reversing 34 L. J. Ch. 815; 2 H. & M. 270; 11 Jur. (N.S.) 600, 12 L. T. 844, 13 W. R. 736 — WOOD, V.-C., distinguished, Wolverhampton and Walsall Ry. v. L. & N. W. Ry. (post); applied, Phipps v. Jackson (1887) 56 L. J. Ch. 559, 33 W. R. 878, — STIRLING, J.

Lumley v. Wagner (col. 1321), considered. Montague v. Flockton (post, col. 1324)

De Mattos v. Gibson (*supra*, col. 1322), referred to, Catt v. Tourle (*supra*, col. 1322), distinguished, Greenhill v. Isle of Wight, &c., Ry. (*supra*); referred to, Montague v. Flockton (post, col. 1321), Luker v. Dennis (*supra*). The Celtic King (1894) 63 L. J. Adm. 37; [1894] P. 175, 6 R. 75; 70 L. T. 562, 7 Asp. M. C. 440. — BARNES, J.; Whitwood Chemical Co. v. Hardman (1891) 60 L. J. Ch. 428; [1891] 2 Ch. 416. — C.A. (post, col. 1325), distinguished, Bucknall v. Tatam (1900) 88 L. T. 121. — C.A. A. L. SMITH and V. WILLIAMS, L.J.

Lumley v. Wagner, considered.

Wolverhampton and Walsall Ry. v. L. & N. W. Ry. (1873) L. R. 16 Eq. 133, 43 L. J. Ch. 131. SELBORNE, J.C. (for ROMILLY, M.R.). — With regard to *Lumley v. Wagner*, to which reference was made, really when it comes to be examined it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on

a highly artificial and technical ground, and to extend it to an ordinary case of breach and service, which is not properly a case of specific performance. The technical distinction being made that "I will not do a thing" is the agreement — "I will," even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think the form ought to be changed by the use of a negative rather than an affirmative. — (p. 140.)

Lumley v. Wagner, applied, Warnes v. Roulledge (1871) 43 L. J. Ch. 601, L. R. 18 Eq. 497, 30 L. T. 857, 22 W. R. 760. — JESSUP, M.R., referred to, Bowen v. Hall (*supra*, col. 1323).

Pothargill v. Rowland (1873) 43 L. J. Ch. 252; L. R. 17 Eq. 132; 29 L. T. 414, 22 W. R. 42. — JESSUP, M.R., and Wolverhampton and Walsall Ry. v. L. & N. W. Ry., considered. And see post, col. 1325

Lumley v. Wagner, explained. Donnell v. Bennett (1883) 22 Ch. D. 835; 52 L. J. Ch. 414; 48 L. T. 68, 31 W. R. 816; 47 J. P. 342

PRY, J. — It appears to me that the tendency of recent decisions, and especially *Endergill v. Houndland and Wolverhampton and Walsall Ry. v. L. & N. W. Ry.* is towards this view — that the Court ought to look at what is the nature of the contract between the parties, that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation, but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the Court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me — (p. 837. And see post, col. 1325).

Fechter v. Montgomery (1893) 33 Beav. 22. — ROMILLY, M.R., referred to, Montague v. Flockton (1873) 42 L. J. Ch. 677; L. R. 16 Eq. 189, 28 L. T. 580, 21 W. R. 668 — MALINS, V.-C. And see post, col. 1325.

Fechter v. Montgomery, distinguished. Donnell v. Bennett, referred to, Gimson v. Cunningham (1898) [1894] 1 Q. B. 125.

WILLS, J. — It is certainly true, as has been argued, that the Court will decline to interfere

by injunction where the plaintiff fails to do that which he has promised to do as part of the contract. An instance of this is afforded by *Frechter v. Montgomery*. . . In that case the plaintiff was bound to give the defendant a reasonable opportunity of acting, and failed to do so.—p. 180.

WRIGHT, J.—The contract contains a negative stipulation which the plaintiff seeks to enforce by injunction. Until the decision in *Donnell v. Bennett*, the doctrine in accordance with which such stipulations were enforced by injunction was seriously interfered with by the supposed rule that, where there could be no device for specific performance of a contract on the one side, there ought to be no injunction on the other side; but since the decision in *Donnell v. Bennett* this view has been somewhat altered.—p. 182

Fothergill v. Rowland (*supra*), discussed.

Kulth. Prowse & Co. v. National Telephone Co. (1894) 68 L. J. Ch. 373, [1894] 2 Ch. 147, 8 R. 776; 70 L. T. 276, 42 W. R. 380, 53 J.P. 573.—KEKEWICH, J.

Wolverhampton and Walsall Ry. v. L. & N. W. Ry. (*supra*), referred to.

Tailby v. Official Receiver (1888) 58 L. J. Q. B. 75, 13 App. Cas. 523; 60 L. T. 162, 87 W. R. 513.—H.L. (5); Whitwood Chemical Co. v. Hardman (*post*).

Lumley v. Wagner (*supra*), discussed.

Montague v. Flockton (col. 1824), discussed.

Whitwood Chemical Co. v. Hardman (1891) 60 L. J. Ch. 428, [1891] 2 Ch. 116; 64 L. T. 715, 39 W. R. 430.—C.A. LINDLEY and KAY, L.J. And see *post*, col. 1936.

Lumley v. Wagner, referred to.

Ryan v. Mutual Tontine Westminster Chambers Association (1892) 62 L. J. Ch. 232; [1893] 1 Ch. 116; 2 R. 156, 67 L. T. 820; 41 W. R. 146.—C.A. USHER, M.R., TOPES and KAY, L.J.; *reversing* 61 L. J. Ch. 895, [1892] 1 Ch. 427; 66 L. T. 277, 40 W. R. 379.—A. L. SMITH, J. (sitting for ROMER, J.). And see *post*, col. 1926.

Lumley v. Wagner, distinguished and not applied.

Donnell v. Bennett (col. 1824), referred to. Fothergill v. Rowland (*supra*, col. 1824). Wolverhampton and Walsall Ry. v. L. & N. W. Ry., and Ryan v. Mutual Tontine Westminster Chambers Association, *principles applied*.

Davis v. Foreman (1894) 64 L. J. Ch. 187; [1894] 3 Ch. 654; 8 R. 725, 43 W. R. 165.—KEKEWICH, J.

Fothergill v. Rowland, distinguished.

Wolverhampton and Walsall Ry. v. L. & N. W. Ry. and Donnell v. Bennett, applied. Metropolitan Electric Supply Co. v. Ginder (1901) 70 L. J. Ch. 862 (*post*, col. 1926).

Lumley v. Wagner, distinguished.

Whitwood Chemical Co. v. Hardman (*supra*), applied.

Mutual Reserve Fund Life Association v. New York Life Insurance Co. and Harvey (1896) 75 L. T. 528.—C.A. LINDLEY and A. L. SMITH, L.J.

Whitwood Chemical Co. v. Hardman and Lumley v. Wagner, discussed.

Ehrmann v. Bartholomew (1898) 67 L. J. Ch. 819, [1898] 1 Ch. 671, 78 L. T. 646; 46 W. R. 600.

ROMER, J.—In my opinion the injunction asked for by the notice of motion ought not to be granted. The application is based on clause 3 of the agreement between the parties, which contains a negative stipulation, and so far distinguishes this case from that of *Whitwood Chemical Co. v. Hardman*. As the present M.R. stated in *Whitwood Chemical Co. v. Hardman*, cases where negative stipulations in contracts of service are enforced by the Court ought not to be extended, and are to be regarded as anomalies which it would be very dangerous to extend. To enforce such a general negative stipulation as I find here would be, in my opinion, a dangerous extension, for here the stipulation extends to business of any kind, while the negative stipulations enforced in the *pro* cases, such as *Lumley v. Wagner*, were confined to special services.—p. 320.

Lumley v. Wagner, referred to. Robinson (William) & Co., Ltd. v. Heuer (1898) 67 L. J. Ch. 644, [1898] 2 Ch. 451; 79 L. T. 281; 47 W. R. 84.—C.A. LINDLEY, M.R., GUTTER and COLLINS, L.J.; *reversing* [1898] 1 Ch. 671.—NORRIS, J. (who had refused an injunction on the authority of *Ehrmann v. Bartholomew, supra*).

Ryan v. Mutual Tontine Westminster Chambers Association (*supra*, col. 1925).

Lumley v. Wagner, and Whitwood Chemical Co. v. Hardman (*supra*), applied. Alexander v. Mansons Proprietary, Ltd. (1900) 16 Times L. R. 131.—STILLING, J.

Ryan v. Mutual Tontine Westminster Chambers Association, discussed.

Wolverhampton Corporation v. Emmons (1901) 70 L. J. K. B. 429; [1901] 1 K. B. 515; 84 L. T. 407, 49 W. R. 563.—C.A. A. L. SMITH, M.R., COLLINS and ROMER, L.J.

Lumley v. Wagner, principle applied. Manchester Ship Canal Co. v. Manchester Racecourse Co. (1901) 70 L. J. Ch. 408, [1901] 2 Ch. 37, 84 L. T. 486; 49 W. R. 418.—C.A. RIGBY, V. WILLIAMS and STIRLING, L.J.

Whitwood Chemical Co. v. Hardman, explained.

Lumley v. Wagner, referred to. Metropolitan Electric Supply Co. v. Ginder (1901) 70 L. J. Ch. 862; [1901] 2 Ch. 799, 84 L. T. 818, 49 W. R. 508; 65 J.P. 619.—BUCKLEY, J. See judgment.

Metropolitan Electric Supply Co. v. Ginder, referred to.

Husey v. London Electric Supply Corporation (1902) 71 L. J. Ch. 313; [1902] 1 Ch. 411, 86 L. T. 160; 50 W. R. 420.—C.A. V. WILLIAMS, STIRLING and COZENS-BAWLEY, L.J.

East Lancashire Ry. v. Hattersley (1849) 8 Hare 73, considered.

Kirk v. The Queen (1873) L. R. 14 Eq. 558. WICKENS, V.-C.—*East Lancashire Ry. v. Hattersley*, the only authority which was cited for it, seems, I agree with Sir Roundell Palmer, to have proceeded to some extent on the consent or submission of the parties. It is not at all clear to me that Wigram, V.-C., would or could have made any order on it, if the parties had stood on then extreme rights; and there was at

least consent enough to make an appeal impossible. Moreover, it was a single case, and a part of the reasoning in the judgment was, I think, not unfavourably criticised by Sir Roundell Palmer. It was, no doubt, suggested by the Solicitor-General that this is a trespass in respect of which the Courts of law would, in the existing state of the law, grant an injunction in an action of trespass. The mere fact that it is a continuing trespass, in the sense in which this is a continuing trespass, seems to me in no way conclusive, and I should observe that the power of the Courts of law to grant an injunction in a case of this sort, is rather against than in favour of the supposition, that the Court of Chancery has the jurisdiction. Certainly I decline for the first time to hold that there is such a jurisdiction, though I entirely agree with the Solicitor-General that it would be very convenient, and that it would be very much better if the Court had it.—p. 570.

Frewin v Lewis (1838) 4 Myl & Cr. 249.—COTTENHAM, L.C., *reversing* 9 Sim. 66—V.C., *approved and adopted*, *Oldaker v. Hunt* (1855) 6 De G. M. & G. 376; 1 Jur. (N.S.) 788; 8 Eq. R. 671; 3 W. R. 297.—KNIGHT BRUCE and TURNER, L.J.J. and CRESSWELL and V. WILLIAMS, J.J.; *referred to*, *Att.-Gen. v. Manchester (Bishop)* (1867) L. R. 3 Eq. 486, 15 L. T. 646, 15 W. R. 673.—STUART, V.-C.

Shaw v. Jersey (Earl) (1879) 48 L. J. C. P. 808, 4 C. P. D. 120, 359, 28 W. R. 142.—COLERIDGE, C.J. and DENMAN, J., *affirmed*, C.A. BRITT, COTTON and THESIGER, L.J.J., *approved*.

Quartz Hill Consolidated Gold Mining Co. v Beall (1882) 51 L. J. Ch. 874, 20 Ch. D. 501; 46 L. T. 746, 30 W. R. 883—C.A. JESSEL, M.R., BAGGALLAY and LINDLEY, L.J.J.

* **Quartz Hill Consolidated Gold Mining Co. v Beall**, *principle applied*, *Armstrong v. Armit*, (1886) 2 Times L. R. 887—COLERIDGE, C.J. and DENMAN, J., *Poullett (otherwise Hinton) v. Chatto and Windus* (1887) 4 Times L. R. 85.—GRITTY, J.; *referred to*, *Pollard v. Photographic Co* (1888) 58 L. J. Ch. 251, 40 Ch. D. 845; 60 L. T. 418; 37 W. R. 266—NORTH, J., *adopted*, *Bonnard v. Perryman* (1891) 60 L. J. Ch. 617, [1891] 2 Ch. 269.—C.A. (*post*, col. 1833)

Day v. Brownrigg (1878) 48 L. J. Ch. 173, 10 Ch. D. 294, 39 L. T. 553, 27 W. R. 217—C.A. JESSEL, M.R., JAMES and THESIGER, L.J.J.; *reversing* 39 L. T. 220—MALINS, V.-C., *approved*

Quartz Hill Consolidated Gold Mining Co. v. Beall (1882) 51 L. J. Ch. 874, 20 Ch. D. 501—C.A. (*supra*).

Day v. Brownrigg, *dicta approved*.
North London Ry. v. G. N. Ry. (*post*, col. 1828).

Day v. Brownrigg, *applied*.
Street v. Union Bank of Spain (1885) 80 Ch. D. 156; 55 L. J. Ch. 31, 53 L. T. 262, 33 W. R. 901.

PEARSON, J.—I think I should be doing what both the late M.R. and the L.J.J., in *Day v. Brownrigg*, thought would be going beyond the jurisdiction of the Court if I were to grant an injunction where there was no attempt to interfere with trade; no legal injury done; but where there simply was a matter of inconvenience—*id.* 159.

Beddo v. Beddo (1878) 47 L. J. Ch. 388; 9 Ch. D. 89, 26 W. R. 570.—JESSEL, M.R., *approved*

Quartz Hill Consolidated Gold Mining Co. v Beall (1882) 20 Ch. D. 501—C.A. (*supra*)

Aslett v. Southampton Corporation (1880) 50 L. J. Ch. 31, 16 Ch. D. 143, 43 L. T. 161, 29 W. R. 117.—JESSEL, M.R., *not applied*

Donahoe v. Local Government Board (1892) 46 L. T. 300, 30 W. R. 334—PRY, J.

Aslett v. Southampton Corporation, *questioned*

Malmesbury Ry. v. Budd (1878) 45 L. J. Ch. 271, 2 Ch. D. 113.—JESSEL, M.R., and **Beddo v. Beddo**, *explained*.

Gaskin v. Balls (1879) 13 Ch. D. 324; 28 W. R. 552—C.A. JAMES, BAGGALLAY and THESIGER, L.J.J., *dicta approved*.

North London Ry. v. G. N. Ry. (1888) 11 Q. B. D. 30, 52 L. J. Q. B. 380, 48 L. T. 615; 31 W. R. 490—C.A.

BRITT, L.J.—No case has, I think, gone beyond what my own views on the subject are, unless it be *Aslett v. Southampton Corporation*, where apparently an injunction was granted in a case in which no Court before the Judicature Act would have granted an injunction; but it is not a case in which before the Judicature Act no Court would have given any remedy, because obviously before that Act there was a remedy by a *quo warranto*. In *Malmesbury Ry. v. Budd* the M.R. issued an injunction, but it was on the ground that the arbitrator had been guilty of corruption. And in *Beddo v. Beddo* the M.R. also issued an injunction, but that was on the ground that the arbitrator had been guilty of misconduct, the misconduct in that case being that the arbitrator, after he had assumed his authority as arbitrator, had become indebted to one of the suitors without the knowledge of the other side. Now I will not enter upon the case of *Hedley v. Bates* (*post*, col. 1331), because it is one about which there has been considerable discussion, and it is one about which the M.R. himself has said that he did not think he had so expressed himself as to make what he intended as clear as almost all his judgments are. Therefore the only case which goes beyond my own personal inclination as to the construction of this section is *Aslett v. Southampton Corporation*, and I doubt whether that case is rightly decided, but it is not now necessary to determine this. It seems to me that the dicta of James and Thesiger, L.J.J. in *Day v. Brownrigg* (*supra*, col. 1827) and *Gaskin v. Balls* are quite sufficient if authority were wanted for what we are now deciding—p. 37.

COTTON, L.J. to the same effect
And see "ARBITRATION" (*supra*, col. 54).

Beddo v. Beddo, *referred to*
Jackson v. Barry Ry. (1892) [1893] 1 Ch. 238; 2 R. 207, 68 L. T. 472; 9 Times L. R. 90—C.A. LINDLEY and BOWEN, L.J.J.; A. L. SMITH, L.J., *dissenting*.

Aslett v. Southampton Corporation (*supra*), *considered*

Richardson v. Methley School Board (1893) 62 L. J. Ch. 943, [1893] 3 Ch. 510, 3 R. 701—C.A. L. T. 308; 42 W. R. 27.—KIRKUP, J.

Southey v. Sherwood (1817) 2 Meriv. 435.—*strictly followed* *Quartz Hill v. Beall*, *supra*.

(1826) 5 B. & C. 173; 29 R. R. 207, 210; referred to, *Morgan v. M'Adam* (1866) 36 L. J. Ch. 228.—WOOD, V.-C. Pollard v. Photographic Co. (1888) 58 L. J. Ch. 251, 10 Ch. D. 315 (*supra*, col. 1327).

Barnett v. Chetwood (1720) 2 Mer. 411, n. n. and **De Bost v. Beresford** (1810) 2 Campb. 511, 11 B. R. 782, *disapproved*.

Gee v. Pritchard (1818) 2 Swanst. 414, 19 R. R. 87, *approved*.

Bank of England v. Anderson (1837) 7 L. J. Ch. 265; 2 Keen 328.—LANGDALE, M.R.

Clark v. Freeman (1848) 17 L. J. Ch. 142, 11 Beav. 112, 12 Jur. 149.—LANGDALE, M.R. (*And see post*, cols. 1330—1332).

Martin v. Wright (1833) 6 Sim. 207, 38 R. R. 120.—SHADWELL, V.-C.

Farna v. Silverlock (1856) 21 L. J. Ch. 632, 1 K. & J. 503, 3 W. R. 592; 8 O. 1 K. & J. 650, 3

Eq. L. 483, 3 W. R. 352.—WOOD, V.-C., *reversed on one point*, (1856) 26 R. J. Ch. 11, 6 De G. M. & G. 214, 2 Jur. (N.S.)

1008; 4 W. R. 731.—GRANWORTH, L.C., and **Routh v. Webster** (1847) 10 Beav. 561

—M. R. *disapproved*. *And see post*, cols. 1330—1332.

Austria (Emperor) v. Day (1861) 30 L. J. Ch. 690, 3 De G. F. & J. 217, 7 Jur. (N.S.) 639, 4 L. T. 494; 9 W. R. 712.—C.A. CAMPBELL, L.C.,

KNIGHT BRUCE and TURNER, L.JJ.

Austria (Emperor) v. Day, referred to, *Granworth v. Welmeley* (1866) 35 L. J. Ch. 352, 14 L. J. 1 Eq. 518; 12 Jur. (N.S.) 205, 14 L. T. 220; 14 W. R. 303.—WOOD, V.-C., *Fattison v. Gilford* (1874) 43 L. J. Ch. 524, 14 R. 18 Eq. 259,

22 W. R. 673.—JESSEL, M.R., *Hole v. Bradbury* (1879) 48 L. J. Ch. 673; 12 Ch. D. 880, 41 L. T. 163, 250, 28 W. R. 39.—FRY, J. *Rivière's Trade Mark*, in 16 (*plant*, col. 1331), *Stevens v. Chown* (1901) 70 L. J. Ch. 571, [1901] 1 Ch. 894, 84 L. T. 796; 49 W. R. 460, 65 J. P. 470.—FAR-

WELL, J., *And see post*.

Clark v. Freeman (*supra*), *commented on*, *Maxwell v. Hogg* (1867) 36 L. J. Ch. 438, 1 R. 2 Ch. 307; 16 L. T. 130; 15 W. R. 467.—TURNER and

CAIRNS, L.JJ.

Reg. v. Druff (1867) 16 L. T. 355.—BRAMWELL, B., *approved*.

Gee v. Pritchard (*supra*), **Austria (Emperor) v. Day**, and **Macaulay v. Shackell** (1827) 1 High. (N.S.) 96.—H.L. (B.). ELDON, L.C., *affirming* S. C. *nom.* Shackell v. Macaulay (1824) 3 L. J. (O.S.) Ch. 27.—L.C., *disapproved and applied*.

Clark v. Freeman, *commented on*.

Routh v. Webster, referred to.

Springhead Spinning Co. v. Riley (1868) 37 L. J. Ch. 889; 1 R. 6 Eq. 651; 19 L. T. 64; 15 W. R. 1138.—MALINS, V.-C. *And see col.* 1331.

Macaulay v. Shackell, *discussed*.

Hill v. Campbell (1875) 44 L. J. Q. P. 97, 1 L. R. 10 C. P. 222, 247; 32 L. T. 69; 23 W. R. 336.—C.P. *See judgment of* COLLIERIDGE, C.J.

Routh v. Webster and Springhead Spinning Co. v. Riley (*supra*), *applied*.

Dixon v. Holden (1869) L. R. 7 Eq. 488, 20 L. T. 367; 17 W. R. 462.—MALINS, V.-C.

Dixon v. Holden, followed.

Rollins v. Hinks (1872) 41 L. J. Ch. 358, 1 R. 13 Eq. 356, 26 L. T. 56, 20 W. R. 287.—MALINS, V.-C.

Dixon v. Holden, *observed on*.

Mulkern v. Ward (1872) L. R. 13 Eq. 619, 41 L. J. Ch. 464, 26 L. T. 881.

WIGKINS, V.-C.—But for this case I should have considered it perfectly well settled that the Court of Chancery will not restrain by injunction the publication of a libel. What was said by Lord Ellenborough in *Dabest v. Beresford* (*supra*), "that the L.C. would grant an injunction against the exhibition of a libellous picture," has been expressly disavowed by Lord Campbell in *Austria (Emperor) v. Day* (*supra*), and is inconsistent with the dictum of Lord Eldon in *Gee v. Pritchard* (*supra*), with that of Lord Langdale in *Clark v. Freeman* (*supra*), and with that of Sir L. Shadwell in *Martin v. Wright* (*supra*), and, lastly, it seems to me inconsistent with what may be clearly discovered to have been Lord Cottenham's opinion in *Fleming v. Newton* ((1848) 1 H. L. Cas. 363), for which opinion, it may be observed, he gives very strong reasons.

Dixon v. Holden has introduced a rule which, if not contrary to the doctrine of these cases, affords at least a very material qualification of it. It was laid down in that case that the Court will restrain the publication of a libel where it affects property or the potentiality of acquiring property, at least where the potentiality of acquiring property is professional or commercial. It is not for me to say that the rule so laid down is erroneous; but I think it was wholly new, and that nothing whatever was said in *Austria (Emperor) v. Day*, or in any other case, except possibly in the peculiar and very different case of *Springhead Spinning Co. v. Riley* (*supra*), which supports it in any way.

Routh v. Webster (*supra*) and **Clark v. Freeman** (col. 1328), *approved*.

Dixon v. Holden and Springhead Spinning Co. v. Riley, *disapproved*.

Prudential Assurance Co. v. Knott (1875) L. R. 10 Ch. 142, 44 L. J. Ch. 192, 23 W. R. 249, 31 L. T. 866.—C.A.

CAIRNS, L.C. (after referring to *Gee v. Pritchard* (*supra*, col. 1329), *Austria (Emperor) v. Day* (*supra*), *Clark v. Freeman*, *Martin v. Wright* (col. 1329), *Mulkern v. Ward* (*supra*), and *Fleming v. Newton* (*supra*), continued.

The only shadow of authority the other way is in *Dixon v. Holden*, decided by Malins, V.-C. in the year 1869. I say nothing about the decision in that particular case, and I do not mean to say that the decision is not capable of being maintained. It professes to proceed mainly upon a case of *Routh v. Webster*, because I observe that the V.-C. says (at p. 493), "*Routh v. Webster* is an authority going the whole length of what is asked here. In that case a joint stock company was established, having for its only object the carrying passengers by steamboat and omnibus at a cheap rate. The defendants, the provisional directors, had published prospectuses in which the name of the plaintiff was used without his authority as a trustee of the company. They also paid Morfey's into the bankers of the company to the plaintiff's accounts as trustee." That case appears, if I may say so, to have been quite rightly decided. The

difficulties in which the plaintiff might have been placed, especially at the time when that case was decided, looking at what was supposed then to be the state of the law as to such undertakings, are obvious; and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorised use of his name. It was upon the authority of that case that *Dixon v. Holden* was professed to be decided, but the V.-C. went further, and said thus (at p. 492) "The business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and, therefore, to be injured in his business is to be injured in his property. But I go further, and say, if it had only injured his reputation it is within the jurisdiction of this Court to stop the publication of a libel of this description, which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property. In this case I go on general principle, and I am fortified by authority. General principle is in favour of it, but authority is not wanting." And further on the V.-C. says (at p. 491). "In the decision I arrive at I beg to be understood as laying down, that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation." Now, in these opinions the V.-C. conceived that he was fortified by authority. The authorities cited are, *Fleming v. Newton*, which appears to me to be an authority exactly to the contrary. *Routh v. Webster*, which was an authority for preventing the improper use of a man's name against his will, *Clark v. Freeman*, where the injunction was refused, and where Lord Langdale said the Court would not interfere to prevent a libel, and the only other case mentioned, *Springhead Spinning Co. v. Riley*, decided by the V.-C. himself, upon which of course the learned judge must be taken to have expressed the same opinion as he expressed in *Dixon v. Holden*. I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this Court, and I cannot accept them as an authority for the present application.—p. 146. JAMES AND MELLISH, L.JS. concurred.

And see post.

Springhead Spinning Co. v. Riley (*supra*, col. 1329), adhered to, *Thorley's Cattle Food v. Massam* (*post*); commented on and not applied, *Temperton v. Russell* (No. 1) (1893) 62 L. J. Q. B. 300, [1893] 1 Q. B. 435, 4 R. 902, 68 L. T. 425; 41 W. R. 321.—C.A. BAKER, M.R., LINDLEY AND BOWEN, L.JS.

Clark v. Freeman (*supra*, col. 1328), not approved.

Riviere's Trade Mark, in re (1884) 26 Ch. D. 48; 53 L. J. Ch. 578; 60 L. T. 763; 32 W. R. 390.—C.A. SELBORNE, L.C. and COTTON, L.J. [*Clark v. Freeman* having been cited in argument to show that unless a person can be damaged in his business he has no ground of complaint.]

SELBORNE, L.C.—That case has seldom been cited but to be disapproved. Could not a professional man be injured in his profession by

having his name associated with a quack medicine?—p. 38.

Clark v. Freeman, referred to

Pollard v. Photographic Co. (1888) 58 L. J. Ch. 251, 40 Ch. D. 815 (*supra*, col. 1327)

Routh v. Webster (*supra*), followed.

Clark v. Freeman, commented on.

Walter v. Ashton (1902) 71 L. J. Ch. 899, [1902] 2 Ch. 282, 87 L. T. 196; 18 Times L. R. 145.—BURNES, J.

Prudential Assurance Co. v. Knott (*supra*, col. 1330), applied.

Hammersmith Skating Rink Co. v. Dublin Skating Rink Co. (1876) Ir. R. 10 154 235.—CHATTERTON, V.-C.

Prudential Assurance Co. v. Knott, considered.

Thorley's Cattle Food Co. v. Massam (1877) 6 Ch. D. 582, 46 L. J. Ch. 718.

MALINS, V.-C., although thinking that sect. 25, sub-sect. 8, of the Judicature Act, 1873, controlled the decision in *Prudential Assurance Co. v. Knott*, and that he was not fettered by that case, or prevented from granting an injunction, decided not to interfere upon an interlocutory application.

Prudential Assurance Co. v. Knott and *Thorley's Cattle Food Co. v. Massam*, considered.

Saxby v. Easterbrook and Hannaford (1878) 3 C. P. D. 889, 27 W. R. 188.

Held by COLERIDGE, C.J. and LINDLEY, J. that the Court has power to issue an injunction to restrain a defendant from publishing of the plaintiff, to the injury of his trade, matter which has been found by a jury to be libellous.

Prudential Assurance Co. v. Knott, referred to.

White v. Mellin (1895) 61 L. J. Ch. 308; [1895] A. C. 151.—H. L. (C) (*post*, col. 1334).

Saxby v. Easterbrook, referred to.

Thorley's Cattle Food Co. v. Massam (1880) 14 Ch. D. 763; 42 L. T. 851, 28 W. R. 966.—MALINS, V.-C., affirmed, C.A. JAMES, BAGGALLAY AND BRAMWELL, L.JS.

Thorley's Cattle Food Co. v. Massam (1880) and *Saxby v. Easterbrook*, disapproved.

Thomas v. Williams (1890) 49 L. J. Ch. 605; 14 Ch. D. 864, 18 L. T. 91, 28 W. R. 983.—PRY, J.

Saxby v. Easterbrook, adopted.

Bonnard v. Perryman (1891) 60 L. J. Ch. 617, [1891] 2 Ch. 269.—C.A. (*post*, col. 1333).

Thorley's Cattle Food Co. v. Massam, referred to.

Dicks v. Brooks (1880) 49 L. J. Ch. 12; 15 Ch. D. 22, 43 L. T. 71; 29 W. R. 87.—C.A. JAMES, BAGGALLAY AND BRAMWELL, L.JS.

Thorley's Cattle Food Co. v. Massam, distinguished.

Halsey v. Brotherhood (1881) 51 L. J. Ch. 233; 19 Ch. D. 386, 45 L. T. 640; 30 W. R. 279.—C.A. COLERIDGE, C.J., BAGGALLAY AND LINDLEY, L.JS.

Thomas v. Williams (*supra*), approved.

Quartz Hill Consolidated Gold Mining Co. v. Beall (1882) 20 Ch. D. 501.—C.A. (*supra*, col. 1327).

Thorley's Cattle Food Co. v. Massam and Thomas v. Williams, *principle applied*.
Hermann Loog v. Bean (1881) 53 L. J. Ch. 1128; 26 Ch. D. 306; 51 L. T. 442, 32 W. R. 994; 45 J. P. 708—C.A. COTTON, BOWEN and FRY, L.J. *And see post*

Thorley's Cattle Food Co. v. Massam, *followed*,
South Western Coal Co. v. North Eastern News Association (1893) 63 L. J. Q. B. 293, (1891) 1 Q. B. 133, 91 R. 240, 69 L. T. 814, 42 W. R. 322, 58 J. P. 196—C.A. ESHER, M.R., LOPES and KAY, L.J.; *applied*, Reddaway v. Banham (1896) 65 L. J. Q. B. 381; [1896] A. C. 199, 71 L. T. 287; 11 W. R. 938—L.R. (K.)

Dicks v. Brooks (*supra*), *discussed*, Halsey v. Brotherhood (*supra*); *referred to*, Burnett v. Tak (1882) 45 L. T. 718—KAY, J.; Household v. Fairburn (1881) 51 L. T. 198—KAY, J.

Marks v. Conservative Newspaper Co (1886) 3 Times L. R. 244—COLERIDGE, C.J.; *doubted by* KIRKEWICH, J., Hill v. Hart Davies (1892) 51 L. J. Ch. 815, 21 Ch. D. 798, 47 L. T. 82, 31 W. R. 22—KAY, J.; and Hermann Loog v. Bean (*supra*), *discussed*.

Coulson v. Coulson (1887) 3 Times L. R. 816—C.A. BIRIEL, M.R., LINDLEY and LOPES, L.J.; *approved*.
Liverpool Household Stores Association v. Smith (1887) 57 L. J. Ch. 85; 37 Ch. D. 170, 57 L. T. 770; 68 L. T. 204, 36 W. R. 485—C.A. COTTON and LOPES, L.J.; *affirming* KIRKEWICH, J.

• **Liverpool Household Stores Association v. Smith and Coulson v. Coulson**, *adopted*.
Bonnard v. Perryman (1891) 60 L. J. Ch. 617, [1891] 2 Ch. 269, 65 L. T. 506, 30 W. R. 435, 7 Times L. R. 153—C.A. COLERIDGE, C.J., ESHER, M.R., LINDLEY, BOWEN and LOPES, L.J.; KAY, L.J. *disentangling*.

Bonnard v. Perryman, *referred to*, Salomons v. Knight (1891) 60 L. J. Ch. 743, [1891] 2 Ch. 291; 64 L. T. 689; 39 W. R. 506—C.A. LINDLEY, BOWEN and KAY, L.J.; *discussed*, Collard v. Marshall (1892) 61 L. J. Ch. 208; [1892] 1 Ch. 571; 66 L. T. 248, 40 W. R. 473—CHITTY, J., *principle applied*, Champion & Co. v. Birmingham Vinegar Brewery Co. (1893) 10 Times L. L. 164.—*See* COLERIDGE, C.J. and COLLINS, J.

Bonnard v. Perryman, *commented on*.
• **Monson v. Tussauds, Ltd.** (1894) 63 L. J. Q. B. 454; [1891] 1 Q. B. 671; 9 R. 177, 70 L. T. 835, 58 J. P. 524; 10 Times L. R. 227—C.A.

Per LORDS LOPES and DAVEY—**Bonnard v. Perryman** has established as a rule of practice that an interlocutory injunction restraining the publication of a libel until the trial of the action will not be granted except in cases where any jury would find that the matter complained of was libellous, or where, if they found otherwise, their verdict would be set aside as unreasonable.

Per LORD HALSBURY.—**Bonnard v. Perryman** cannot restrict the discretion to be exercised on the facts of each case as to whether it is "just and convenient," within sect. 25 of the Judicature Act, 1873, to grant such an injunction.

• **Monson v. Tussauds, Ltd.**, *dictum not followed*.

Kitts v. Moore & Co (1894) 64 L. J. Ch. 162; [1895] 1 Q. B. 253, 12 R. 43, 71 L. T. 676; 43

W. R. 81—C.A. LINDLEY and A. L. SMITH, L.J. *See* "ARBITRATION" (*supra*, col. 56).

Bonnard v. Perryman, *explained*, White v. Mohr (1895) 64 L. J. Ch. 308, [1895] A. C. 154, 11 R. 141, 72 L. T. 831, 43 W. R. 353, 59 J. P. 628—L.R. (K.).
HERSCHELL, L.C., LORDS WATSON, MACNAGHTEN, MORRIS and STANFORD, *referred to*, Lyons & Sons v. Wilkins (1890) 66 L. J. Ch. 601, [1890] 1 Ch. 811, 71 L. T. 353, 45 W. R. 19, 50 J. P. 325—C.A. LINDLEY, KAY, and A. L. SMITH, L.J.

Bonnard v. Perryman and Monson v. Tussauds, Ltd. (*supra*), *principle applied*.
Newton v. Amalgamated Mechanics' Union (1896) 12 Times L. R. 623—CHITTY, J.

Bonnard v. Perryman, *principle applied*, Dredge v. Parnell (1896) 13 Rep. Pat. Cas. 392—CHITTY, J.; *commented on*, London and Northern Bank v. George Newnes, Ltd. (1899) 16 Times L. R. 76—NORTH, J.

Att.-Gen. v. Aspinall (or Liverpool Corporation) (1837) 7 L. J. Ch. 51, 2 Myl. & C. 613; 1 Jun. 812, 45 R. R. 142—L.C., *reversing* 1 Keen 513—M.R., *referred to*, Att.-Gen. v. Newcastle-upon-Tyne Corporation (1889) 58 L. J. Q. B. 558, 23 Q. B. D. 492—C.A. ESHER, M.R., LINDLEY and BOWEN, L.J.; *applied*, Stevens v. Chown (*post*).

Cooper v. Whittingham (1880) 49 L. J. Ch. 752, 15 Ch. D. 501, 43 L. T. 16, 28 W. R. 720—JESSEL, M.R., *approved*.
Hayward v. East London Waterworks Co (1881) 54 L. J. Ch. 523, 28 Ch. D. 138, 52 L. T. 175—CHITTY, J.

Cooper v. Whittingham, *on question of costs discussed*, Jones v. Curling (1884) 53 L. J. Q. B. 373, 13 Q. B. D. 262, 50 L. T. 349, 32 W. R. 551—C.A. BRETT, M.R., BOWEN and FRY, L.J.; Huxley v. West London Extension Ry (1886) 55 L. J. Q. B. 560, 17 Q. B. D. 373—COLERIDGE, C.J. (*see* "COSTS" *supra*, col. 725); *approved*, Sonnenschein v. Barnard (1887) 57 L. T. 712—STIRLING, J.

Cooper v. Whittingham and Hayward v. East London Waterworks Co, *discussed*.
Stevens v. Chown (1901) 70 L. J. Ch. 571; [1901] 1 Ch. 894, 81 L. T. 790, 49 W. R. 460, 65 J. P. 470—FARWELL, J.

Cooper v. Whittingham, *commented on*.
Devonport Corporation v. Tosei (1902) 71 L. J. Ch. 754; [1902] 2 Ch. 182, 86 L. T. 612.—NOTON, J. *And see* "COSTS," col. 723.

Hedley v. Bates (1880) 13 Ch. D. 498; 19 L. J. Ch. 170; 42 L. T. 41; 28 W. R. 364.—JESSEL, M.R., *explained*.

Stannard v. St. Giles, Camberwell (Vestry) (1882) 20 Ch. D. 190, 51 L. J. Ch. 629, 46 L. T. 213; 30 W. R. 695—C.A. JESSEL, M.R., ST. J. HANSEN and LINDLEY, L.J.

JESSEL, M.R.—Where the legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction. I refer to that more particularly because *Hedley v. Bates*, which I decided when sitting at the Rolls, was cited as an authority for the exercise of such a jurisdiction. In the first place, as I read *Hedley v. Bates*, it decided no such thing. In that case there was a manifest and admitted trespass, as will be seen by looking at pp. 499 and 500 of the report, and the Court,

having to decide the question between the parties, went on to say that it was convenient to decide the other question—that is, whether or not the provisions of the Act of Parliament applied to the case in question. The magistrates there had no jurisdiction unless a certain notice was given, and the real question I had to decide was whether a valid notice had been given or could be given, and then it was said that that question must be decided by the magistrates when the case should come before them, which it must, and the answer was, "That may be so, but while the whole matter is before the Court in the first instance, and the Court has power to decide whether the magistrates had jurisdiction, it is much more convenient, instead of granting a prohibition, to grant an injunction between the same parties." But the whole doctrine which I laid down (as I thought clearly) in *Hedley v. Bates*, was depen-

JAMES, J.J.—In old times this Court might well have been asked to interfere with criminal proceedings taken against an officer of the Court for the purpose of harassing him, as he had no other sufficient protection. There is an old decision referred to in the note to *Franchign v. Chikona* (1819) (3 Swans 276, 280, n), that arresting and killing a sequestrator was not murder. At that time, therefore, the Court had cause to interfere with criminal proceedings, but the cause for so doing has now ceased. The authority proleptical to us [*York Corporation v. Pilkington*], is, as far as I know, the only case in which this Court has made such an order as we are now asked to make; and often that case is not exactly similar, because it appears that the same right would there have been tried in both Courts—p. 66

from me on the construction of the statute. The case as to an injunction is simply reported by saying that the appeal against the refusal of the injunction was dismissed with costs. In that case I explained, somewhat in the same way that I gave to-day, what the meaning of *Hedley v. Bates* was, and I refused the injunction in that case, because I said the Court is not seized of the case otherwise. It is a mere case of prohibition, and there is no reason for changing the mode of proceeding from prohibition to injunction, where you are not compelled to decide the question on other grounds between the same parties, and in that case having refused that injunction, that refusal was affirmed by the Court of Appeal—p. 196.

Stannard v. St. Giles, Camberwell (Vestry) and Hedley v. Bates (*supra*), referred to North London Ry. v. G. N. Ry (1883) 52 L. J. Q. B. 380, 11 Q. B. D. 30—C.A. BRETT and COTTON, L.Js. (*supra*, col. 1328)

Stannard v. St. Giles, Camberwell (Vestry), considered, Barrett v. Day (1890) 59 L. J. Ch. 461, 43 Ch. D. 435, 62 L. T. 597, 38 W. R. 362—NORTH, J.; Grand Junction District Waterworks Co. v. Hampton Urban District Council (No. 1) (1898) 67 L. J. Ch. 603; [1898] 2 Ch. 331 (*post*, col. 1337)

Hedley v. Bates (*supra*), observations not applied

St. James's Hall, Ltd. v. L. O. C. (1900) 83 L. T. 98—C.A. A. J. SMITH and V. WILLIAMS, L.Js.

York Corporation v. Pilkington (1742) 9 Mod. 273; 2 Atk. 302—L.C., commented on

East v. Browne (1874) L. R. 10 Ch. 64; 44 L. J. Ch. 1; 81 L. T. 493, 23 W. R. 50; 19 Cox C. C. 80—CAIRNS, L.C., JAMES and MELISH, L.Js.

appealed from, and the L.J.J. thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a Court of equity has interfered in criminal proceedings. I do not say that the Court might not interfere in a possible case, but as a general rule it will not. Then I come to the question whether there is any equity at all. Now I have been referred to *Auckland (Lord) v. Westminster Local Board of Works*, and, speaking with all deference to the eminent judges who decided it, it appears to me that sufficient attention was not paid to the real facts of that case. The L.J.J. dealt with the case as if the Westminster Board of Works had threatened to pull down what they had no right to pull down, and that being a wrongful act, they felt no doubt as to their jurisdiction to restrain it. If that had been the case here, I should, without that decision, have granted an injunction, just as in the case of a railway company exceeding its powers. But, on reading the report, that was not the real state of the case at all. The Westminster Board of Works had not threatened to pull down the houses, but to apply to a magistrate for an order to pull down, and such an order could not have been made except by a magistrate having jurisdiction to make it; so that the application was really to restrain the Board, not from pulling down—as both the L.J.J. treated it—but from applying to a magistrate for an order to pull down. Consequently the judgment in that case has, in fact, no real application to the present case. I cannot, therefore, treat that as a decision upon the question whether a Court of equity will restrain an application to a magistrate for an order to pull down, it decided a totally different point, and I therefore cannot consider it as an authority applicable to the present case—p. 467.

Kerr v. Preston Corporation, *referred to*.
Preston Corporation v. Fullwood Local Board
 (1885) 63 L. T. 718, 34 W. R. 196; 60 J. P. 228.
 —NORTH, J.

York Corporation v. Pilkington; Saul v. Browne (*supra*); and **Kerr v. Preston Corporation**, *distinguished and not applied*.
Thiton Medical and General Life Assurance Association, In re (1886) 55 L. J. Ch. 416, 32 Ch. D. 503; 64 L. T. 152; 34 W. R. 390.—KAY, J.

Kerr v. Preston Corporation, *dicta adopted*.
Mcintosh & Pontypool Improvements Co., In re (1891) 47 L. J. Q. B. 161—COLLIERIDGE, C.J. and WRIGHT, J.

Auckland (Lord) v. Westminster District Building Works (*supra*) and **Kerr v. Preston Corporation**, *considered*.
Grand Junction Waterworks Co. v. Hampton Urban District Council (No. 1) (1898) 67 L. J. Ch. 603, 2 Ch. 381, 78 L. T. 678, 46 W. R. 611; 62 J. P. 506.—STIRLING, J.

Auckland (Lord) v. Westminster Board of Works and Grand Junction Waterworks Co. v. Hampton Urban Council, *applied*.
St. James's Hall, Ltd. v. L. C. C. (1900) 83 L. T. 98.—C.A. **A. G. SMITH and V. WILLIAMS, L.J.**
Grand Junction Waterworks Co. v. Hampton Urban Council, *observations not applied*. **Alt-Gen v. Methyly Tyddil Union** (1900) 69 L. J. Ch. 209; [1900] 1 Ch. 516; 82 L. T. 662, 48 W. R. 408; 64 J. P. 276.—C.A. **LINDLEY, M.R., RIGBY and V. WILLIAMS, L.J.**, *followed*. **Devonport Corporation v. Tozer** (1902) 71 L. J. Ch. 754, [1902] 2 Ch. 188; 80 L. T. 612.—JOYCE, J.

Newby v. Harrison (1861) 30 L. J. Ch. 863; 8 De G. F. & G. 287; 7 Jur. (N.S.) 981; 5 L. T. 12; 9 W. R. 849.—L.J., *reversing* 1 J. & H. 678; 1 L. T. 397.—V.C.; *disallowed*. **Carr v. Benson** (1868) L. R. 3 Ch. 524; 18 L. T. 696; 16 W. R. 744.—WOOD and SELWYN, L.J.; **Dane Valley Wy. v. Rhys** (1869) 38 L. J. Ch. 120.—HAYTERLEY, L.C.; *applied*. **Newcomen v. Coulson** (1878) 47 L. J. Ch. 429, 7 Ch. D. 764, 38 L. T. 275; 26 W. R. 350.—MALINS, V.C., *disallowed*. **Smith v. Day** (*post*). **Hear v. Hantley** (1889) 58 L. J. Ch. 780, 42 Ch. D. 461, 61 L. T. 538; 38 W. R. 186.—C.A. **COTTON, FRY and LOPES, L.J.**

Novello v. James (1854) 24 L. J. Ch. 111, 5 De G. F. & G. 876; 1 Jur. (N.S.) 217; 3 W. R. 127.—L.J., *disallowed*.
Smith v. Day (1882) 21 Ch. D. 421; 18 L. T. 54, 31 W. R. 187.—C.A. **JESSER, M.R., BRETTE and COTTON, L.J.**

Smith v. Day, *disallowed*.
Hall, Ex parte, Wood, In re (1888) 52 L. J. Ch. 907, 38 Ch. D. 614, 49 L. T. 275, 32 W. R. 179.—C.A. **BARGALLAY, COTTON and BOWEN, L.J.**

Smith v. Day, *dictum disallowed from*.
Griffith v. Blake (1884) 27 Ch. D. 474, 63 L. J. Ch. 965; 51 L. T. 274, 32 W. R. 884.
COTTON, L.J.—The late M.R. there expressed an opinion that there ought not to be an enquiry as to damages unless the plaintiff had been guilty of some default in obtaining the injunction. Probably he did not mean his remarks to apply to a case like this, where, if the injunction was improperly granted, it would not be because the judge made a mistake, but because the plaintiff's evidence was not true. But I am

of opinion that his *dictum* is not well founded, and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary.—p. 477.

LINDLEY, L.J.—The *dictum* of the late M.R. is not consistent with what was done by the C.A. in **Novello v. James** and **Newby v. Harrison** (*supra*)—*ib.*

BARGALLAY, L.J. to the same effect

Smith v. Day, *dictum disallowed from*. **Hunt v. Hunt** (1881) 54 L. J. Ch. 289.—PEARSON, J., *explained and approved*. **Pennell v. Wilson** (1895) 62 L. J. Ch. 884, [1895] 2 Ch. 536, 3 R. 629, 68 L. T. 748; 42 W. R. 57.—KEENEVICH, J.

Bolton v. London School Board (1878) 47 L. J. Ch. 461, 7 Ch. D. 766, 38 L. T. 277; 26 W. R. 549.—MALINS, V.C., *distinguished*.
Wimbledon Local Board v. Croydon Rural Sanitary Authority (1886) 32 Ch. D. 421; 55 L. T. 106 [*Reversed by the C.A.* (COTTON, LINDLEY and LOPES, L.J.) on the merits].

NORTH, J.—Then the point was suggested by Mr. Bazalgette that at any rate, if the motion by the defendants to discharge the order in other respects was right, yet, inasmuch as it was only made on the day on which the order itself would expire (as a matter of fact it was the day before), the motion could not have served any useful purpose, and therefore the defendants ought to pay the costs of it. A case [**Bolton v. London School Board**] was referred to by Mr. Bazalgette, in which that course was followed, of dismissing with costs a motion to dissolve an order that died on the evening of the day on which the motion was made. To begin with, it appears to me that was not a case of moving to discharge a motion for irregularity. That seems to me to make a great difference between that case and this. Independently of that, even if I had taken the view that that case, so far as it went, was an authority in favour of the proposition for which Mr. Bazalgette cited it, it still would not have led to the result he suggests, because the order in this case contains not merely an injunction but also an undertaking by the plaintiff to abide by any order the Court might make as to damages.—p. 425

Jessel v. Chaplin (1856) 2 Jur. (N.S.) 931, 4 W. R. 610.—EX., *followed*.
Smith v. Smith (1875) 44 L. J. Ch. 630, L. R. 20 Eq. 500, 32 L. T. 787; 28 W. R. 771.—JESSER, M.R.

Daniel v. Ferguson [1801] 2 Ch. 27, 30 W. R. 599.—C.A. **LINDLEY and KAY, L.J.**, *followed*.

Von Joel v. Hoinsey (1895) 65 L. J. Ch. 102, [1895] 2 Ch. 774, 73 L. T. 372.—C.A. **LINDLEY, LOPES and RIGBY, L.J.**

Cotton v. Wyld (1863) 32 Beav. 266.—M.R.; *approved*. **Betts v. Nelson** (1868) 37 L. J. Ch. 521; L. R. 3 Ch. 429, 18 L. T. 165, 16 W. R. 324.—CHILMERSFORD, L.C., *see* 8 C. *non* Nelson v. Betts (1871) 40 L. J. Ch. 317, L. R. 6 H. L. 1, 19 W. R. 1121.—H.L. (2.), *referred to*. **Serrao v. Noel** (1885) 15 Q. B. D. 549.—GROVE, J., *reversed*. C.A.; *applied*. **Davenport v. Rylands** (1866) 35 L. J. Ch. 204, L. K. 1 Eq. 302, 1 N. R. 178, 12 Jur. (N.S.) 71, 14 L. T. 53, 14 W. R. 248.—WOOD, V.C.

Davenport v. Rylands (*supra*), *discussed*, Penn v. Bibby (1886) 36 L. J. Ch. 277, L. R. 3 Eq. 808; 15 L. T. 385; 15 W. R. 192—WOOD, V.-C., Betts v. Gallus (1870) L. R. 10 Eq. 392, 18 W. R. 945—JAMES, V.-C.; *followed*, Fitz v. Hobson (1880) 49 L. J. Ch. 321, 14 Ch. D. 542; 42 L. T. 229; 28 W. R. 459—FRY, J.

Osborne v. Tennant (1807) 14 Ves. 136—ELDON, L.C., *approved*.
James v. Downes (1812) 18 Ves. 522, 11 R. R. 247—ELDON, L.C.

James v. Downes and Vansandau v. Rose (1820) 2 J. & W. 264; 22 R. R. 114—ELDON, L.C., *discussed and explained*.

Avery v. Andrews (1882) 51 L. J. Ch. 411; 30 W. R. 561—KAY, J., *approved*.
United Telephone Co. v. Dale (1884) 33 L. J. Ch. 295, 25 Ch. D. 778; 50 L. T. 85, 32 W. R. 428.—PEARSON, J. *See judgment*.

United Telephone Co. v. Dale (*supra*), *referred to*.

D. C. A. & Co (1900) 69 L. J. Ch. 882, [1900] 1 Ch. 484, 82 L. T. 17; 45 W. R. 129—COZENS-HARDY, J.

Lewes v. Morgan (1818) 5 Price 518; **Wellasley (Lord) v. Mornington (Earl)** (1818) 11 Beav. 180, 12 Jur. 367—LANGDALE, M.B., **Avery v. Andrews** (*supra*), and **Day v. Loughurst** (1893) 41 W. R. 283—STIRLING, J., *followed*.

Iverson v. Harris (1802) 7 Ves. 251—ELDON, L.C., *distinguished*.
Seaward v. Paterson (1897) 66 L. J. Ch. 267, [1897] 1 Ch. 545; 76 L. T. 215; 45 W. R. 810—G.A.

LINDLEY, L.J.—The appellants' counsel have argued very strenuously that there is no jurisdiction, and have based their contention upon a passage in Lord Eldon's judgment in *Iverson v. Harris*. That was a case of a prohibition, and Lord Eldon differed from a decision of the Court of Ex. in another case upon the question who was bound by a prohibition. He said "I have no conception that it is competent to this Court to hold a man bound by an injunction who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into Court, so as according to the ancient laws and usages of the country to be made a subject of the writ." That strikes me as perfectly correct. Lord Eldon was addressing himself to the question who the persons were who were bound by an injunction, he was not referring to persons who assisted others in committing breaches of an injunction.—p. 271.

A. L. SMITH and RIGBY, L.J.J. to the same effect.

Iverson v. Harris, *commented on*.
London Corporation v. Cox (1867) 86 L. J. Ex. 228, L. R. 2 H. L. 239, 16 W. R. 44—H.L. (B.) LORDS CRANWORTH and WESTBURY (with the JUDGES). *See opinion of WILLES, J.*

Att.-Gen. v. Wiggin Corporation (1854) 23 L. J. Ch. 429 n-De F. M. & G. 52, 18 Jur. 299, 2 W. R. 303—L.J.J., *discussed*, Ollershaw v. Harrop (1871) 43 L. J. Ch. 534, 1 R. 4 Ch. 480 JAMES and MELLISH, L.J.J., *applied*, **Cleveland v. St. Germain's Union** (1886) 56 L. J. Q. B. 83.—STEPHEN, J. *And see "CORPORATION," supra*, col. 712.

Stevens v. Keating (1850) 19 L. J. Ch. 107, 1 Mac. & G. 659; 2 H. & Tw. 176, 11 Jur. 157—L.C.; and **Bacon v. Jones** (1839) 1 Myl. & Cr. 133; 3 Jur. 994—L.C., *affirmed* 1 Beav. 382—M.R., *applied*.
Betts v. Clifford (1860) 1 J. & H. 74—WOOD, V.-C.

Stevens v. Keating, *discussed*.
Webster v. Manby (1869) L. R. Ch. 372, 20 L. T. 387, 17 W. R. 545—STIRLING and GIFFARD L.J.J.

Betts v. Clifford, *explained*.
Davies v. Marshall (1861) 7 Jur. (N.S.) 720; 1 L. T. 105; 9 W. R. 368.
KINDERLEY, V.-C.—I must suggest that in *Betts v. Clifford* I am satisfied that the V.-C., whose decision is there reported, must have been misunderstood in the passage referred to, because, as that passage stands, if I have read it correctly, it amounts to a *dictum* on this effect—that it is now settled by *Bacon v. Jones* that a party filing a bill for an injunction will not succeed at the hearing unless he has applied for it by interlocutory application. I am sure the V.-C. never laid down, or intended to lay down, any such proposition. It might have been that he expressed himself in general terms, *equated hoc*, with reference to the case before him, and it was assumed that he meant to lay down that as a general proposition; but I am satisfied he never meant to do so.—p. 721.

Betts v. Clifford and Bacon v. Jones, *referred to*.
Mounsey v. Lonsdale (Earl), Att.-Gen. v. Lonsdale (Earl) (1870) L. R. 10 Eq. 577.—MALINS, V.-C., *affirmed*, (1871) 40 L. J. Ch. 198, L. R. 6 Ch. 141; 23 L. T. 791; 19 W. R. 285—JAMES and MELLISH, L.J.J.

Donagel v. Barry (1820) 1 Hog. 46, and **Hamilton v. Patten**, 1 Cr. & Dix. Ab. Ca. 248; *observed on*, O'Beirne v. O'Beirne (1850) 1 Ir. Ch. R. 158.—BRADY, L.C.

Hodgson v. Powis (Earl) (1850) 19 L. J. Ch. 356, 418; 12 Beav. 392, 529; 14 Jur. 906, 965.—ROMILLY, M.R., *reversed*, (1851) 21 L. J. Ch. 17, 1 De G. M. & G. 6, 15 Jur. 1022—KNIGHT BRUCE and CRANWORTH, L.J.J.

Coleman v. West Hartlepool Harbour Co (1861) 3 L. T. 847, 8 W. R. 734—WOOD, V.-C.; *applied*, **Kiteat v. Sharp** (1882) 52 L. J. Ch. 157; 45 L. T. 64, 31 W. R. 227—FRY, J.

INNKEEPER.

Dawson v. Channoy (or Cholimley) (1843) 5 Q. B. 164; D. & M. 348; 13 L. J. Q. B. 83, 7 Jur. 1087—Q.B., *disapproved*.

Richmond v. Smith (1828) 8 B. & C. 9; 2 M. & Ry. 285; 6 L. J. (O.S.) K. B. 279.—K.B., *dictum commented on*.

Morgan v. Ravey (1861) 6 Il. & N. 265; 30 L. J. Ex. 131; 9 L. T. 754; 9 W. R. 976; S. C. at nisi prius, 2 P. & F. 283.

FOLLOCK, C.B. (for the Court).—Then, being, for those reasons, of opinion that the action will lie against the executors if it would have done so against the testator, it remains to consider whether the direction to the jury was correct. We think it was. The objection was that it assumed the defendants were liable if there was

negligence in the plaintiff, and that therefore the defendants would be liable, though not only not negligent, but even diligent. But we think that is the law. It is true the expression in the forms in "fore" is, that the loss was "*propter defectum*" of the innkeeper, but we think the cases show that there is a defect in the innkeeper, whenever there is a loss not arising from the plaintiff's negligence, the act of God, or the Queen's enemies. The only case that points the other way is *Dawson v. Gurney*, as reported 5 Q. B. 161. According to the report, however, of that case in 7 Jur 1037, "there was no evidence of the manner in which the horse received the injury for which the action was brought." This may be the explanation of that case, for though damage happening to the horse from what occurred in the stable might be evidence of *defectus* or neglect, still if it was not shown how the damage arose, it was not even shown that it arose from what occurred in the stable. This would reconcile that case to the general current of authorities.—p. 277

Dawson v. Chamney, referred to.

Cowell v. Simpson (1809) 16 Ves. 245; 10 R. R. 181—L.C., observed upon
Angus v. McLachlan (1883) 52 L. J. Ch. 587; 23 Ch. D. 330, 48 L. T. 863, 31 W. R. 611.—KAY, s. See judgment

Smith v. Dearlove (1848) 6 C. D. 132; 17 L. J. C. P. 219, 12 Jur 377.—C. P., adopted
Gordon v. Silber (1800) 59 L. J. Q. B. 507, 25 Q. B. D. 191; 63 L. T. 233, 39 W. R. 111; 35 J. P. 134.—LOPES, L. J.

Gordon v. Silber and Robinson v. Walter (1815) 3 Binst. 269, dicta adopted

Broadwood v. Granara (1851) 10 Ex. 417, 24 L. J. Ex. 1, 1 Jur (N.S.) 19, 3 W. R. 25, 3 C. L. R. 177.—EX., distinguished.

Robins v. Gray (1895) 14 R. 671; 65 L. J. Q. B. 41; [1895] 2 Q. B. 501, 73 L. T. 232, 44 W. R. 1, 53 J. P. 741.—G.A. RSETER, M.B. KAY and SMITH, L. J.

A. L. SMITH, L. J.—I cannot do better than read the words of Lopes, L. J., in *Gordon v. Silber*, with which I thoroughly agree. "The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails to do so respectively. As a compensation for the burden thus imposed upon him the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title." It has been argued that that principle does not apply if the property in the goods be not in the guest, but in his employer, and that fact be known to the innkeeper, and that *Broadwood v. Granara* has so decided. In my opinion that case does not so decide. There the piano was not brought as the luggage of the guest, or anything of that kind; but here all the sewing-machines were received as the luggage of the commercial traveler, which the innkeeper was bound to take in. The question of pledge has nothing to do with this case, and the only question is what is the custom of the realm? With knowledge we have not to deal, for there is no authority that the lien given by the law of the realm is abrogated if the

innkeeper knew that the goods were not the property of his guest. Knowledge makes no difference, and if half the goods were the guest's, but all were brought as his luggage, the obligation of the innkeeper would be the same throughout.—p. 667.

Gordon v. Silber, dictum commented on

Lamond v. Richard (1897) 65 L. J. Q. B. 313, [1897] 1 Q. B. 541, 76 L. T. 141, 45 W. R. 289; 61 J. P. 260.—WRIGHT and BRUCE, JJ.; affirmed in C. A.

Rex v. Luellin (1700) 12 Mod. 445; and **Burgess v. Clements** (1815) 4 M. & S. 306; Holt 211, n., 1 Stark 251, n., referred to
Reg. v. Rymen (1877) 46 L. J. M. C. 108, 2 Q. B. D. 136, 35 L. T. 774, 25 W. R. 117, 13 Cox C. C. 378.—C. C. R.

Bennett v. Mellor (1793) 5 Term Rep. 273; 2 B. R. 503, distinguished

Reg. v. Rymen (*supra*), referred to
Strauss v. County Hotel Co. (1883) 53 L. J. Q. B. 25, 12 Q. B. D. 27, 49 L. T. 601, 32 W. R. 170, 48 J. P. 69.—COLERIDGE, C. J. and MATHEW, J.

Rex v. Luellin and Reg. v. Rymen, referred to
Lamond v. Richard (1897) 66 L. J. Q. B. 315; [1897] 1 Q. B. 541, 76 L. T. 141, 45 W. R. 289, 61 J. P. 260.—WRIGHT and BRUCE, JJ.; affirmed in C. A.

Bennett v. Mellor, Reg. v. Rymen and Utzen

v. Nicols (1895) 63 L. J. Q. B. 289; [1894] 1 Q. B. 92, 10 R. 13, 70 L. T. 140, 42 W. R. 58, 58 J. P. 105.—CHARLES and WRIGHT, JJ., distinguished

Ochard v. Bush (1898) 67 L. J. Q. B. 650, [1898] 2 Q. B. 284, 78 L. T. 357, 46 W. R. 527.—WILLS and KENNEDY, JJ.

INQUIRY, WRIT OF

Vickery v. L. B. & S. C. Ry. (1870) 39 L. J. C. P. 169, L. B. & S. C. P. 165, 22 L. T. 270, 18 W. R. 549.—C. P., followed.

Vines v. L. B. & S. C. Ry. (1870) 39 L. J. Ex. 175; L. R. 5 Ex. 201; 22 L. T. 418, 18 W. R. 814.—KELLY, C. B. and PIGOTT, B., MARTIN, B., doubting.

INSURANCE.

1. LIFE.
2. AGAINST ACCIDENT
3. FIRE.
4. GUARANTEE.
5. BURGLARY AND HOUSEBREAKING.
6. ACTIONS BY INSURANCE COMPANIES.

1. LIFE

Godsall v. Baldere (1807) 9 East 72.—K.B., distinguished. *Andrews, Ex parte, Bygott, In re* (1816) 1 Madd. 573, 2 Rose 410, 18 R. R. 203.—PILMER, v.-c.; *Bulby v. Morris* (1830) 1 Mod. & R. 62, *Phillips v. Eastwood* (1835) 1 L. & G. 700. Sug. 270.—SUGDEN, L.C., *Humphrey v. Arabu* (1836) 1 L. & G. 1, Plunk. 318.—P. KNETT, L.C., *Henson v. Blackwell* (1845) 14 L. J. Ch. 329; 4 Hare

14.—WIGRAM, V.-C., *overruled*, Dalby v. India and London Life Assurance Co (1854) 24 L. J. P. 2, 15 C. B. 365; 3 O. L. R. 61, 18 Jur 241.—EX. CH [see judgment of Court delivered by PARKER, B., where the cases are discussed], *invented* out, Gaggin v. Upton (1859) Dru 27 ap.—NAPIER, L.C. *referred to*, Rankin v. Otter (1873) 42 L. J. C. P. 169, L. R. 6 H. L. 3; 29 L. T. 142, 22 W. R. 1, 2 Asp. M. C. 65—H.L. (E). *And see post*

Humphrey v. Arabin (*supra*), *commented on*, Henson v. Blackwell (*supra*)

Humphrey v. Arabin, *approved*, Henson v. Blackwell, *discovered*, Bell v. Aheane (1849) 13 Ir. Eq. R. 576.—RADY, L.C.

Humphrey v. Arabin and Bell v. Aheane, *commented on*, Gaggin v. Upton (1859) Dru 427.—NAPIER, L.C.

Godsall v. Boldero (*supra*), *explained*, Burnand v. Rodocanachi (1882) 7 App. Cas. 33, 51 L. J. Q. B. 548; 47 L. T. 277, 31 W. R. 5; 4 Asp. M. C. 576.—H. L. (E) SELBORNE, L.C., LORDS BLACKBURN, WATSON and FITZGERALD

LORD BLACKBURN.—There was a subsequent case, which has not been cited, which proceeded upon an error and has been since reversed (I mean *Godsall v. Boldero*), where a person had insured the life of Mr. Pitt, having no other interest in his life than as a creditor of Mr. Pitt, which gave him an interest, and the House of Commons voted out of pure grace and avour a large sum of money to pay Mr. Pitt's debts, and the executor paid this debt. The insurance company set up the defence that this was a contract of indemnity and that Mr. Pitt's debt having been paid there could not be a tight recovery against them. Lord Ellenborough, falling into a blunder which has been since corrected, thought that the contract of life insurance was a contract of indemnity, and accordingly held that that was a good defence on the part of the insurance company. I have been obliged by people connected with insurance companies and other people with whom I have been brought into contact in the course of my professional experience, that no sooner had that been done than here was such an outcry that every one said he would never insure with a company which was capable of doing such a shabby thing. Consequently the insurance company instantly paid the whole loss and the whole of the costs, and published everywhere that they had done so. Nevertheless Lord Ellenborough's decision stood until it was decided in the Ex. Ch. [*Dalby v. India and London Life Assurance Co, post*] that that case went altogether upon a mistaken idea that a contract of life insurance was a contract of indemnity, whereas it was nothing of the kind. But if it had been a contract of indemnity, the part of Parliament to pay Mr. Pitt's debts would have prevented the man's sustaining any loss by the death of Mr. Pitt, and consequently the decision would have been right.—p. 340

Burnand v. Rodocanachi, *discovered*, Castellain v. Preston (1866) 14 Q. B. D. 380.—C.A. (*post*, col. 1356); *referred to*, Elgood v. Harris (1896) 1 Com. Cas. 400.—COLLINS, J.

Dalby v. India and London Life Assurance Co, (*supra*), *approved and applied*, Law v. London Indisputable Life Policy Co. (1855) 24

L. J. Ch. 196, 1 K. & J. 223; 3 Eq. R. 338; 1 Jur. (N.S.) 178, 3 W. R. 154.—WOOD, V.-C., *referred to*, Knox v. Turner (1870) 39 L. J. Ch. 207, L. R. 9 Eq. 155.—STUART, V.-C. (*see post*, col. 1346); *explained and applied*, Bradburn v. G. W. Ry. (1874) 44 L. J. Ex. 9, L. R. 10 Ex. 1; 31 L. T. 464; 23 W. R. 48.—EX. *referred to*, Keith v. Protection Marine Insurance Co. (1882) 10 L. R. Ir. 51.—FITZGERALD and DOWNS, J.B.; Harris v. son and Ingram, In re, Whimney, Ex parte (1900) 69 L. J. Q. B. 912; [1900] 2 Q. B. 710; 83 L. T. 189, 19 W. R. 2, 7 Manson 578.—WRIGHT, J., *reversal*, C.A. ALVERSTONE, M.R., RIGBY and COLLINS, L.J.J.

• Law v. London Indisputable Life Policy Co. (*supra*), *adhered to*, State Fire Insurance Co. In re (1863) 33 L. J. Ch. 125; H. & M. 457, 1 De G. J. & S. 634, 2 N. R. 565; 11 W. R. 1011.—WOOD, V.-C., *affirmed*, L.J.J.; *followed*, Robson v. McCreight (1858) 27 L. J. Ch. 171, 25 Beauv. 272; 1 Jun. (N.S.) 269.—ROMLEY, M.R., Stocker v. Cowan (1861) 30 L. J. Ch. 882, 29 Beauv. 637, 7 Jun. (N.S.) 906, 4 L. T. 695, 9 W. R. 801.—ROMLEY, M.R., *referred to*, Alliance Society, In re (1886) 54 L. J. Ch. 540, 28 Ch. D. 559; 52 L. T. 605.—KAY, J., *varied*, C.A. BAGGALLAY, BOWEN and FRY, J.J.

Bruce v. Garden, L. R. 8 Eq. 430, 20 L. T. 1002, 17 W. R. 990.—JAMES, V.-C. *reversed*, (1869) 39 L. J. Ch. 334, L. R. 5 Ch. 32; 22 L. T. 895, 18 W. R. 384.—HATHERLEY, L.C.

Bruce v. Garden.—L.C. *explained*, Salt v. Northampton (Marquess) (1891) 61 L. J. Ch. 49, [1892] A. C. 1; 65 L. T. 765; 40 W. R. 529, 8 Times L. R. 104.—H. L. (E) EARL OF SELBORNE, LORDS BRAMWELL and MORRIS; LORD HANNEN *dissenting*

New York Life Insurance Co. v. Fletcher (1885) 117 U. S. Rep. 519, *approved and applied*

Bawden v. London, Edinburgh and Glasgow Assurance Co. (1892) 61 L. J. Q. B. 792; [1892] 2 Q. B. 534; 57 J. P. 146.—C.A. Esher, M.R., LINDLEY and KAY, L.J.J., *referred to*.

Biggar v. Rock Life Assurance Co. (1901) 71 L. J. K. B. 79, [1902] 1 K. B. 516, 85 L. T. 636.—WRIGHT, J.

Canning v. Farguhar (1886) 55 L. J. Q. B. 225, 16 Q. B. D. 727, 54 L. T. 890, 34 W. R. 423.—C.A. Esher, M.R., LINDLEY and LOPES, L.J.J., *distinguishing*.

Roberts v. Security Co. (1894) 66 L. J. Q. B. 119, [1897] 1 Q. B. 111; 75 L. T. 561; 45 W. R. 214.—C.A. Esher, M.R., LOPES and RIGBY, L.J.J.

Gamble v. Accident Life Assurance Co. (1870) Ir. R. & O. L. 204.—EX. *followed*, Patton v. Employers' Liability Assurance Co. (1887) 20 L. R. Ir. 93.—HARRISON and MURPHY, J.J.

Hutchison v. National Loan Assurance Co. (1845) 7 Ct. Sess. Cas., 2nd ser. 467, *disapproved*

Duckett v. Williams (1834) 3 L. J. Ex. 141; 2 O. & M. 348; 4 Tyr. 240.—EX. *discussed*, Life Association of Scotland v. Foster (1872) 11 Ct. Sess. Cas., 3rd ser. 851, *distinguished*.

Thomson v. Weems (1884) 9 App. Cas. 671.—H. L. (SC.).

LORD BLACKBURN.—Those whose business it is to insure lives calculate on the average rate of mortality, and charge a premium which on that ordinary average will prevent their being losers. There are some expressions used by the judges in the Court of Session in the case of *Hutchison*, which would seem to lay it down, at least when it is the party's own life that is assured, that it is illegal, or at least so absurd that no one would make such a contract, to engage that if the life is such that the risk is of the ordinary kind, the insurer shall be bound, but that if there is a disease tending to shorten life, such as to make it not the ordinary risk, the insurer shall not be bound, whether the assured knew it or not. I cannot agree to this, it seems to me a very reasonable stipulation on the part of the insurer, and that it is not at all absurd or improper on the part of the assured to assent to such being a term of the contract. It is seldom that a derangement of one important function can have gone so far as to amount to disease without some symptoms having developed themselves, but the insurers have a right if they please to take a warranty against such disease, whether latent or not, and it has very long been the course of business to insert a warranty to that effect.

In *Duchett v. Williams*, in 1834, it was held, on reasoning to my mind irresistible, that in a declaration substantially, as far as regards this point, the same as this, what was untrue, so as to have the effect of avoiding the insurance, was also untrue so as to cause the forfeiture of the premium. In *Anderson v. Fitzgerald* (post, col. 1859), Lord B. Levens points out very strongly that where such a consequence would follow from a warranty, before a contract is held to have the effect of a warranty, it is necessary to see that the language is such as to show that the assured as well as the insurer meant it, and that the language in the policy being that of the insurers, if there is any ambiguity it must be construed most strongly against them. But he never questioned that if there was a warranty, and it was not fulfilled, it avoided the policy. And with the exception of *Hutchison's Case* . . . I think that in every case in which moral guilt was thought an element in the question of true or untrue, it has always been on the ground that the contract was such as not sufficiently to show that there was an agreement on the part of the assured that there should be a warranty. In *Parker's Case*, I think there was very strong ground for saying that it was not shown that the assured contracted that her answers to a medical man selected by the company, who was to examine her alone and report to them confidentially the conclusion to which he came, were warranted to be accurate; the very object of the examination would be frustrated if the patient were not to answer frankly and without reserve to the questions she was asked.—p. 681

LORD WATSON to the same effect. LORD FITZGERALD concurred.

Gottlieb v. Cranch (1855) 22 L. J. Ch. 912. 1 De G. M. & G. 419, 17 Jur. 704—L.J.; and **Lea v. Hinton** (1854) 5 De G. M. & G. 823, 19 Beav. 321—L.J. and M.R., *affirmed* in **Drysdale v. Piggott** (1856) 25 L. J. Ch. 878, 1 De G. M. & G. 546, 2 Jur. (N.S.) 1078; 4 W. R. 773—KNIGHT BRUCE and TURNER, L.J. O.C.

Gottlieb v. Cranch and Morland v. Isaacs (1855) 24 L. J. Ch. 753, 20 Beav. 389; 1 Jur. (N.S.) 989, 3 W. R. 397.—M.R., *referred to*. And see *post*, col. 1847.

Gaggie v. Upton (1859) Dru. 477.—NAPIER, L.C.

Lea v. Hinton and Drysdale v. Piggott, *followed*.

Coutenay v. Wright (1860) 30 L. J. Ch. 181; 2 Giff. 837, 6 Jur. (N.S.) 1283, 3 L. T. 438, 9 W. R. 163.—STUART, V.-C.

Gottlieb v. Cranch, *followed*.

Knox v. Turner (1870) 39 L. J. Ch. 207, L. R. 9 Eq. 155—STUART, V.-C.; *affirmed*, L. R. 45 Ch. 516, 39 L. J. Ch. 750, 23 L. T. 227; 18 W. R. 873—HATHERLEY, L.C., *Preston v. Neale* (post).

Knox v. Turner, *followed*.

Lea v. Hinton, Drysdale v. Piggott; and **Coutenay v. Wright**, *discussed*.

Preston v. Neale (1879) 12 Ch. D. 760; 40 L. T. 303, 27 W. R. 642.

BACON, V.-C.—In *Lea v. Hinton* the defendant as surety and creditor effected an insurance for the purpose of indemnifying himself, and received a larger sum on the policy than was necessary for those purposes. It was there held that he was not entitled to retain more than was sufficient to repay him, and that the surplus belonged to the estate of the debtor against whom he had charged all that he had paid. In *Drysdale v. Piggott* a similar decision was made, although there all the premiums had been paid by the creditor who had insured, and notwithstanding that the debtor had refused to pay the premiums when required to do so, and *Coutenay v. Wright* is to the like effect. But, in all these cases the relation of debtor and creditor was indisputable, and the ground of the decisions was that the insurance being only to secure the debt the creditor had no interest after the debt was paid. . . . *Gottlieb v. Cranch*, often referred to, and, as I conceive, never questioned, explains and establishes the principles applicable to cases like the present. And although in the more recent case of *Knox v. Turner*, Stuart, V.-C. expressed considerable doubt as to the grounds upon which some of the preceding decisions had been arrived at, yet, feeling himself bound by those decisions, he dismissed the bill of a plaintiff who, under circumstances not distinguishable from the present, except that he had purchased an annuity which the grantee had protected by effecting an insurance, sought to compel the grantee to transfer to him the policy. The V.-C. in his judgment so expressed himself as to encourage an appeal, an appeal was brought, and, being heard before Lord Hatherley, was by him unhesitatingly dismissed. It must, I think, therefore be considered as fully established upon authority that a grant of an annuity like that in the present case is a transaction perfectly lawful and perfectly plain, that whatever be the right of re-purchase, no relation of debtor and creditor is thereby created; that the indemnity which the grantee thinks fit to make for himself does not constitute a security in which the grantor has any right or interest; and that the claim of the plaintiff to have the proceeds of the policy brought into the account as if the original plaintiff could have claimed any interest in it, wholly fails.—p. 769

Holland v. Smith (1806) 6 Esp. 11.—C.J.,
Drysdale v. Piggett and Morland v. Isaacs (*supra*), *explained*
Salt v. Northampton (Marquess) (1891) 61 J. Ch. 49; [1892] A.C. 1 (*supra*, col. 1344).
 —H.L. (R.).

Vyse v. Wakefield (1840) 9 L. J. Ex. 274,
 6 M. & W. 422, 4 Jur. 509, 8 D. P. C. 377.
 —EX., *affirmed*, 7 M. & W. 126; 4 Jur. 611; 8 D. P. C. 912.—EX. CH., *considered*.
Makin v. Watkinson (1870) 40 L. J. Ex. 33,
 11 G. Ex. 25, 23 L. T. 592, 19 W. R. 286—
 X. MARTIN, B., *dismissing*.

Sheridan v. Phoenix Life Assurance Co. (1858)
 7 L. J. Q. B. 228, 4 Jur. (N.S.) 831—Q.B.,
reversed, 28 L. J. Q. B. 94, 1 El. Bl. & El. 156,
 40; 5 Jur. (N.S.) 142—EX. CH.; *but affirmed*,
om. Phoenix Life Assurance Co. v. Sheridan
 (1861) 31 L. J. Q. B. 91, 8 H. L. Cas. 745, 7
 M. (N.S.) 174, 3 L. T. 564—H.L. (B.). CAMP-
 BELL, L.C., LORDS CRANWORTH, CHILMERSFORD
 and KINGSDOWN.

Burridge v. Row (1841) 13 L. J. Ch. 178, 9
 Jur. 299—LYNDHURST, J. G., *affirming* 11 L. J.
 Ch. 369, 1 Y. & C. C. C. 183, 191.—V.C.,
approved, **Clack v. Holland** (1854) 19 Beav. 262;
 4 L. J. Ch. 13, 18 Jur. 1007, 2 W. R. 402—
 SMILLY, B.; Leslie, in re (*post*); *explained*,
Alcock v. Scottish Imperial Insurance Co. (*post*,
 col. 1348).

Clack v. Holland (*supra*), *dismissed*; Williams
 Higgins (1868) 17 L. T. 525; 16 W. R. 390—
 TUAET, V.C. Saunders v. Dunman (*post*),
approved, **Clack v. Holland** (1854) 19 Beav. 262,
 in re, Billing v. Brogden (1888) 38 Ch. D. 646;
 9 L. T. 650; 17 W. R. 84.—NORTH, J., *affirmed*,
 X. COTTON, FRY and LOPES, L.JJ.

West v. Reid (1843) 12 L. J. Ch. 245; 2
 Hare 249, 7 Jur. 147.—V.C. and Shear-
 man v. British Empire Mutual Life
 Assurance Co. (1872) 41 L. J. Ch. 466,
 L. R. 14 Eq. 4; 26 L. T. 570, 20 W. R.
 620—M.R., *explained*.

Saunders v. Dunman (1878) 7 Ch. D. 825, 47
 J. Ch. 338; 38 L. T. 416, 26 W. R. 397.
 FRY, J.—A mortgagee having an equity of
 redemption, or an ultimate interest in the fund,
 not improving that fund by the performance of
 one condition without which he cannot get it,
 does not, in my opinion, by performing that
 condition create a charge in his own favour as
 against his mortgagee. I was referred to two
 cases which undoubtedly appear at first sight
 somewhat to support the contention. The cases
 are *West v. Reid* and *Shearman v. British Empire*
Insurance Co. It is enough for me to say
 that in neither of these two cases does it appear
 to me that the point for which they were cited
 to me was the subject-matter of discussion and
 decision. In *West v. Reid* the point in controversy
 was abandoned at the bar. In *Shearman*
v. British Empire Insurance Co. an offer had
 been made, which was not withdrawn from,
 and upon which the M.R. acted. It is quite
 rare that he makes an observation there that it
 was *misage*, but, looking at his previous decision
 in *Clack v. Holland* (*supra*), I very much
 doubt whether his lordship meant to determine
 that question. Certainly that point does not
 appear to have been argued, the question for

argument being whether a person who had made
 a salvage payment was entitled to the entirety
 of the fund; and an offer having been made to
 give the defendant the portion of the fund which
 represented the actual payment, and that offer
 apparently never having been withdrawn, the
 case was decided on that ground. These are
 authorities therefore which do not appear to me,
 to sustain the proposition for which they were
 cited—p. 829.

West v. Reid and **Shearman v. British**
Empire Mutual Life Assurance Co.,
explained
Falcke v. Scottish Imperial Insurance Co.
(post)

Fennell v. Miller (1857) 26 L. J. Ch. 669, 23
 Beav. 172, 3 Jur. (N.S.) 850; 5 W. R. 215—
 M.R., *explained and followed*, **Post v. Roberts**
 (1861) 30 L. J. Ch. 666; 29 Beav. 167, 7 Jur.
 (N.S.) 100, 4 L. T. 760; 9 W. R. 605—M.R.,
referred to, **Leslie, in re** (*post*), *followed*, **Fry**
v. Lane (1888) 58 L. J. Ch. 113, 40 Ch. D. 312,
 60 L. T. 12; 37 W. R. 135.—KAY, J.

Saunders v. Dunman (*supra*), *adhered to*
Aylwin v. Witty (1861) 30 L. J. Ch. 860, 9
 W. R. 720.—KINDERSLEY, V.C.; and
Gill v. Downing (1874) 1, 11, 17 Eq. 816;
 30 L. T. 157, 22 W. R. 360—MALL, V.C.,
dismissed.

Tharp, in re (1852) 2 Sm. & G. 578, n., *commented on*. *And see post*, col. 1349.

Norris v. Galesian Insurance Co. (1869)
 38 L. J. Ch. 720, L. R. 8 Eq. 127—MALL, V.C.,
referred to.

Leslie, in re, Leslie v. French (1888) 52 L. J.
 Ch. 762, 29 Ch. D. 552, 48 L. T. 564, 31
 W. R. 361.—FRY, L.J. Judgment adopted by
PEARSON, J. *And see post*.

Leslie, in re, Leslie v. French, referred to
Leigh v. Dickeson (1883) 53 L. J. Q. B. 120;
 12 Q. B. D. 194.—FOLLOCK, B., *approved*, (1884)
 54 L. J. Q. B. 18; 15 Q. B. D. 60, 52 L. T. 790;
 33 W. R. 538.—C.A. BRIET, M.R., COTTON and
 LINDLEY, L.JJ.

Gill v. Downing and **Aylwin v. Witty**,
considered and explained

Leslie, in re, and Tharp, in re, referred to.
Falcke v. Scottish Imperial Insurance Co.
 (1886) 34 Ch. D. 234, 56 L. J. Ch. 707; 56
 L. T. 220, 35 W. R. 143.—C.A.

COTTON, L.J. (after having discussed *West v. Reid* and *Burridge v. Row* (*supra*)) continued.
 These [*Shearman v. British Empire Mutual*
Assurance Co. (*supra*)], undoubtedly, the M.R. gave
 to a bankrupt mortgagee credit for premiums
 paid after the bankruptcy, and a lien for the
 amount of the premiums, but for what reason
 does not appear at all in the report. All that
 the reporter has told us is this, that the M.R.
 said that the plaintiff, the mortgagee, was clearly
 entitled to the policy moneys, but that the
 premiums paid subsequently to the bankruptcy
 were in the nature of salvage moneys, and the
 plaintiff must repay them to the legal personal
 representative of the mortgagee with interest
 upon them. Fry, L.J., in *Saunders v. Dunman*
(supra), has suggested, and I think it is highly
 probable that is the correct explanation, that the
 decision went on the ground that previously to
 the institution of the suit the plaintiff, the

mortgagee of the policy, had offered to pay the legal person, representative a sum larger than the amount of the premiums with interest thereon at 1 per cent. That very probably is the ground of the decision. But if the M.R. meant to express an opinion that a person having no interest in a policy can, by payment of the premiums, acquire a lien on the policy, I am bound to say I differ from that view. The

real explanation of the case (*Gill v. Donovan*), in my opinion, is not that permission was given to persons who paid these premiums without authority to claim a lien for the amount of the premiums either on the income or the capital, but that the only question was, whether payment was to be made to them immediately, notwithstanding the restraint on anticipation. That restraint on anticipation would not have prevented the trustees from paying the premiums, and it did not prevent repayment to the mortgagees who paid them. The V.C. there (*Lytton v. Witty*) refused to apply the doctrine alleged by the respondents to be essentially applicable to these cases, that a person whose expenditure has saved the property has a lien.—pp 246, 247. BOWEN, L.J. concurred.

PRY, L.J. (who also concurred).—It appears that the expression "salvage moneys," so we are informed by one of the learned counsel for the appellant, and I dare say he is quite right, first occurs in the report of *Tharp, In re*, which was before Lord St. Leonards in 1852, where he seems to have used the expression as one familiar to the Irish Courts in certain cases. I certainly wish that the expression had remained on the other side of the Channel, where it seems to have arisen. I doubt whether any doctrine which is expressed by the word "salvage" applies to cases of this description.—p. 254

Leslie, In re, explained.

Winchelsea's (Earl) Policy Trusts, In re (1888) 58 T. J. Ch. 20; 39 Ch. D. 168; 59 L. T. 167. 37 W. R. 77.

NOTEH, J.—I think that Fry, L.J. intended, in *Leslie, In re*, to lay down exhaustively the cases in which a person who pays a premium in respect of a policy of insurance will be entitled to a lien upon the proceeds of the policy, and that he meant to say that a trustee would not be entitled to a lien in any other case than that which he mentioned.—p. 23

Leslie, In re, considered. Strutt v. Tippet (1890) 62 L. T. 475.—C.A. COTTON, LINDLEY and LOPEZ, L.J.J.; Power's Policies. In re (post)

Tharp, In re (supra), referred to

Power's Policies, In re (1888) [1899] 1 Ir. R. 6.—C.A. ASHBORNE, L.C.; FITZGIBBON and HOLMES, L.J.J.

Power's Policies, In re, applied.

M'Donnell's Estate, In re [1900] 1 Ir. R. 397.—ROSS, J.

Faleke v. Scottish Imperial Insurance Co. (supra, col 1848), applied. Winn, In re, Reol. J. Winn (1887) 57 L. T. 383.—KAY, J. Winchelsea's Policy Trusts, In re (supra). Patten v. Bond (or Lloyd) (1889) 60 L. T. 584, 37 W. R. 378.—KAY, J. referred to. Blyth v. Fladgate (1890) 60 L. J. Ch. 66.—[1891] 1 Ch. 337; 63 L. T. 546, 39 W. R. 432.—STIRLING, J.; Gas. Flout Whitten (No. 2) (1892) 65 L. J. P. 17, [1896] P. 12; 73 L. T. 698; 41 W. R. 268; 8 Asp.

M. C. 110.—C.A., affirmed (1896) 66 L. J. P. 99, [1897] A. C. 337, 76 L. T. 663.—H.L. (D) (see "SHIPPING"), Power's Policies, In re (supra); discussed, Durant & Co. v. Roberts (1900) 69 L. J. Q. B. 382, [1900] 1 Q. B. 629, 82 L. T. 217, 18 W. R. 476.—C.A. COLLINS and ROMER, L.J.J., A. L. SMITH, L.J. dissenting, reversed, H.L. (E) See "PRINCIPAL AND AGENT"

Cook v. Black (1842) 11 L. J. Ch. 268; 1 Huc 890, 6 Jur 164.—WIGRAM, V.C., distinguished

Solicitors' and General Life Assurance Co. v. Lamb (1861) 33 L. J. Ch. 426. 1 H. & M. 710; 10 Jur (N.S.) 739, 10 L. T. 160, 702. 12 W. R. 941.—WOOD, V.C. affirmed, 2 De G. J. & S. 251.—KNIGHT BRUCE and TURNER, L.J.J.

Solicitors' & Co., Assurance Co. v. Lamb, approved. White v. British Empire Mutual Life Assurance Co. (1868) 38 L. J. Ch. 53, 1 R. 7 Eq. 394, 19 L. T. 306; 17 W. R. 26.—MALINS, V.C.; followed. City Bank v. Sovereign Life Assurance Co. (1881) 50 L. T. 565, 32 W. R. 658.—PEARSON, J.

Crossley v. City of Glasgow Life Assurance Co. (1876) 46 L. J. Ch. 65, 4 Ch. D. 121, 36 L. T. 285, 25 W. R. 264.—JESSEL, M.R., approved.

Rosier's Trusts, In re (1877) 37 L. T. 426.—MALINS, V.C.

Crossley v. City of Glasgow Life Assurance Co. overruled (with regard to time for beginning to pay interest)

Webster v. British Empire Mutual Life Assurance Co. (1880) 15 Ch. D. 169, 49 L. J. Ch. 769; 43 L. T. 229, 28 W. R. 818.—C.A. JAMES COTTON and THESIGER, L.J.J., reversed JESSEL, M.R.

COTTON, L.J.—What we have to consider, therefore, is this: whether there is anything to justify the finding of the M.R. that there was any default or neglect to pay the money by the defendant company. If there was not, then the principle on which interest should be granted—that is, by way of damages—fails. The M.R. followed his former decision in *Crossley v. City of Glasgow Life Assurance Co.*, which he thought decided this case upon many points. There the facts were very simple. In that case he gave, as he has given here, the assurance office all their costs as between solicitor and client, and he did so on the ground that they were justified in declining to pay the money without the decree of the Court. In the present case, it has not been questioned before us that the decree of the Court below gives a complete exoneration or discharge to the assurance office. It must not be assumed that we decide that that is so. That question is not before us, but it may hereafter arise. The M.R. in both cases decided that the decree of the Court would be a complete indemnity to the assurance office, upon this ground, that, although there was no legal personal representative to give a discharge to the office, yet he had the power to dispense with the presence of the legal personal representative, and that his decree, made in the absence of the legal personal representative under that power, would be a good discharge to the office. That is, in fact, a decision that until the decree the office could not reasonably be called upon to pay.—p. 176.

Webster v British Empire Mutual Life Assurance Co. (*supra*), *dicta* commented on *Quintus v. Caledonian Fire and Life Insurance Co.* (1881) 19 Ch D 534, 51 L J Ch 80, 45 L T 662, 30 W R 123.

COTTELL, J. — In *Webster v. British Empire Mutual Life Assurance Co.*, no doubt, James, L.J. said he was a little surprised at the decree having been made in the absence of the legal personal representative. But when the facts of that case are looked at they show a good reason for that observation. There the amount of an insurance on the life of an insured had been limited over to an equitable mortgagee in the absence of a legal personal representative of the mortgagor, the sum payable on the policy being largely in excess of the mortgage debt. The effect was to pay to the creditor a large surplus which belonged to the insolvent's estate. I should in that case have felt the same doubt which James, L.J. felt. Certainly Cotton, L.J. went further, and appeared to doubt whether the order would give a complete discharge to the insurance company. I should have thought, if it had been necessary to decide the point, that the order would have given a complete discharge. At all events, those observations of the learned judges were only *dicta*, and do not throw any doubt on the jurisdiction of the Court in such a case as this — p. 537.

BAGGALLAY, L.J., to the same effect. LINDLEY, L.J., *concurrent*.

Acey v Fernie (1840) 10 L J. Ex. 9, 7 M & W 131 — *EXC.*, *distinguished*.
Economic Fire Office, in re (1896) 12 Times L. R. 142. — WILLIAMS, J.

Acey v. Fernie, followed.

* London and Lancashire Life Assurance Co. v. **Fernie** (1897) 66 L. J. P. C. 116, [1897] A. C. 199; 13 Times L. R. 572. — P. C.

SIR H. STRONG (for self, LORDS MAGNATHEN and MORRIS) and SIR R. COUCH — The principle upon which the decision on *Acey v. Fernie* proceeded applies. The dealings between the appellants and their agent were, as regards the assured, *res inter alios*, and afford no presumption of an intention to treat the agent as acting for his true principals, but as the representative of the assured — p. 120.

Hall, in re (1861) 5 L. T. 395, 10 W. R. 37 — WOOD, V.-C., *followed*.

United Kingdom Life Assurance Co., in re (1863) 84 L. J. Ch 554, 34 Bea. 493, 6 N. R. 59; 11 Jur. (N.S.) 424, 12 L. T. 441, 13 W. R. 613 — ROMILLY, M.R.

United Kingdom Life Assurance Co., in re, followed

Webb's Policy, in re (1866) 35 L. J. Ch 850, L. R. 2 Eq. 456, 12 Jur. (N.S.) 595, 11 L. T. 89, 14 W. R. 857 — WOOD, V.-C.

Webb's Policy, in re, followed on question of costs

Kerr's Policy, in re (1869) L. R. 8 Eq. 331 — JAMES, V.-C.

Webb's Policy, in re, not followed

Russell's Policy Trusts, in re (1872) L. R. 15 Eq. 26, 27 L. T. 706, 21 W. R. 97 — MALINS, V.-C.

Russell's Policy Trusts, in re, followed
Nemphill v. Queensland Sheep Investment Co. (1879) 29 L. T. 737 — MALL, V.-C.

United Kingdom Life Assurance Co., in re; Webb's Policy, in re, and Hall, in re (*supra*), *discussed*.

Haycock's Policy, in re (1876) 15 L. J. Ch 247, 1 Ch D. 611, 24 W. R. 291 — JESSEL, M.R. *And see post*, col. 1353.

Hall, in re; United Kingdom Life Assurance Co., in re, and Webb's Policy, in re, commented on

Matthew v. Northcott Assurance Co. (1878) 6 Ch. D. 80; 47 L. J. Ch 562, 38 L. T. 468, 27 W. R. 51.

JESSEL, M.R. — In *Hall, in re*, Lord Hatherley, then V.-C., incorrectly, in my opinion, apprehended the effect of a policy of insurance. In that case an insurance company had paid in a sum of money under the Trustee Relief Act, and the V.-C. says, "that it had been held that a mere stakeholder could pay in a fund under the Trustee Relief Act, and therefore the company were justified in so doing." He does not mention the authority where it had been so held, but even if that were so, a debtor is not in the position of a mere stakeholder, even where the creditor has dealt with the debt so as to make two claims to it. He may interplead, and in that sense, in that way, and to that extent, may be described incorrectly as a stakeholder, but that is a peculiar case, and an ordinary debtor cannot be considered a stakeholder. But when I come to look at *Hall, in re*, I find it was not an ordinary policy, it was a family policy, and it seems to have been thought that there was something peculiar or special about the case. The matter came before Lord Romilly in *United Kingdom Life Assurance Co., in re*. What happened there has happened, according to my experience, very often. An eminent Queen's Counsel, now Baggallay, L.J., and Mr. Everett, were counsel for the petitioners, and Mr. Alderson was counsel for the respondents, the Aldersons, who brought in a claim. He took the point that they were not liable to pay the costs because the Trustee Relief Act did not apply. It was not the company who took the objection, but he took the objection to avoid the payment of costs, so that he was not in a very favourable position. Mr. Wickens, for the insurance company, as to the right to pay in under the Trustee Act, cited *Hall, in re*. Then the M.R. said, "that he concurred with Wood, V.-C., that mere stakeholders might pay money into Court under the Trustee Relief Act, though they might not, strictly speaking, be termed trustees." He ordered the costs of the company of and relating to the payment into Court, and of this application, as between solicitor and client, and the costs of the petitioners, to be paid by the respondents, the Aldersons. So that he agreed that they were not trustees. He said they were mere stakeholders, and he concurred with Wood, V.-C. He did not really, as far as I can see, give a judicial judgment on the matter. It was a case in which he was not very anxious to decide favourably to the objecting party, and he ordered the respondents to pay the costs, which they ought to have paid in any event. No doubt it might have required a bill to make them pay them. That is all by decided. As I understand, he thought they were not strictly trustees, but that the Act applied to a mere stakeholder though not a trustee. Then when the matter came before

Wood, V.-C., in *Webb's Policy, In re*, it came in this way: "There were some very important questions to be argued out between the parties. They did not object at all, it was principally desired to take the opinion of the Court, they all took the benefit of the payment into Court, they did not object to pay the costs of the company, but they did object to pay the costs as between solicitor and client, and that is how the question came to be decided. Mr. Wickens, for the assurance company, argued 'that the company were entitled to costs as between solicitor and client. In an interpleader suit no doubt the plaintiff was entitled to costs only as between party and party, but the intention of the framers of the Trustee Act (10 & 11 Vict. c. 96, s. 1) was not to substitute a proceeding for an interpleader suit. It was rather to substitute a proceeding for a suit to administer a trust, and to relieve persons who held moneys belonging to others in their hands,' and he cited *United Kingdom Life Assurance Co., In re*. There Wood, V.-C. observed, 'I think the question was argued before me, and decided in a case of *Hall, In re*.' The argument on the other side was that the company were stakeholders, and were to have their costs as between party and party. The V.-C. consulted the M.R., the M.R. having relied upon him in *Hall, In re*, and what he says, is this:—'I observe that in *United Kingdom Assurance Co., In re*, where the M.R. had to determine upon the propriety of payment into Court by an insurance company of the proceeds of a policy, his lordship decided that a stakeholder of this description came within the designation in the Act of 'trustees, executors, administrators or other persons, having in their hands any moneys belonging to any trust,' and he appears to have given the company their costs, as between solicitor and client, without any argument.' Then, after saying that the M.R. agreed with him, he goes on: 'The object of the Act was to relieve not only trustees, executors, and administrators, but other persons having trust money in their hands, and to enable them to obtain a cheap and efficacious mode of having the rights of the parties settled. It is in every way desirable that this form of proceeding should be encouraged rather than otherwise.' He does not decide they are trustees although they have trust moneys, but he says, 'the M.R. has decided that it was desirable to encourage this form of proceeding,' and that is all. I may say neither judge, in fact, said there was a trust—pp. 81–87.

Haycock's Policy, In re (*supra*), followed. *Sutton's Trusts, In re* (1879) 48 L. J. Ch. 850, 12 Ch. D. 175, 27 W. R. 529—HALL, V.-C.

Amicable Insurance Society v. Bolland (*Fauntleroy's Case*) (1830) 2 Dow & Cl. 1, 4 Bligh (N.S.) 194, 33 R. R. 22—H.L. (N.).

ELDON, L.C., followed.

Cleaver v. Mutual Reserve Fund (1891) 61 L. J. Q. B. 128, [1892] 1 Q. B. 117, 66 L. T. 220, 40 W. R. 230, 56 J. P. 180.—O.A. *ESHER, M.R., LOPES and MEY, L.J.J., reversing* 60 L. J. Q. B. 672; 65 L. T. 220; 39 W. R. 638.—DENMAN and WILLS, J.J.

2. AGAINST ACCIDENT.

Fitton v. Accidental Death Insurance Company (1864) 34 L. J. O. P. 28; 17 C. B.

(N.S.) 122—C.P., approved but distinguished.

Smith v. Accident Insurance Company (1870) 39 L. J. Ex. 211, L. R. 5 Ex. 302, 22 L. T. 801, 18 W. R. 1107.

CERASBY, B.—Fitted v. Accidental Death Insurance Co. does not, to my mind, resemble the present case, for, in the first place, the words of the condition were different, and in the next place, the terms of which the plaintiff died was tentatively produced instantaneously by the accidental violence. It was hardly to be considered as arising within the system—p. 214.

CHANNELL and MARTIN, JJ. to the same effect. **KELLY, C.B.** dissented.

Trew v. Ry. Passengers' Assurance Co. (1861) 30 L. J. Ex. 317; 6 H. & N. 839, 7 Jur. (N.S.) 878, 4 L. T. 833; 9 W. R. 671—EX. CH., reversing (1860) 29 L. J. Ex. 218, 5 H. & N. 211, 6 Jur. (N.S.) 799, 8 W. R. 191—EX., followed.

Winspear v. Accident Insurance Co. (1880) 50 L. J. Q. B. 292, 6 Q. B. D. 12, 13 L. T. 159, 29 W. R. 116—O.A. **COLERIDGE, C.J., BAGGALLAY and BHEET, L.J.J.; referred to, Minifie v. Ry. Passengers' Assurance Co.** (1881) 41 L. T. 554—FOLLOCK, B. and STEPHEN, J.

Winspear v. Accident Insurance Co. (*supra*), followed.

Lawrence v. Accidental Insurance Co. (1881) 50 L. J. Q. B. 522, 7 Q. B. D. 216, 15 L. T. 29, 29 W. R. 802, 45 J. P. 781—DENMAN and WATKIN WILLIAMS, J.J.

Reynolds v. Accidental Insurance Co. (1870) 22 L. T. 820—C.P. **Winspear v. Accident Insurance Co.** and **Lawrence v. Accident Insurance Co.**, distinguished and distinguished.

Walker v. London and Provincial Insurance Co. (1888) 28 L. R. II 572—EX. DIV.

Winspear v. Accident Insurance Co. and **Lawrence v. Accidental Insurance Co.**, distinguished.

Hensley v. White (1890) 69 L. J. Q. B. 188; [1900] 1 Q. B. 481, 81 L. T. 767; 48 W. R. 257, 63 J. P. 804.—O.A.

RIGBY, L.J.—The cases which have been cited on behalf of the appellant were decisions on policies of insurance, and do not in any way touch the present case.—p. 190.

COLLINS, L.J.—In all these cases the cause of death had this element—the something fortuitous and unexpected. The fortuitous and unexpected element is the proximate or ultimate thing bringing about the death. The cause in each of the cited cases was accidental. That element is wanting in this case.—*ib.* v. WILLIAMS, L.J. concurred.

3. FIRE.

Dobson v. Sotheby (1827) M. & M. 90; 31 R. R. 718, approved.

Shaw v. Robberds (1837) 6 L. J. K. B. 106, 6 A. & E. 75, 1 N. & P. 279, W. & W. D. 91, 1 Jan. 6—K. B. **Sillem v. Thornton** (*post*).

Shaw v. Robberds, followed. **Pim v. Reid** (1843) 12 L. J. C. P. 299, 4 Man. & G. 1, 6 Scott (N.R.) 982—O.P.; distinguished, **Sillem v. Thornton** (*post*).

Pim v. Reid, (*supra*), distinguished
Sillem v. Thornton (1861) 23 L. J. Q. B. 362, 3
 El. & Bl. 868, 2 C. L. R. 1710, 18 Jan. 718, 2
 W. R. 521.—Q. B.

Sillem v. Thornton, commented on
Stokes v. Cox (1874) 26 L. J. Ex. 113, 1
 II & Bl. 320, 533, 3 Jur. (N.S.) 15, 5 W. R. 89
 —EX. CH., reversing (1866) 25 L. J. Ex. 291 —
 EX. BRIDGEMAN, B., dissenting
WILLES, J.—In *Sillem v. Thornton* the descrip-
 tion in the policy was untrue. At the time of
 the execution of the policy the promises described
 as of two stones were, in fact, of three, there-
 fore, whatever is said in *Sillem v. Thornton* as
 to a subsequent alteration making a policy void
 must have been extra-judicial.—p. 113.

Sillem v. Thornton, doubted.
Thompson v. Hoppen (1868) 27 L. J. Q. B. 411,
 El. Bl. & Bl. 1048, 3 Jur. (N.S.) 93, 5 W. R. 857.
 —EX. CH., reversing (1866) 26 L. J. Q. B. 18, 6
 El. & Bl. 172, 937, 3 Jur. (N.S.) 133.—Q. B.
WILLES, J.—In effect, there being no violation
 of the law, and no fraud in the insured, an
 increase of risk to the subject-matter of insur-
 ance, its identity remaining, though such increase
 of risk be caused by the assured, does not avoid
 the insurance. I may add, that there is a case
 of *Sillem v. Thornton*, which turned mainly
 upon a question of identity of the subject-matter
 intended to be assured, and which may be
 sustained on that ground, notwithstanding our
 present decision. That part of the judgment in
 that case which discusses the above point was
 not called for by the facts, and if it was in-
 tended to negative the proposition just stated,
 we ought to overrule it.—p. 445.

Stokes v. Cox, approved
Wheelton v. Hardisty (1858) 27 L. J. Q. B.
 241, 8 El. & Bl. 282, 285, 5 Jur. (N.S.) 11, 6
 W. R. 339.—EX. CH., partly reversing (1857)
 26 L. J. Q. B. 265; 3 Jur. (N.S.) 1169, 5 W. R.
 784.—Q. B.; referred to, **Johnson v. Rayton**
 (1881) 50 L. J. Q. B. 753, 7 Q. B. D. 498; 45
 L. T. 374.—Q. A.

Wheelton v. Hardisty, distinguished, **Mac-
 donald v. Law Union Fire and Life Insurance
 Co.** (1874) 43 L. J. Q. B. 131, L. R. 9 Q. B. 328;
 30 L. T. 545, 22 W. R. 530.—Q. B.

Wright and Pole, In re (1834) 1 A. & E. 621,
 40 R. R. 879, 8 C. R. non Sun Fire Office, In re,
 8 N. & M. 819.—K.B.

Tarleton v. Stanforth (1791-1790) 5 Term
 Rep. 608, 1 B. & P. 471, 5 Anstr. 707; 4
 R. R. 845; and **Salvin v. James** (1805) 6
 East 571; 2 Smith 646, 8 R. R. 540,
 commented on.

Simpson v. Accidental Death Insurance Co.
 (1857) 26 L. J. C. P. 289, 2 C. D. (N.S.) 257; 3
 Jur. (N.S.) 1079.—C.P.

Wesley v. Woods (1795-1790) 6 Term Rep.
 710; 2 H. Bl. 574, 3 B. R. 323, dissented.
London Guarantee Co. v. Peartrey (1890)
 5 App. Cas. 911; 43 L. T. 890, 28 W. R. 893; 45
 J. P. 4.—H. L. (IR) **LORDS BLACKBURN** and
WATSON; **SERBORN, L.C.**, dissenting; reversing
 6 Ir. R. C. L. 210.—EX.

Mason v. Sainsbury (1782) 3, Dougl. 61,
 approved, **Clark v. Blything Hundred** (or Inhabit-
 ants) (1823) 2 R. & C. 274, 3 D. & R. 189, 2
 L. 1 (o.s.) K. B. 7; 29 G. R. 33.—K. B., principle
 applied, **Yates v. White** (or Whyte) (1838) 7 L. J.
 C. P. 116, 4 Bing. (N.S.) 272; 5 Scott 640.—C. P.
 referred to, **Anggum v. Upton** (post), **Bankin v.**
Potter (1873) 12 L. J. C. P. 169; L. R. 6 H. L.
 83 (*supra*, col. 1843); applied **Jeisen v. East**,
 and **West India Dock Co.** (1875) 11 L. J. C. P.
 181, L. R. 10 C. P. 800; 32 L. T. 321, 23 W. R.
 621.—C. P.

Yates v. Whyte, referred to.
Anggum v. Upton (1859) 19, 12f.—NAPIER,
 L.C.

**Mason v. Sainsbury, Clark v. Blything
 Hundred and Yates v. Whyte**, discussed
 and approved.
Simpson v. Thompson (1877) 3 App. Cas. 279;
 38 L. T. 1, 3 Asp. M. C. 567.—H. L. (803).

**Mason v. Sainsbury, Clark v. Blything
 Hundred and Godin v. London Assurance
 Co.** (1754) 1 Burr. 490, discussed and
 approved.

North British and Mercantile Insurance Co. v.
London, Liverpool and Globe Insurance Co. (3)
 (1877) 46 L. J. Ch. 537, 5 Ch. D. 569, 36 L. T.
 629.—G.A. **JAMES** and **MELLEN, L.J.**, **HAG-
 GALLAY, J.A.**

North British and Mercantile Insurance Co. v.
London, Liverpool and Globe Insurance Co.,
 commented on and followed, **Darrell v. Tibbitts**
 (1880) 50 L. J. Q. B. 33, 5 Q. B. D. 560; 12 L. T.
 797, 29 W. R. 66; 11 J. P. 695.—G.A. **BRETT**,
COTTON and **THESIGER, L.J.** See judgments,
 applied, **Andrews v. Patriotic Assurance Co.**
 (1886) 18 L. R. Ir. 835.—EX. D. And see post,
 col. 1358.

Garden v. Ingram (1852) 23 L. J. Ch. 478 —
CRANWORTH, L.C., distinguished.
Lees v. Whiteley (1864) 35 L. T. 412;
 L. R. 2 Eq. 143, 14 L. T. 472; 14 W. R. 581.—
KINDERHLEY, V.-C.

**Garden v. Ingram, Lees v. Whiteley, Dur-
 rant v. Friend** (1852) 21 L. J. Ch. 353,
 5 De G. & Sm. 343, 16 Jur. 709.—**PARKER,**
V.-C., and **Norris v. Harrison** (1877) 2
 Madd. 268, discussed and explained
Poole v. Adams (1861) 33 L. J. Ch. 639,
 4 N. R. 9, 10 L. T. 287; 12 W. R. 623.—
KINDERHLEY, V.-C., approved.

Rayner v. Preston (1881) 50 L. J. Ch. 472,
 18 Ch. D. 1, 14 L. T. 787; 29 W. R. 816; 45
 J. P. 829.—G.A. **COTTON** and **BRETT, L.J.**,
JAMES, L.J., dissenting; affirming (1880) 14
 Ch. D. 227; 43 L. T. 18, 23 W. R. 808, 41 J. P.
 634.—**JUSSEL, M.R.** See judgments.

Garden v. Ingram, explained
Seymour v. Vernon (1852) 21 L. J. Ch. 483;
 16 Jur. 189.—**KINDERHLEY, V.-C.**, followed
Rook v. Worth (1750) 1 Ves. sen. 460 —
HARDWICKE, L.C. and **Parry v. Ashley**
 (1829) 3 Sim. 97; 80 R. R. 132.—**SHAD-
 WELL, V.-C.**, discussed
Warwick v. Brettnall (1882) 23 Ch. D. 188;
 31 W. R. 529.—**CHITTY, J.**

Darrell v. Tibbitts (*supra*), applied.
Rayner v. Preston (*supra*), commented on

Simpson v. Scottish Union Insurance Co. (1868) 32 L. J. Ch. 829; 1 H. & M. 618; 9 Jur. (N.S.) 711; 1 N. R. 537; 8 L. T. 112, 11 W. R. 459—WOOD, V.-C., explained. *And see post*, col. 1358.

Simpson v. Thomson (*supra*, col. 1356), and **Collingridge v. Royal Exchange Assurance Corporation** (1877) 47 L. J. Q. B. 32, 3 Q. B. D. 178, 37 L. T. 625; 26 W. R. 112

—MELLOR and LUSH, JJ., referred to (*Castellain v. Preston* (1883) 11 Q. B. D. 380, 52 L. J. Q. B. 366; 19 L. T. 29, 31 W. R. 557—C.A.; *reversing* (1882) 8 Q. B. D. 613, 46 L. T. 569, 30 W. R. 597—CHITTY, J.).

BRETT, L.J., in *Bernard v. Rodocanachi* (*supra*, col. 1343) the foundation of the judgment on my mind was that what was paid by the United States Government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. *Darrell v. Tibbitts* seems to me to be entirely in favour of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in *Darrell v. Tibbitts* the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it.—p. 380—391.

COTTON, L.J., to the same effect.

• BOWEN, L.J., who also concurred, said: "We have been asked to hold that a tenant from year to year can always recover the full value of the house from the insurance company, although he has intended to insure only his limited interest in it. There is some justification for that in the language of James, L.J. in *Rayner v. Preston*. He says this: 'In my view of the case it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance. But that Act seems to me to show that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by showing that he was of extreme old age or suffering from a mortal disease.' Now, with the greatest possible respect and reverence for all that is left to us of the judgments of a great judge like James, L.J., I confess I do not follow that. . . . It is true that in most cases the claim of a tenant from year to year, or for years, cannot be answered by handing over to him what may be the marketable value of his property, and the reason is that he insures more than the marketable value of his property, and he loses more than the marketable value of his property; he loses the house in which he is living, and the beneficial enjoyment of the house

as well as its pecuniary value. That, I think, is all that was meant by the V.-C. in *Simpson v. Scottish Union Insurance Company*—p. 399.

Rayner v. Preston, distinguished, *Andrews v. Patriotic Assurance Co.* (*post*), referred to, *Inland Revenue Commissioners v. Angus* (1889) 23 Q. B. D. 579, 61 L. T. 832; 38 W. R. 3, 53 J. P. 453—COLLIERIDGE, C.J. and HAWKINS, J.; affirmed, C.A. HALSEBURY, L.C., ESHER, M.R. and LINDLEY, L.J.

Castellain v. Preston, referred to *Simpson v. Thomson*, explained. *Sea Insurance Co. v. Hadden* (1881) 53 L. J. Q. B. 252, 13 Q. B. D. 706, 50 L. T. 657; 32 W. R. 311; 5 Asp. M. C. 230—C.A. BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.

Castellain v. Preston, referred to *Simpson v. Thomson* (*supra*, col. 1356), and *discussed and distinguished* *Andrews v. Patriotic Assurance Co.* (1886) 18 L. R. Ir. 355—EX. D.

Darrell v. Tibbitts (*supra*, col. 1356), and **Castellain v. Preston**, discussed. *West of England Fire Insurance Co. v. Isaacs* (1896) 65 L. J. Q. B. 653, [1896] 2 Q. B. 377, *affirmed*, (1896) 66 L. J. Q. B. 36; [1897] 1 Q. B. 226, 75 L. T. 544—C.A. ESHER, M.R., LOPES and EGBY, L.JJ.

COLLINS, J.—A point was made upon behalf of the defendant, based upon a dictum of Cotton, L.J. in *Darrell v. Tibbitts*, which raised, I think, the only material difficulty in this case. His lordship said: "If the company had known of the covenants in the lease, and of the actual position of the parties, it might have been said that they had paid without requiring the covenant to be enforced, and therefore had lost their remedy." In the present case the plaintiffs, when they paid the insurance money to the defendant, were thoroughly aware of all his rights against his lessor. They had seen the lease, and their attention had been called to the covenant, and therefore it becomes necessary to consider whether that fact distinguishes the case from *Darrell v. Tibbitts*, and obliges the plaintiffs to renounce such rights as they might have retained had they chosen to insist upon them at the time they paid the money. Cotton, L.J., in a later case, makes observations which seem to be somewhat inconsistent, not with the decision, but with the suggestion which he apparently makes in the passage I have cited from *Darrell v. Tibbitts*. In . . . *Castellain v. Preston*, he says: "If the proposition is stated in that manner, it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid, and it is established by *Darrell v. Tibbitts* that the insurance company is entitled to that benefit whether or not before they pay the money they insist upon a calculation being made of what can be recovered in diminution of the loss by the assured, if they do not insist upon that calculation being made, and if it afterwards turns out that in consequence of something which ought to have been taken into account in estimating the loss, a sum of money or even a benefit, not being a sum of money, is received, then the office, notwithstanding the payment made, is entitled to say that the assured is to hold that for its benefit, and although it

was not taken into account in ascertaining the sum which was paid, yet when it has been received it must be brought into account; and if it is not a sum of money, but a benefit that has been received, its value must be estimated in money." I have already dealt with the difference between a benefit actually received and a benefit lost, but subject to that difference, that is undoubtedly an expression of opinion by Cotton, L.J., that the fact that a company has paid with full knowledge of the facts does not debar them from requiring a subsequent account on the footing of a benefit which they knew of and had not dealt with in account when they paid. I do not myself see any principle upon which that exception or limitation could be placed unless they had so acted as to be estopped, and to make it inequitable for them to insist upon the position, which they must, by their conduct as between themselves and their assured, be deemed to have abandoned.—p. 655

Leeds v Cheetham (1827) 1 Sm. 146, 5 L. J. (o.s.) Ch 105, 127 R. R. 181.—LEACH, v.-c., *upheld*

Lofft v Dennis (1859) 5 Jur. (N.S.) 727 28 L. J. Q. B. 168, 1 El. & El. 474, 7 W. R. 199.—Q. B.

[The decision in *Leeds v. Cheetham* is not accepted as law by Lord St. Leonards, who, in his *Handy Book on Property Law*, p. 101, 1st edit., p. 109, 6th edit., says to the landlord "if, however, you have insured, although not bound to do so, and received the money, you cannot compel payment of the rent, if you decline to lay out the money in rebuilding"]

CAMPBELL, C.J.—With regard to the opinion expressed by Lord St. Leonards, his book is a most valuable publication, and I pay respect to it; if it were proposed to make it law, I might be ready to support it; but it is only the opinion of a most learned judge, and it is contrary to a solemn decision, and to my own opinion.—p. 720.

Leeds v. Cheetham and Lofft v. Dennis, *referred to*

Kenney v Employers' Liability Assurance Corporation [1901] 1 Ir. R. 301.—C.A. ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ., *WALKER, L.J., dissenting*.
And see "LANDLORD AND TENANT."

Richards v Easto (1846) 15 L. J. Ex. 168;

15 M. & W. 244.—EX., *discussed*.

Fuliter v Phippard (1817) 17 J. Q. B. 89, 11 Q. B. 347, 12 Jur. 202.—Q. B.

Fuliter v Phippard, *referred to*

Gosely, Ex parte, Barker, in re (1864) 34 L. J. Bk. 1, 4 De G. J. & S. 477, 10 Jur. (N.S.) 1085; 11 L. T. 319, 13 W. R. 60.—WESTBURY, L.C.

4. GUARANTEE.

Benham v United Guarantees and Life Assurance Co. (1832) 21 L. J. Ex. 817, 7 Ex. 744, 16 Jur. 691.—EX. and **Anderson (or Henderson) v Fitzgerald** (1853) 4 H. L. Cas. 483; 17 Jur. 995.—H.L. (IR.).

CRANWORTH, L.C., LORDS BROUGHAM and LEONARDS, with the judges.—*reversing*

Towle v National Guardian Assurance Society (1861) 30 L. J. Ch. 900, 7 Jur. (N.S.) 618, 1109;

5 L. T. 193; 10 W. R. 49.—*reversing* 3 Giff. 12; 3 L. T. 481; 9 W. R. 649.—STUART, v.-c.

TURNER, L.J.—Those cases depend upon the terms of the policy, how far the office has or has not protected itself against the consequences of any misrepresentation which might be made to them, but in the present case there cannot be a doubt that this office has done everything it could to protect itself.—p. 915 **KNIGHT MURDOCH, L.J.**, concurred. *And see Universal Non-Tariff Fire Insurance Co., in re, Forbes' Claim* (1875) 14 L. J. Ch. 761, 1 L. R. 19 Eq. 485; 23 W. R. 464.—MALINS, v.-c.

Anderson v Fitzgerald, discussed, London Assurance v Mansel (*post*); Thomson v Wemyss (1884) 9 App. Cas. 671.—H.L. (SC.) (*supra*, col. 1844)

Dalglish v. Jarvis (1850) 20 L. J. Ch. 475; 2 Mac. & G. 231; 2 H. & Tw. 437; 14 Jur. 945.—LORDS COMMRS. (*And see post*); and **Lindenau (or Von Lindenau) v. Deffborough** (1828) 8 B. & C. 586, 3 Moo. & R. 45; 3 Cui. & P. 360, 7 L. J. (O.S.) K. B. 42.—K.B., *referred to*

London Assurance v Mansel (1879) 48 L. J. Ch. 331; 11 Ch. D. 368, 41 L. T. 220, 27 W. R. 444.—JESSEL, M.R. *And see post*.

Dane v Mortgage Insurance Corporation (1893) 63 L. J. Q. B. 144; [1894] 1 Q. B. 54, 9 R. 96, 70 L. T. 88, 42 W. R. 227.—C.A. BISHOP, M.R., LOPES and KAY, L.JJ., *principle applied*.

Finlay v. Mexican Investment Corporation (1896) 66 L. J. Q. B. 151. [1897] 1 Q. B. 517; 76 L. T. 257.—CHARLES, J.

Dane v. Mortgage Insurance Corporation, Finlay v. Mexican Investment Corporation, Dalglish v. Jarvis and London Assurance v Mansel, *referred to*.

Seaton v Heath (1899) 69 L. J. Ch. 631; [1899] 1 Q. B. 782, 80 L. T. 579; 17 W. R. 487, 4 Com. Cas. 193.—C.A. A. L. SMITH, COLLINS and ROMER, L.JJ., *reversing BIGHAM, J., C.A.*, *reversed on the facts, non*. **Seaton v. Bignall** (1900) 69 L. J. Q. B. 109, [1900] 1 Q. B. 85; 82 L. T. 205; 5 Com. Cas. 193.—H.L. (M.). HALSBURY, L.C., LORDS MACNAGHTEN, MORRIS, SHAW, DAVEY, BRAMPTON and ROBERTSON. *And judgment of BIGHAM, J., restored*

Dane v. Mortgage Insurance Corporation, Finlay v. Mexican Investment Corporation and Seaton v. Heath, *applied*

Part's Bank v. Albert Mines Syndicate (1900) 5 Com. Cas. 116.—MATHEW, J.

5. BURGLARY AND HOUSEBREAKING.

George v Goldsmiths' and General Burglary Insurance Association (1898) 67 L. J. Q. B. 807; [1898] 2 Q. B. 189, 78 L. T. 818, 46 W. R. 557; 82 J. F. 634.—WILLS and KENNEDY, JJ., *reversed*, (1899) 68 L. J. Q. B. 365, [1899] 1 Q. B. 595, 80 L. T. 248; 47 W. R. 474.—C.A. RUSSELL OF KILLOWEN, C.J., A. L. SMITH and COLLINS, L.JJ.

6. ACTIONS BY INSURANCE COMPANIES

London Monetary Advance and Life Assurance Co. v. Smith (1855) 27 L. J. Ex. 479, 3 H. & N. 543.—EX., *overruled*, **London and Provincial Provident Society v. Ashton** (1862) 12 C. B. (N.S.) 709, 723, 7 L. T. 531; 11 W. R. 162.—EX. CH.

INTEREST.

Hitchman v. Stewart (1855) 21 L. J. Ch. 690, 3 Drew 271; 3 R. 838, 1 Jur. (N.S.) 839, 3 W. R. 464—*v. o.*, followed.
Swan's Estate, in re, 1r R. 4 Eq. 408—*C. A.*

Petre v. Duncombe (1851) 2 L. M. & T. 107; 20 L. J. Q. B. 242, 15 Jur. 80, and **Hitchman v. Stewart**, adopted.
McKewan's Case, Maria Anna and Steinbank Coal and Coke Co. (1877) 46 L. J. Ch. 819, 6 Ch. D. 447, 37 L. T. 201, 25 W. R. 857—*v. o.*, partly reversed, *C. A.*

Petre v. Duncombe and Hitchman v. Stewart, approved and followed.
Fox, Walker & Co., in re, Bishop, Ex parte (1880) 15 Ch. D. 400; 50 L. J. Ch. 18, 43 L. T. 165, 29 W. R. 114—*C. A.*

COTTON, L.—If there had been no authority on the point, the matter would have possibly been more doubtful, but in several cases interest has been allowed on payments made both under express and implied contracts to indemnify. In **Petre v. Duncombe**, under a covenant by way of indemnity to a surety, interest was allowed by way of damages upon payments which had been made by the surety, it being held that on a contract to indemnify the person to be indemnified should be put in the same position as if the man who had contracted to indemnify him had in fact done what he had contracted to do, that is, had paid the money at the proper time. And **Kinderley v. C.**, in a very careful judgment in **Hitchman v. Stewart**, came to the same conclusion where there was only an implied contract by co-sureties to indemnify or repay another co-surety the amount which he had paid in excess of his fair proportion. There the Vice-Chancellor allowed interest, on the ground that there was an implied contract to indemnify, following the old case of **Lewson v. Wright** (1 Cox 275), where the point does not appear to have been argued, but interest was allowed under somewhat similar circumstances. That decision of Vice-Chancellor Kinderley's has been followed in the recent case of **In re Swan's Estate**, where the Court of Appeal in Ireland allowed interest under similar circumstances on the same principle on an implied contract to indemnify. Having regard to these authorities, and to the consideration that where there is a contract to indemnify, express or implied, the person who is to be indemnified ought to be put in the same position as if the act against which he is to be indemnified had been done by the person who is to indemnify him at the time when it ought to have been done, we are of opinion that the proof for interest ought to be admitted.—p. 421

Petre v. Duncombe, not applied.
Watson, in re, Turner v. Watson (1896) 65 L. J. Ch. 553; [1896] 1 Ch. 925; 74 L. T. 453, 44 W. R. 571.—*NORTH, J.*

Cameron v. Smith (1819) 2 B. & Ald. 305; 20 R. R. 414, observations adopted.
Cook v. Fowler (1874) 43 L. J. Ch. 855; 1 R. 7 H. L. 27.—*H. L. (B)*

Cook v. Fowler, adopted.
Goldstrom v. Tallerman (1886) 56 L. J. Q. B. 22; 18 Q. B. D. 1; 55 L. T. 866; 55 W. R. 68—*C. A.*

Cook v. Fowler, distinguished.
Dixon, in re, Haynes v. Dixon (1900) 69 L. J. Ch. 609, [1900] 2 Ch. 561, 83 L. T. 129, 48 W. R. 668.—*C. A.*

L. C. & D. Ry. v. S. E. Ry. (1891) 61 L. T. 501.—*KIRKEWICH, J.*, reversed, (1891) 61 L. J. Ch. 294, [1892] 1 Ch. 120; 65 L. T. 732, 40 W. R. 194—*C. A.* **LINDLEY, BOWEN and KAY, L. J.**; the latter decision affirmed, (1893) 63 L. J. Ch. 93, [1893] A. C. 429, 1 R. 275; 69 L. T. 637; 58 J. P. 36.—*H. L. (C)* **LORDS HERSCHELL, L. C., WATSON, MORRIS and SLAND**

Harper v. Williams (1849) 4 Q. B. 219; 12 L. J. Q. B. 227—*Q. B.*, referred to.
Duncombe v. Brighton Club and Norfolk Hotel Co. (1875) 44 L. J. Q. B. 216; 1 R. 10 Q. B. 371; 82 L. T. 868, 28 W. R. 795—*Q. B.*

De Havilland v. Bowerbank (1807) 1 Camp. 50, applied, **Higgins v. Sargent** (1823) 2 B. & C. 348, 3 D. & R. 614, 2 L. J. (O.S.) K. B. 33; 26 R. R. 379, considered, **L. C. & D. Ry. v. S. E. Ry.** (1893) 63 L. J. Ch. 93, [1893] A. C. 429, 1 R. 275, 69 L. T. 637, 58 J. P. 36.—*H. L. (C)*

De Havilland v. Bowerbank, applied.
McKewan's Case, Maria Anna and Steinbank Coal and Coke Co. (1877) (*supra*, col. 1361).

Gordon v. Swan (1810) 12 East 419, 2 Camp. 429, 11 R. R. 758, n. and **Calton v. Bragg** (1812) 15 East 223, 18 R. R. 451, followed.

Higgins v. Sargent (1823) 2 B. & C. 348, 3 D. & R. 613, 2 L. J. (O.S.) K. B. 33; 26 R. R. 379.—*K. B.*

Higgins v. Sargent, not applied.
The Northumbria (1869) 39 L. J. Adm. 3, L. R. 3 A. & E. 6, 9; 21 L. T. 681, 18 W. R. 188

Higgins v. Sargent; Rhodes v. Rhodes (1860) Johnson 653, 29 L. J. Ch. 418, 6 Jur. (N.S.) 600, 8 W. R. 204—*v. o.*, and **Foster v. Weston** (1830) 6 Bing. 409; 4 M. & P. 589, 8 L. J. (O.S.) C. P. 295—*C. P.*, followed

Hill v. South Staffordshire Ry. (1874) 43 L. J. Ch. 556, 1 R. 18 Eq. 154—*v. o.*

Mackintosh v. G. W. Ry. (1863) 1 Giff. 683, —*v. o.*, and **Mildmay v. Methuen** (1855) 3 Drew 91, not followed.
Hill v. South Staffordshire Ry. (1874) 43 L. J. Ch. 556, 1 R. 18 Eq. 154. But see *infra*, col. 1363

HALL, V.-C.—The case of **Mackintosh v. Great Western Railway Co.** would seem to be an authority independently of the statute. **Stuart, V.-C.**, however, did not in his judgment as to interest refer to the cases which I have already mentioned, but he seems to have gone on some earlier authorities which, in the cases to which I referred, were reviewed and considered to be no longer applicable at law. Under all the circumstances of that case, and treating the question as one of legal right, I do not consider that case is an authority in favour of the plaintiffs for the allowance of interest. The case of **Mildmay v. Methuen** was referred to. I do not consider that the decision in that case is satisfactory, or one which ought to guide me in coming to a conclusion in this case; if, independently of it, I should come to a different conclusion, which, under all the circumstances of this case, I certainly should

come to. The circumstances of that case are not set forth, and there is nothing to explain what the nature of the deduction was. but even supposing that I could treat the present as a case within the 28th section, I do not find that that section is imperative. It merely empowers a jury, if "they shall think fit," to allow interest at a rate not exceeding a certain amount. Those words give a discretion to the jury to say whether the case is, under all the circumstances of it, one in which interest ought to be allowed or not. A new trial would not, I think, be granted, because the jury had not allowed interest under that section.—p 560

Macintosh v G. W. Ry., considered

L. C. & D. Ry. v. S. E. Ry. (1893) 63 L. J. Ch. 93; [1893] A. C. 429, 1 R. 275; 69 L. T. 637; 58 J. P. 36—H. L. (R)

Mildmay v Methuen and Berrington v Phillips (1836) 1 M. & W. 18, 1 D. P. C. 758—EX. *adopted*.

Genke v. Ross (1875) 11 L. J. C. P. 315, 42 L. T. 606; 23 W. R. 658—C. P.

Duncombe v Brighton Club and Norfolk Hotel Co. (1875) 11 L. J. Q. B. 216, 1 R. 10, Q. B. 371, 32 L. T. 863; 23 W. R. 795—Q. B., *Eddowes v Hopkins* (1780) 1 Doug. 370; and *Arnott v Redfern* (1826) 3 Bing. 363; 11 Moore 209, 2 Car. & P. 88, 4 L. J. (O.S.) C. P. 89—C. P., *Page v. Newman* (1829) 9 B. & C. 378, 4 M. & R. 305, 7 L. J. (O.S.) K. B. 267—K. B., *considered*

L. C. & D. Ry. v. S. E. Ry. (1893) 63 L. J. Ch. 93; [1893] A. C. 429, 1 R. 275; 69 L. T. 637; 58 J. P. 36—H. L. (R)

Hill v. South Staffordshire Ry. (1871) 43 L. J. Ch. 556, 1 R. 18 Eq. 154.—V. C., *questioned*

Genke v. Ross (1875) 32 L. T. 606, 4 L. J. C. P. 315, 23 W. R. 658—C. P.
GROVE, J.—It was argued by Mr. Moir, and the argument is partly supported by the reasoning of Hall, V. C. in *Hill v. The South Staffordshire Railway Co.*, that to constitute a demand within the statute (3 & 4 Will. 4, c. 42, s. 28), the sum demanded must be specified in the notice. I agree with my lord in thinking that there are no words in the statute to support that argument.—p. 668.

Hill v. South Staffordshire Ry., applied.

Waid v. Eyre (1880) 49 L. J. Ch. 657, 15 Ch. D. 130; 43 L. T. 525; 23 W. R. 712—M. R., *affirmed*, C. A.

Smith v. Copleston (1849) 11 Henv. 482, *questioned*.

Knapp v. Burnaby (1861) 30 L. J. Ch. 844; 5 L. T. 52, 9 W. R. 765

WOOD, V. C.—I am at a loss to understand the grounds of the decision in *Smith v. Copleston*, unless there were special circumstances in that case.—p. 75.

Knapp v. Burnaby (1861) 30 L. J. Ch. 844, 5 L. T. 52; 9 W. R. 765.—V. C., *followed*
Horne v. Foxes v. Horner (1896) 65 L. J. Ch. 694; [1896] 2 Ch. 188, 74 L. T. 686, 44 W. R. 556—CHITTY, J.

Bruce v. Hunter (1813) 3 Camp. 467, *considered*.

Lloyd Edwards, In re, Williams v. Trench

(1891) 61 L. J. Ch. 22, 65 L. T. 453—KEECH-WICH, J.

Lloyd Edwards, In re, Williams v. Trench, not followed

Anglesey (Marquis), In re, Wilmot v. Gardner (1901) 70 L. J. Ch. 810, [1901] 2 Ch. 518; 85 L. T. 179, 19 W. R. 708—C. A. *RIGHT, COLLINS and HOMER, L.J. reversing COLEMAN, HARDY, J.*

Glancarty (Lord) v. Latouche (1807) 1 R. R. & B. 129, *explained and distinguished*
Croskill v. Bower (1863) 32 L. J. Ch. 519; 32 Bear. 86, 9 Jur. (N.S.) 267, 8 L. T. 135, 11 W. R. 111—M. R.

Glancarty (Lord) v. Latouche, applied

Mosse v. Salt (1863) 32 Bear. 269; 32 L. J. Ch. 756—M. R., *Daniell v. Sinclair* (1881) 50 L. J. P. C. 50, 6 App. Cas. 181, 41 L. T. 257, 29 W. R. 569—P. C.

Mosse v. Salt, followed.

Stewart v. Stewart (1891) 27 L. R. 11; 351.

INTERNATIONAL LAW.

- 1 SOVEREIGN STATES
- 2 REVOLT AND RESTORATION.
- 3 PERSONS
- 4 DOMICIL
- 5 PROPERTY.
- 6 CONTRACTS
- 7 JURISDICTION OF ENGLISH COURTS
- 8 PROCEDURE.
- 9 FOREIGN JUDGMENT

1 SOVEREIGN STATES

Colombian Government v. Rothschild (1825) 1 Sim. 91; 5 L. J. (O.S.) Ch. 13; 27 R. L. 171—M. R., *adopted*

Spain (King) v. Hullett (1833) 1 Cl. & F. 333; 7 Bligh (N.S.) 359—H. L. (E.)

Colombian Government v. Rothschild, considered

Pinoleau v. United States (1866) 36 L. J. Ch. 36; 1 R. 2 Eq. 659; 12 Jur. (N.S.) 721; 14 L. T. 700, 14 W. R. 1012.—V. C.

Colombian Government v. Rothschild, considered and distinguished

United States of America v. Wagner (1867) L. R. 2 Ch. 582; 36 L. J. Ch. 621; 16 L. T. 646, 15 W. R. 1025—L. C. and L.J.; *reversing* L. R. 3 Eq. 721, 16 L. T. 86, 15 W. R. 634.—V. C.

LORD CHELMSFORD, L. C.—The argument before us in support of the demurrer has been chiefly rested upon the case of the *Colombian Government v. Rothschild*, and it has gone the length of maintaining that by the rules of procedure in Chancery a foreign republic is unable to institute a suit for the recovery of its own property in its own name, and being pressed to state in what manner the United States of America are to sue in our Courts, the counsel for the defendants said the only proper mode was in the name of their President. That, however, was not the view of Wood, V. C. (L. R. 3 Eq. 124) (p. 686). It was insisted that the case of the *Colombian Government v. Rothschild*, which was approved of by the House of Lords, had settled this question in defendants' favour. That case, however, seems to have proceeded upon grounds which render it wholly inapplicable to the purpose for

which it was cited. The bill was filed in the name of the Government of the State of Colombia, and its advocates, Don Manuel José Hurtado, described as a citizen of the said State and Minister Plenipotentiary from the same to the Court of His Britannic Majesty, with the addition of his residence. The bill having been demurred to, the Vice-Chancellor, Sir John Leach, allowed the demurrer. Now I do not understand this to be a decision that the State of Colombia could not be plaintiffs in a suit instituted for the recovery of the property of the State, much less that they could not sue unless they appointed some public officer, having himself no interest in the subject in litigation, to represent their rights. The Vice-Chancellor, by the words, "It must sue in the names of some public officers who are entitled to represent the interests of the State," must have referred to some persons or body in whom the interests of the State were vested, and who were, therefore, entitled to represent it in a suit. There was nothing upon the face of the bill to indicate whether the Government of Colombia was such a body, or, indeed, of whom it was composed, so that if the defendants had been desirous of filing a cross bill, they would have been wholly unable from information contained in the original bill to know upon whom process should be served.—p. 588

Hallett v. Spain (King) (1828) 1 Dow & Cl. 109, 2 Bligh (N.S.) 31.—H.L. (E.), and **Spain (King) v. Hallett** (1833) 1 Cl. & F. 333, 7 Bligh (N.S.) 359.—H.L. (K.), *adopted*. **Brunswick (Duke) v. Hanover (King)** (1844) 6 Beav. 1 38, 13 L. J. Ch. 107, 8 Jur. 253.—M.R., *affirmed*, (1848) 2 H. L. Cas. 1.

Spain (King) v. Hallett, *referred to*. **Prizoleau v. United States of America** and **Johnson** (1866) 36 L. J. Ch. 36, L. R. 2 Eq. 659, 12 Jur. (N.S.) 734, 14 L. T. 700, 14 W. R. 1012.—V.C.

Spain (King) v. Hallett and Prizoleau v. United States of America and Johnson, *referred to*.

United States of America v. Wagner (1867) 36 L. J. Ch. 624, M. R. 2 Ch. 582, 16 L. T. 646, 15 W. R. 1026.—L.C. and L.J. *reversing* L. R. 3 Eq. 724; 16 L. T. 86; 15 W. R. 631.—V.C.

United States of America v. Wagner, and Schneider v. Lizardi (1846) 9 Beav. 461, *affirmed*.

Penado (Baron) v. Johnson (1873) 29 L. T. 452; 22 W. R. 103.—V.C.

United States of America v. Wagner, *followed*.

Liberia Republic v. Imperial Bank (1873) 42 L. J. Ch. 574; L. R. 19 Eq. 179.—V.C.; **Peru Republic v. Wagnelin**, **Wagnelin v. Peru Republic** (1876) 44 L. J. Ch. 583, L. R. 20 Eq. 110; 32 L. T. 426, 23 W. R. 776.—V.C.

Arnot (Nabob) v. East India Co (1798) 4 Bro. C. C. 180, *adopted*.

Secretary of State for India v. Kamachee Boye Sahaba (1859) 13 Moore P. C. 22, 7 Moo Ind. App. 476; 7 W. R. 722.—P.C.

Secretary of State for India v. Kamachee Boye Sahaba, *considered*.

Musgrave v. Pujado (1879) 49 L. J. P. C. 20, 5 App. Cas. 102; 11 L. T. 629, 28 W. R. 373.—P.C.

Secretary of State for India v. Kamachee Boye Sahaba, *followed*.

Cook v. Spragg (1899) 68 L. J. P. C. 144, [1899] A. C. 572, 81 L. T. 281.—P.C. **LORDS**, MACNAGHTEN, L.J., WATSON, HOBHOUSE, MACNAGHTEN and MORRIS.

Brunswick (Duke) v. Hanover (King) (1841) 6 Beav. 1 38, 13 L. J. Ch. 107, 8 Jur. 253.—M.R., *disallowed*.

Smith v. Wagnelin (1869) 38 L. J. Ch. 465; L. R. 8 Eq. 198, 20 L. T. 724, 17 W. R. 904.—M.R. **Parlement Belge** (1880) 5 P. D. 197, 207, 42 J. T. 273; 28 W. R. 642.—C.A. **JAMES, BAGGALLAY and BRET, L.J.J.**, **Appu v. Queen's Advocate** (1881) 53 L. J. P. C. 72, 9 App. Cas. 371, 51 L. T. 401.—P.C., and **Mighell v. Johore (Sultan)** (1894) 63 L. J. Q. B. 693, [1894] L. R. 119, 9 R. 417; 70 L. T. 84, 58 J. P. 254.—Q.B. **SMITH, M.R., LOPES and KAY, L.J.J.**

Brunswick (Duke) v. Hanover (King), *applied*.

Stromberg v. Costa Rica Republic (1880) 29 W. R. 125, 44 L. T. 199.—C.A. **JESSEL, M.R., JAMES and LUSH, L.J.J.**, *observations considered*.

South African Republic v. La Compagnie Franco-Belge (1897) [1898] 1 Ch. 190, 67 L. J. Ch. 92.—NORTH, J.

Larivière v. Morgan (1872) 41 L. J. Ch. 746; L. R. 7 Ch. 550, 26 L. T. 859, 20 W. R. 731.—L.C.; *reversed*, (1875) L. R. 7 H. L. 423.—H.L. (E.).

Magdalena Steam Navigation Co. v. Martin (1859) 2 El. & El. 94, 28 L. J. Q. B. 310; 5 Jur. (N.S.) 1240; 7 W. R. 598.—Q.B., *applied*.

The Chankieh (1873) L. R. 4 A. & E. 59, 98, Parkinson v. Foster (1885) 55 L. J. Q. B. 163; 16 Q. B. D. 152, 53 L. T. 818, 34 W. R. 215; 50 J. T. 470.—MATHEW and WILLS, J.J., **Munro v. Bey v. Gadban** (1894) 63 L. J. Q. B. 621; [1894] 2 Q. B. 352, 9 R. 519, 71 L. T. 51, 42 W. R. 545.—C.A. **SMITH and DAVEY, L.J.J.**

2. REVOLT AND RESTORATION.

United States of America v. McRae, 36 L. J. Ch. 722, L. R. 4 Eq. 827, 16 L. T. 691.—V.C.; *reversed*, (1867) 37 L. J. Ch. 129, L. R. 3 Ch. 79, 17 L. T. 423; 16 W. R. 377.—L.C.

3. PERSONS

McConnell v. Hector (1802) 3 Bos & P. 113; and **Wells v. Williams** (1898) 1 Id. **RAYN.** 282, 1 Salik 46, *adopted*.

Jonge Klassina (1800) 5 C. Rob. 41, *dictum adopted*.

Janson v. Diefontein Consolidated Mines (1902) 71 L. J. K. B. 857; [1902] A. C. 484, 87 L. T. 872; 51 W. R. 142.—H.L. **LORDS**, HALSBURY, L.C., MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON and LINDLEY.

Grzebrock in re, Chavasse, Ex parte (1865) 4 De G. J. & G. 555; 34 L. J. Bk. 17; 11 Jur. (N.S.) 400; 12 L. T. 249; 13 W. R. 327.—L.C., *followed*.

The Helen (1865) 35 L. J. Ad. 2, L. R. 1 Ad. 1, 11 Jur. (N.S.) 1025, 13 L. T. 305, 14 W. R. 136.—ADM.

Bacon v Bacon (1641) Cro Cas 601; **Dee d Dourure v Jones** (1791) 4 Term Rep 300; 2 R R 390, and **Collingwood v Pace**, 1 Vent 413, *discussed and followed*, **Sharp v De St. Sauveur** (1871) 11 L J Ch 570, 15 R R 7 Ch 343, 25 L T 112 20 W R 269—**HATHERLEY, J.C., applied**.
De Geer v Stone (1882) 52 L J Ch 57; 22 Ch D 243; 17 L T 431, 31 W R 241—**KAY, J**

De Geer v Stone, applied.
Willoughby, In re (1885) 51 L J Ch 1122, 30 Ch D 324, 53 L T 928, 33 W R 850—**KAY, J**, *affirmed*, C.A.

Clementson v Blessig (1855) 11 Ex 135, *observed upon*.
De Wahl v Braune (1856) 1 H & N. 178; 25 L J Ex 313, 1 W R 646

MARTIN, B doubted that part of the note to this case which cites authorities to show that the effect of war is to avoid contracts between belligerent parties.

Lindo v Belisario (1795) 1 Hag Cons 216, *discussed and distinguished*.
De Wilton, In re, De Wilton v Montefiore (1900) 69 L J Ch 717. [1900] 2 Ch 481, 83 L T 70, 48 W R 645

STIRLING, J—It [*Lindo v Belisario*] was the first case in which the validity of a Jewish marriage was considered by an Ecclesiastical Court. In dealing with it Lord Stowell (then Sir William Scott) said: "This is a case which comes—modern knowledge of that law." That language would not have been inappropriate if the question before him had related to the capacity of the contracting parties as well as to the formalities of the marriage. In fact, however, the question related to the formalities only. It was one of intricacy and difficulty, and I am unable to find anything in the judgment which indicates that the observations to which I have referred were directed to anything beyond that which the learned judge was called on to decide; certainly I cannot look on them as an authority for the proposition that the capacity of members of the Jewish faith to contract marriage is regulated by their own law and not by the law of this country. The question in *Reg v Millis* [(1844) 10 Cl & F 534; 8 Jur 717.—**H.L. (12)**] See "HUSBAND AND WIFE," *supra*, col 1195] was also one of form, and to it the remarks of Lord Brougham (*see* p 796) and Lord Campbell (*see* p 794), cited in argument, appear to have been addressed—pp 723, 724.

Simonin v Mallac (1860) 2 Sw. & Tr 67, 29 L J Mat. 97, 6 Jur (N.S.) 561; 2 L T 327, *considered*.

Sottomayer v De Barros (1877) 47 L J P. 23, 3 P D 1; 37 L T 415, 36 W R 455—C.A.

CORTON, L J [for the Court]—It only remains to consider the case of *Simonin v Mallac*. The objection to the validity of the marriage in that case, which was solemnized in England, was the want of the consent of the parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin v Mallac*

does not, we think, govern the present case—p 7

Simonin v Mallac, applied.
Le Suour v Le Sneur (1876) 15 L J P. 73, 1 P D 139, 34 L T 511, 24 W R 616—C.A.

Simonin v Mallac, doubted.
Niboyet v Niboyet (1878) 18 L J P. 11, 1 P D 1; 39 L T 186; 27 W R 269—C.A.

Simonin v Mallac, followed.
Hay v Northcote (1900) 69 L J Ch 586; [1900] 2 Ch 262; 82 L T 656, 48 W R 615.—**FARWELL, J.**

Sottomayer v De Barros 46 L J P. 43; 2 P D 81; 36 L T 716, 25 W R 541; *reversed*, (1877) 47 L J P. 23, 3 P D. 1; 37 L T. 415; 26 W R 455—C.A.

Sottomayer v De Barros, followed.
Cooke's Trusts, In re (1877) 56 L J Ch 637; 56 L T 737, 35 W R 608.

Sottomayer v De Barros, distinguished.
Hay v Northcote (1900) (*supra*)

Sottomayer v De Barros, supra in C.A., and **S G** (1879) 49 L J P. 1; 5 P. 11, 9 L T. 281, 27 W R. 917—**HANNEN, P**, *considered*.
Bozzelli, In re, Husey-Hunt v Bozzelli (1902) 71 L J Ch 505; [1902] 1 Ch 731, 86 L T 415; 50 W R 417—**SWINTEN-RADY, J**

Brook v Brook (1861) 9 H L Cas. 193; 7 Jur (N.S.) 422; 4 L T 93, 9 W R 461—**H.L. (R)**, *affirming* 27 L J Ch 461, 3 Sw & G 481—*v-c, considered*.
Alison's Trusts, In re (1871) 81 L T. 638; 28 W R. 226—*v-c, Sottomayer v De Barros* (1877)—C.A. (*supra*). **Pawson v Brown** (1879) 49 L J Ch 193, 13 Ch D 202, 41 L T 339; 28 W R. 452—*v-c, De Wilton, In re* (1900) 69 L J Ch 717; [1900] 2 Ch 481.—**STIRLING, J.**; and **Bozzelli, In re** (1902) (*supra*).

Hyde v Hyde and Woodmansee (1866) 35 L J Mat 57, 1 R. 1 P. 130, 12 Jur. (N.S.) 414, 11 L T 188, 11 W R 517,

followed.
Bethell, In re, Bethell v Hildyard (1888) 57 L J Ch 487, 38 Ch D 220, 58 L T 671; 36 W R 503

STIRLING, J—Those decisions [*Johnson v Johnson's Administrator* and *Connolly v Woodrick*] are not, of course, binding upon me, but they are entitled to most respectful consideration.

I am not sure that the learned judges who decided those cases took the same view of the law as is expressed by Lord Penzance, by which I consider myself to be bound; but in both cases the facts were very different from those in the present case, and circumstances were proved which might, in my judgment, well lead to the conclusion, consistently with the doctrine laid down in *Hyde v Hyde and Woodmansee*, that the marriages there under consideration were valid according to the law of England.

Hyde v Hyde and Woodmansee (1866) 35 L J P. 57, 1 R. 1 P. & D 130, 12 Jur. (N.S.) 414, 11 L T. 188, 14 W R. 517, *distinguished*.

Brinkley v Att-Gen (1890) 69 L J P. 81; 15 P D. 76; 62 L T. 911.—**HANNEN, P.**

Hyde v. Hyde, considered

Bozzelli, in re. *Hussey-Hunt v. Bozzelli* (1902) 71 L. J. Ch 505; [1902] 1 Ch 751, 86 L. T. 115; 50 W. R. 417.—SWINSTEAD, J.

Foubert v. Turst (1709) 1 Bro P. C. 129.

1 Bro Ch. 207, and *Freemout v. Dedire*

(1718) 1 P. Wms 424.—HARDWICK, L.C., explained.

Lesley v. Hog (1801) Robertson's Sc. App. Chs. 47; 1 Paton's Sc. App. 581.—H.L. (80) LORDS HILTON, L.C. and ROSS-LAN.

Viditz v. O'Hagan (1899) 68 L. J. Ch 553, [1899] 2 Ch 569, 80 L. T. 794; 17 W. R. 571.—COZZENS-HARDY, J.; *reversed*, (1900) 69 L. J. Ch 507; [1900] 2 Ch 87, 82 L. T. 180, 48 W. R. 516.—O.A. LINDLEY, M.R., RIGBY and COLLINS, L.J.

Viditz v. O'Hagan, distinguished

Banks, in re. Heynolds v. Ellis (1902) 71 L. J. Ch 708; [1902] 2 Ch. 333, 50 W. R. 663.—BUCKLEY, J.

Edwards v. Carter (1893) 63 L. J. Ch. 100.

[1893] A. C. 360, 60 L. T. 153; 58 J. P. 4.—H.L. (8); and *Cooper v. Cooper* (1888) 13 App. Cas 88, 59 L. T. 1.—H.L. (8c), considered.

Van Grutten v. Digby (1862) 32 L. J. Ch.

179; 31 Beav 561, 9 Jur (N.S.) 111; 7 L. T. 455; 11 W. R. 290.—M.R., distinguished.

Viditz v. O'Hagan (1900) 69 L. J. Ch 507, [1900] 2 Ch. 87; 82 L. T. 180, 48 W. R. 516.—O.A. LINDLEY, M.R., RIGBY and COLLINS, L.J.

LINDLEY, M.R.—That brings me to the second point . . . that is the question whether this settlement has become binding on this lady or not. She was an Irish lady. The settlement was executed at Bernin Switzerland and in the English language and with English trustees in the British Embassy, and it was executed previous to and in contemplation of her marriage with an Austrian gentleman. It was contemplated that after marriage they should, as they did, go and live in Austria.—In other words, that she should become domiciled in Austria. Now, according to the English law this settlement by her was a voidable contract in the sense explained by the H. L. in *Edwards v. Carter*, to which I will refer presently. She lived two or three years in Austria, and then became of age—twenty-one. By the Austrian law she was unable to ratify this contract or to confirm it or to place it out of her power to revoke it, and now we have to consider the consequences that arise. The position is simply that this lady never had either before or after marriage power to make an irrevocable settlement. Can we hold, therefore, that this settlement has become irrevocable? That is the paradox that is put to us. Cozzens-Hardy, J. has taken this view of it. He says, first, that upon the authority of *Van Grutten v. Digby* this was an English settlement to be governed by English law, and by the English law as expounded by the H. L. in *Edwards v. Carter*. . . covenants in a marriage settlement or a settlement made on the marriage by infants are voidable, and become binding unless repudiated within a reasonable time. It is said that she always had power at all events to repudiate, and that she could do that by Austrian law, and that the English law cannot

be applied to that state of things, and that inasmuch as she has not repudiated within a reasonable time this contract has become irrevocable. To my mind that is not sound reasoning. For, in the first place, as regards *Van Grutten v. Digby*, the point we have to consider did not arise for discussion or determination. There was no question there about capacity to contract. It was a settlement made by people of mature age, binding upon them when made, and Lord Romilly was clearly right in saying that this was a contract which was to be decided according to the law of England regardless of any change of domicile afterwards. But here we are faced with a difficulty which arises from the capacity to contract, and that difficulty does not appear to me to be touched, and still less governed, by the decision in *Van Grutten v. Digby*.—p. 511

Guepratte v. Young (1850) 4 De G. & Sm.

217, held applicable.

Barnard, in re. Barnard v. White (1887) 56 L. T. 9.

Lolley's Case (1812) Fac. Coll. 20th March,

1812, R. & R. 237, 2 Cl. & F. 567; 15 R. R. 757, discussed.

Warrender v. Warrender (1835) 2 Cl. & F. 188, 9 Bligh (N.S.) 89.—H.L. (8c)

Lolley's Case followed

Conway v. Beazley (1835) 3 Hag. Ecce 639, and *Dolphin v. Robins* (1859) 7 H. L. Cas 390, 3 Macq. II L. 568, 29 L. J. P. 11, 5 Jur (N.S.) 1271, 1 W. R. 674.—H.L. (E.)

Lolley's Case and Warrender v. Warrender,

referred to.

Brook v. Brook (1861) 9 H. L. Cas 193; 7 Jur (N.S.) 429, 4 L. T. 93, 9 W. R. 461.—H.L. (E.), affirming 27 L. J. Ch 401; 3 Sm. & G. 481.—V.C.

Lolley's Case and Warrender v. Warrender,

commented on and explained.

Shaw v. Gould (1865) L. R. 3 H. L. 58, 37 L. J. Ch 439, 18 L. T. 833.—H.L. (E.)

LORD CRANWORTH.—Now, whatever be the difficulties in such cases as the present, I think the doctrine that no divorce in Scotland resting merely on a *forum domicilii*, had, at all events before the passing of our English Divorce Act in 1857, any effect in England on the validity of an English marriage, is established on the highest authority. It is impossible to have a stronger authority for this than the case of *Lolley*, for it was decided there by the twelve judges that by the second marriage he was guilty of bigamy, though on general principles every leaning in a criminal case would be in favour of the party accused. That case was followed by Dr. Lushington in *Conway v. Beazley* (3 Hag. Ecce Rep 639).

There, as in the present case, the second marriage was had in Scotland, not, as in *Lolley's Case*, in England. . . and it was attempted on that ground to distinguish the two cases. But Dr. Lushington held that the principle was the same wherever the second marriage was solemnized, for that, as neither of the parties to the first marriage had been, at any time, *bona fide* domiciled in Scotland, the principle of *Lolley's Case* must prevail.—p. 70

LORD WESTBURY. . . *Lolley's Case* was, without question, rightly decided, but it does not involve the conclusion that the judges held the

Scotch decree of divorce of no effect because an English marriage was indissoluble by English law. There are other and legitimate grounds of decision to which the judgment in *Lolley's Case* may, and in my opinion ought, to be referred. Throughout the Scotch proceeding the domicile of both parties was in England, and the residence in Scotland was temporary only, and intended only for the purpose of having a suit for divorce instituted. The judge, therefore, was not the judge of the domicile; the suit was not *bona fide*, and the whole proceeding was in fraud of English law, and injurious to English interests. It has been supposed that *Lolley's Case* was recognised by Lord Eldon in the case of *Tolby v. Lindsay* (1 Dow 117), which came before this House in 1813. But on an examination of the judgments in that case in Dow's Reports, it will be seen that one main difficulty felt by Lord Eldon as to the validity of the Scotch divorce arose from the circumstances of the parties not being domiciled in Scotland at the time of the decree. So Dr. Lushington, in the case of *Conway v. Beazley*, appears to have thought that the true ground of the invalidity of the decree of divorce in *Lolley's Case* was the fact of the parties not being domiciled in Scotland at the time — p. 85.

Lolley's Case, referred to

Warrender v. Warrender, explained and applied

Le Sueur v. Le Sueur (1876) 45 L. J. P. 73, 1 P. D. 139, 34 L. T. 511; 24 W. R. 616 — P. D.

Lolley's Case and Warrender v. Warrender, considered.

Niboyet v. Niboyet (1878) 48 L. J. P. 1, 1 P. D. 1; 39 L. T. 486; 27 W. R. 203 — C.A.

Lolley's Case, applied

Briggs v. Briggs, (1880) 5 P. D. 163 — HANSEN, P.

Lolley's Case, explained

Warrender v. Warrender; Geils v. Geils (1852) 1 Macq. 255 — H. L. (SC.); and *Maghee v. McAllister*, 3 Ir. Ch. 640, considered.

Pitt v. Pitt (1861) 4 Macq. 627, 10 Jur. (NS.) 735; 10 L. T. 626, 12 W. R. 1089. — H. L. (SC.), observed upon.

Harvey v. Farnie (1882) 8 App. Cas. 48, 52 L. J. P. 33, 48 L. T. 273; 31 W. R. 133, 17 J. P. 308 — H. L. (E.).

[For the first five cases see the judgments at length.]

SERBOENE, L. C. — It is said that Lord Brougham in the case of *McCarthy v. Deceux*, decided that because the solemnisation of the marriage with an English woman had taken place in England, therefore the Danish Court could not, under these circumstances, dissolve the marriage. I have all due respect for the judicial decisions of all who have at any time filled the office of Lord Chancellor. I have great respect for the high reputation of Lord Brougham, but I am compelled to speak without much respect of the decision in *McCarthy v. Deceux*, not only because it seems to me to proceed upon a view of *Lolley's Case* which is not really tenable, but also because it is a decision which, upon principles universally recognised, would be incapable of being supported even if it were true that the English Court ought not to have recognised that Danish divorce; because, beyond all doubt on

that supposition both the husband and the wife lived and died domiciled in Denmark and the distribution of both their personal estates would by a law which is beyond controversy, fall to be regulated in England and everywhere by the law of Denmark and not by the law of England and, therefore, unless it had been ascertained that the law of Denmark under those circumstances would not distribute those estates in the same manner as if there had been a valid divorce the decision manifestly lost sight of the true question in the case. I do not, therefore, think it necessary to say more about the case of *McCarthy v. Deceux* — p. 52.

Warrender v. Warrender, applied

Bethell, in re, Bethell v. Hillyard (1888) 5 L. J. Ch. 487; 38 Ch. D. 220; 58 L. T. 671, 2 W. R. 503 — STIRLING, J.; *Bullen-Smith, in re, Bornes v. Bullen-Smith* (1888) 38 L. T. 571 — KAY, J.

Shaw v. Gould (supra, col. 1870), approved

Le Mesurier v. Le Mesurier (1895) 64 L. J. P. C. 97; [1895] A. C. 517, 72 L. T. 873; 11 J. 527 — P. C.

Niboyet v. Niboyet, 3 P. D. 52, reversed (1878) 18 L. J. P. 1, 1 P. D. 1, 39 L. T. 486, 27 W. R. 203 — C.A.

Niboyet v. Niboyet (supra, in C. A.)

observed upon.
Harvie v. Farnie (1882) (supra, col. 1871).

Niboyet v. Niboyet, adopted.

Turner v. Thompson (1888) 57 L. J. P. 10; 1 P. D. 37, 58 L. T. 837; 36 W. R. 702; 52 J. 1 151 — Mat. Forsyth v. Forsyth (1890) 63 L. T. 263 — Mat.

Niboyet v. Niboyet, commented on

Le Mesurier v. Le Mesurier (1895) — P. A. (supra).

McCarthy v. Deceux (1831) 2 Russ. & M. 614 — L. C., considered.

Warrender v. Warrender (1835) 2 Cl. & F. 188; 9 Bl. (NS) 89 — H. L. (SC.). *Shaw v. Gould* (1868) 37 L. J. Ch. 433, L. B. 3 H. L. 55; 1 L. T. 833 — H. L. (E.); *Niboyet v. Niboyet* (1876) 48 J. P. 1, 1 P. D. 1, 39 L. T. 486; 2 W. R. 203 — C.A.; *Daniell v. Daniell* (1881) 5 L. J. P. C. 50, 6 App. Cas. 481, 44 L. T. 257, 29 W. R. 569 — P. C.

McCarthy v. Deceux, dissented from

Harvey v. Farnie (1882) — H. L. (E.) (supra, col. 1871).

Yelverton v. Yelverton (1850) 20 L. J. Mai 34; 1 Sw. & Tr. 571; 6 Jur. (NS) 21;

L. T. 181; 8 W. R. 134. — MAT., considered.

Burton v. Burton (1873) 21 W. R. 619; *Le Sueur v. Le Sueur* (1876) (supra, col. 1871); *Niboyet v. Niboyet* (1878) — C.A. (supra); *Frederick v. Frederick* (1878) 37 L. J. P. 41; P. D. 63; 39 L. T. 94; 26 W. R. 617 — HANSEN, P.; *Michell, in re, Cunningham, ex parte* (1881) 53 L. J. Ch. 1067, 13 Q. B. D. 418, 51 L. T. 447, 33 W. R. 22, 1 Morrell 137. — C.A.

Wilson v. Wilson (1872) 41 L. J. P. 38; L. R. 2 P. D. 435, 25 L. T. 108, 189, 20 W. R.

378 — MAT., approved.

Le Mesurier v. Le Mesurier (1895) 64 L. J. P. C. 97, [1895] A. C. 517, 72 L. T. 873, 11 J. 527. — P. C.

Allison v Catley, 1 Durl B & M 11025

(Sc.), not followed

Gould v Dickens (1852) 17 Jan 123.

LORD TRURO expressed his opinion that *Allison v. Catley* was inconsistent with the decision of the House in this case—p 430.

De Nicols, In re, De Nicols v Cartier (1898) 67 L J Ch 271. [1898] 1 Ch 103—KREWECH, J. *reversed*, (1898) 67 L J Ch 419; [1898] 2 Ch 60. 78 L T 511, 36 W R 532—O A LINDLEY, M R, RIGBY and COLLINS, L J, the latter decision *reversed* and the former *restored*, (1899) 69 L J Ch 109; [1900] A C 21; 81 L T 733. 18 W R 269—H L (R) LORDS HALSBURY, L C, MACNAGHTEN, MORRIS, SHAND and BRAMPTON

Lashley v Hog (1801) Robertson & Sc. App. Cas. 1; 1 Paton's Sc. App. 581—H L (Sc.), explained and distinguished

De Nicols v Cartier (1899) 69 L J Ch 109; [1900] A C 21, 81 L T. 733. 18 W R. 269—H L (R) LORDS HALSBURY, L C, MACNAGHTEN, MORRIS, SHAND and BRAMPTON

LORD HALSBURY, L C.—I should think that, in order to be binding on your lordships, a previous decision must be in principle, and, as applicable to the same circumstances, identical, and it appears to me that the case by which the M R thought himself bound (*Lashley v Hog*) is quite distinguishable both in principle and in circumstances. To omit other questions, the cardinal distinction between the French and the Scottish law is not, I think, without an important bearing upon the very question in debate, and I think it may be stated shortly thus. If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires, as part of that contract relation, a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his; and hence, I think, is to be found the key to Lord Eldon's judgment. He says, "The true point . . . to do intestate." It will be observed that the whole point of what Lord Eldon argues is that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that, as by law he can dispose of it as he will, it is not unreasonable that he should be at liberty to do something which by its legal effect will change what I think are inaccurately described as what would have been the rights of the wife if no change had taken place, because in substance she has, until the husband's death, no rights at all. Doubtless it is true that, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the *ius mariti* it is described as a legal assignation to the husband, and in commenting on this authority, the late Mr Finlay, while at the Scottish Bar, in his book on the "Law of Husband and Wife" (2nd ed.), vol 1, p 677, says: "At a very early period . . . that fell under common law." How different the position of the wife is under the French law is sufficiently indicated, in contrast to the above extract, by

sect. 1444 of the Code Civil. And if the propositions are put shortly—that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right, the distinction between the two systems is evident enough. The *communio bonorum* in Scotland is a mere fiction. In France it is a reality, and in England, as the M R says, the parties to the litigation now being discussed, Mr and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after-acquired, became the property of Mr Hog by the mere fact of the marriage, and gave Mrs Hog no proprietary right whatever to the movable property in question. Once it is admitted that the marriage gives a proprietary right (and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage, and a real proprietary right conferred by specific contract), the anomaly pointed out by the M R, and sought to be explained, becomes at once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosslyn. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only, the husband's change of domicile may bring with it the consequential change from such relation. Here, however, as I have endeavoured to point out, the French marriage confers not only an implied, but an actual binding partnership proprietary relation fixed by the law upon the person of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify. I can only account for the absolutely inaccurate use of the Scottish term *ius relictæ* as arising from a reference to a dispute that appears to have existed in the Scottish authorities as to whether those rights flowed from the communion, whereas, to quote again from Mr Fraser's book, p 671, he says "It has been found . . . before them." It is for this reason, as I understand that, when once Lord Eldon came to the conclusion that the husband and wife had become Scottish domiciled spouses, the property not affected by a previous complete and irrevocable right would properly be distributed according to Scottish law. It follows, therefore, if I am right, that that case is not binding on this House, and that we are at liberty to decide the question now in dispute in accordance with reason and common sense—pp 112—111

Dalhousie (Countess) v. M'Donnell (1840) 7 Cl & F 817, 1 Rob 475.—H L (Sc.); and **Monro v Monro** (1840) 7 Cl & F 842; 1 Rob 492—H L (Sc.), applied. **Udny v Udny** (1869) L R 1 H L (Sc.), 441 156—H L (Sc.). **Lauderdale Peerage** (1885) 10 App. Cas. 692, 758—H L (Sc.).

Monro v Monro, discussed and applied **Grove, In re, Vancher v Treasury Solicitor** (1888) 58 L J Ch 57; 10 Ch D 219; 59 L T 587, 37 W R 1.—O A. COTTON, FRY and LEECH, L J J

Lauderdale Peerage (1885) 10 App. Cas. 692—H L (Sc.), applied. **Lowat Peerage**, (1885) 10 App. Cas. 763—H L (Sc.).

Hervey v. Hervey (1773) 2 W Bl. 877, and **Goodman v. Goodman** (1859) 28 L. J. Ch. 745—*L. J. referred to.*

Lyle v. Gilwood (1874) 44 L. J. Ch. 164; L. R. 19 Eq. 98, 23 W. R. 157.—*v. c.*

Goodman v. Goodman, *referred to.*
Collins v. Bishop (1878) 48 L. J. Ch. 81.—*v. c.*

4 DOMICIL

The Indian Chief (1802) 3 C. Rob. Ad. l., *applied*

Udny v. Udny (1869) L. R. 1 H. L. (Sc.) 441, 451; **Tootal's Trusts, In re** (1883) 52 L. J. Ch. 664; 23 Ch. D. 532; 48 L. T. 816, 31 W. R. 653.—**CHITTY, J.**

Tootal's Trusts, In re, distinguished.
Vallance's Trusts, In re, Luncheon Board of Works, Ex parte (1883) 52 L. J. Ch. 791; 24 Ch. D. 177; 48 L. T. 911; 32 W. R. 887.—**PEARSON, J.**

Tootal's Trusts, In re, approved.
Abd-ul-Messih v. Farra (1888) 57 L. J. P. C. 58, 13 App. Cas. 431, 59 L. T. 106.—**P. C.**

Aikman v. Aikman (1861) 3 Macq. H. L. 854, 377—*H. L. (Sc.), dicta applied.*
Moorhouse v. Lord (1863) 10 H. L. Cas. 272, 1 N. R. 555, 32 L. J. Ch. 295; 9 Jur. (N.S.) 677, 8 L. T. 212, 11 W. R. 637—*H. L. (P.)*

Moorhouse v. Lord, considered.
Capdevielle, In re (1864) 2 H. & C. 985, 5 N. R. 15; 33 L. J. Ex. 306; 10 Jur. (N.S.) 1155; 12 W. R. 110—*EX. BRAMWELL, B. doubting.*
approved. **Pitt v. Pitt** (1864) 4 Macq. H. L. 627, 10 Jur. (N.S.) 735, 10 L. T. 626; 12 W. R. 1089—*H. L. (Sc.).*

Moorhouse v. Lord, dictum qualified.

Udny v. Udny (1869) L. R. 1 H. L. Sc. 441.

LORD WESTBURY—In advising to Mr. Justice Story's work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed: "The result of the more recent English cases seems to be that for a change of national domicile there must be a definite and effectual change of nationality." In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this House in the case of *Moorhouse v. Lord*, when in speaking of the acquisition of a French domicile, Lord Kingsdown says, "A man must intend to become a Frenchman instead of an Englishman." These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality, that is, of natural allegiance. That would be to confound the political and civil status of an individual, and to destroy the difference between *patria* and *domicilium*—p. 459.

Moorhouse v. Lord; Capdevielle, In re and Att.-Gen. v. Wahlstatt (Countess) 3 H. & C. 374, *considered.*

Halkin v. Eckford (1869) L. R. 8 Eq. 631, 21 L. T. 87, 17 W. R. 1069.

JAMES, v. c.—The law in this case is very clearly laid down in the judgment of Lord Westbury in the case, to which I have been referred on both sides of *Udny v. Udny* in the House of Lords. He says (p. 458), "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole

or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be a residence fixed not for a limited period, or for a particular purpose, but generally, and indefinite in the future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established." That is the rule as laid down by Lord Westbury. In substance it is the same as the rule laid down in the same case by the Lord Chancellor, and differs but slightly, I think, from the rule as laid down by Lord Selwyl. I agree that it must be considered as differing from the rule as laid down in what may be called the intermediate class of cases in the *Exchequer v. In re Capdevielle, Attorney-General v. Countess de Wahlstatt*; following the decision in the House of Lords, *Moorhouse v. Lord*, in which, if I may use the expression, that unfortunate *dom. civile* *patriam* was introduced, as if it were a question of nationality, and not of more or less permanence of residence. It does differ from these cases, but it differs in bringing back the law to that which (in my opinion) was always, before those cases, considered to have been the law, and evidently is the law as laid down by the treatise writers, viz., that domicile was to be considered as changed whenever there was a change of residence of a permanent character voluntarily assumed—p. 460.

Moorhouse v. Lord, explained.

Brunel v. Brunel (1871) L. R. 12 Eq. 298, 301; 25 L. T. 378, 19 W. R. 970.—*v. c.*

Moorhouse v. Lord, observation referred to.
Att.-Gen. v. Wahlstatt (Countess); Donaldson v. McClure (1847) 26 Court of Sess. Cas. (2nd series) 307, **HaMaze v. Eckford**, and **Atcheson v. Dixon** (1870) 39 L. J. Ch. 705; L. R. 10 Eq. 589; 23 L. T. 97; 18 W. R. 989—*v. c., disapproved.*

Douglas v. Douglas (1871) L. R. 12 Eq. 617; 11 L. J. Ch. 74; 25 L. T. 530; 20 W. R. 35.

WICKENS, v. c.—It is universally, or all but universally, true, that in order to prove that the domicile of an adult of sound mind has been changed, an intention on his part must be shown. The question on which opinion has been differed is as to what he must be shown to have intended. According to one view it is sufficient to show that he intended to settle in a new country, to establish his principal or sole and permanent home there, though the legal consequences of so doing, on his civil status, may never have entered his mind. According to the other view, it is necessary to show that he intended to change his civil status, to give up his position as, for purposes of civil status, a citizen of one country, and to assume a position as for the like purposes, the citizen of another. This stricter view is supported by opinions of great weight, amongst others, by the Lord President, in *Donaldson v. McClure*, that of the Lord Chief Baron Pollock in *Attorney-General v. Countess de Wahlstatt*, and

by some expressions used by the late Lords Cranworth and Kingsdown. . . . And cases like *Haldane v. Eckford*, where the change of civil status can be shown to have been recognised and accepted by a person who had no special reason to deny, and probably did not desire it, are very rare indeed. The stricter rule would therefore, in the very great majority of cases, leave the domicile to be governed by origin, which, it seems to me, would be in every respect a convenient view. But I cannot satisfy myself that the stricter rule, as I have called it, can be considered as the law of England (p. 613).

Moorhouse v. Lord, considered.

Att.-Gen. v. Winans (1901) 85 L. T. 508; 65 J. P. 819.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Haldane v. Eckford (infra), observations approved.

Doncet v. Geohagan (1878) 9 Ch. D. 111. 26 W. R. 825.—C.A.

Udny v. Udny (1869) L. R. 1 H. L. 411—H. L. (8*), considered.

Haldane v. Eckford (1869) L. R. 8 Eq. 631, 21 L. T. 87, 17 W. R. 1059.—V.C. See extract, *supra*.

Udny v. Udny, explained and adopted.

Brund v. Brund (1871) L. R. 12 Eq. 298, 25 L. T. 378, 10 W. R. 970.—V.C.

Udny v. Udny, discussed.

Douglas v. Douglas (1871) 41 L. J. Ch. 74; L. R. 12 Eq. 617, 25 L. T. 530; 20 W. R. 35.—V.C.

Udny v. Udny, observations adopted.

Wilson v. Wilson (1872) (*supra*, col 1372), Hamilton v. Dallas (1875) 45 L. J. Ch. 16, 1 Ch. D. 257; 39 L. T. 195; 24 W. R. 264.—V.C. King v. Foxwell (1870) 45 L. J. Ch. 693, 3 Ch. D. 518, 21 W. R. 629.—M.R., Firebrace v. Firebrace (1878) 47 L. J. P. 41; 4 P. D. 63; 30 L. T. 94, 26 W. R. 617.—HANNES, P., Platt v. Att.-Gen. for New South Wales (1878) 47 L. J. P. C. 26; 3 App. Cas. 336, 38 L. T. 71, 26 W. R. 616.—P.C.

Udny v. Udny, dictum explained and applied.

Tootal's Trusts, in re (1883) 52 L. J. Ch. 664, 23 Ch. D. 592; 48 L. T. 816; 31 W. R. 653.—CHITTY, J.

Udny v. Udny, observations adopted.

Bindford v. Young (1884) 54 L. J. Ch. 96; 26 Ch. D. 656.—PEARSON, J., Patience, in re, Patience v. Main (1885) 54 L. J. Ch. 897, 29 Ch. D. 976; 52 L. T. 687; 33 W. R. 501.—CHITTY, J., Abdul-Messih v. Farra (1888) 57 L. J. P. C. 88, 13 App. Cas. 431, 59 L. T. 106.—P.C.

Udny v. Udny, applied.

Grove, in re, Vancher v. Treasury Solicitor (1888) 53 L. J. Ch. 57; 40 Ch. D. 216, 59 L. T. 587; 37 W. R. 1.—C.A.

Udny v. Udny, considered.

Att.-Gen. v. Winans (1901) 85 L. T. 508; 65 J. P. 819.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Doncet v. Geohagan (1878) 9 Ch. D. 111, 26

W. R. 825.—C.A., referred to.

Patience, in re, Patience v. Main (1885)—CHITTY, J. (*supra*). Gough, in re, Chaignish v. Hewitt (1892) [1892] 3 Ch. 180, 67 L. T. 689.—CHITTY, J., affirmed in C.A.

Doncet v. Geohagan, considered.

Att.-Gen. v. Winans (1901) 85 L. T. 508; 65 J. P. 819.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Att.-Gen. v. Dunn (1840) 6 M. & W. 511,

observed upon.

United States (President) v. Diamond (1861) 33 Beav. 449, 4 N. R. 7, 33 L. J. Ch. 501; 10 Jur. (N.S.) 538; 10 L. T. 321; 12 W. R. 701.

ROMILLY, M.R.—I must say that *Attorney-General v. Dunn* is irreconcilable with a great number of cases.—*Forbes v. Forbes* (Kay 841).

Tovey v. Lindsay (1813) 1 Dow. 131, 139,

139, 140.—H.L. (SC), *observations limited.*

Dolphin v. Robins (1859) 7 H. L. Cas. 390, 3 Macq. H. L. 563, 29 L. J. P. 11, 5 Jun (N.S.) 1271, 7 W. R. 674.—H.L. (N).

Tovey v. Lindsay, dictum adopted.

Shaw v. Gould (1868) 87 L. J. Ch. 433; L. R. 3 H. L. 55; 18 L. T. 838.—H.L. (E).

Tovey v. Lindsay, discussed.

Harvey v. Farnie (1882) 52 L. J. P. 33; 8 App. Cas. 43, 55, 48 L. T. 273, 51 W. R. 433, 47 J. P. 808.—H.L. (E).

Dolphin v. Robins (1859) 7 H. L. Cas. 390,

3 Macq. H. L. 563, 29 L. J. P. 11, 5 Jun (N.S.) 1271, 7 W. R. 674.—H.L. (E), *applied.*

Shaw v. Gould (1868)—H.L. (E) (*supra*); Le Sueur v. Le Sueur (1876) 45 L. J. P. 73, 1 P. D. 189; 34 L. T. 511; 24 W. R. 616.—P.D.

Dolphin v. Robins, observed upon.

Harvey v. Farnie (1882)—H.L. (E) (*supra*).

Dolphin v. Robins, considered.

Le Mesurier v. Le Mesurier (1895) 61 L. J. P. C. 97, [1895] A. C. 517, 539; 72 L. T. 869; 11 R. 527.—P.C.

Loustalan v. Loustalan, Martin, in re (1900)

68 L. J. P. 106; 81 L. T. 459.—JUDGE, P.; reversed, (1900) 69 L. J. P. 75; [1900] P. 211, 82 L. T. 806, 48 W. R. 509.—C.A. HIGBY and WILLIAMS, L.JJ.; LINDLEY, M.R. dissenting.

Pottinger v. Wightman (1817) 3 Mer. 67, 17

R. R. 20.—M.R., *explained.* Beaumont, in re (1898) 62 L. J. Ch. 923, [1898] 3 Ch. 490, 8 R. 9; 42 W. R. 142.—STIRLING, J.

Craigie v. Lewin (1861) 3 Curt. 435; 7 Jur

519, *marginal note inserted.* Att.-Gen. v. Pottinger (1862) 6 H. & N. 738; 30 L. J. Ex. 284, 7 Jur. (N.S.) 470; 4 L. T. 368, 9 W. R. 678.—M.R.

COLLOCK, C.B.—The case is rightly decided, but the marginal note is wrong. The ground of the decision was, that the deceased had not returned to Scotland with the intention of residing there permanently.—p. 741.

5. PROPERTY.

Pouey v. Horden (1900) 69 L. J. Ch. 231

[1900] 1 Ch. 492, 82 L. T. 61.—FARWELL, J., and BALD, in re, BALD v. BALD (1897) 66 L. J. Ch. 524; 76 L. T. 462, 45

W. R. 499.—FARWELL, J., *applied.*

Mégret, in re, Tweddie v. Mauder (1901) 7 L. J. Ch. 451; [1901] 1 Ch. 547, 84 L. T. 192.—HARDY, J.

Doe d. Birtwhistle v. Vardill (1826) 5 B. & C. 438; 4 L. J. (o.s.) K. B. 190.—K.B.; S.O. (1830) 6 Bligh (N.S.) 479, 8 G. (1835) 2 Cl. & F. 571; 9 Bligh (N.S.) 32, 8 G. (1840) 7 Cl. & F. 895, West 500, 1 Scott (N.N.) 828, 6 Bing (N.O.) 385, 4 Jun. 1076.

—H.L. (E.), *discussed*
Wright's Trust, In re (1855) 25 L. J. Ch. 621, 2 & J. 595; 2 Jur. (N.S.) 465, 4 W. R. 541.—G.; *Don's Estate*, In re (1857) 27 L. J. Ch. 98, 4 rev. 194, 3 Jun. (N.S.) 1192, 5 W. R. 846.—G.; *Fenton v. Livingstone* (1859) 3 Macq. H. L. 37, 556, 5 Jur. (N.S.) 1183; 7 W. R. 671.—H.L. (G.); *Shaw v. Gould* (1868) 37 L. J. Ch. 433; 30 & J. 8 H. L. 55, 70, 18 L. T. 833.—H.L. (E.); *Skottowe v. Young* (1871) 40 L. J. Ch. 366; 1 R. 1 Eq. 474; 24 L. T. 220, 19 W. R. 583.—V.-C.

Doe d. Birtwhistle v. Vardill; Don's Estate, In re, *Fenton v. Livingstone*, and *Skottowe v. Young*, *discussed*.
Goodman's Trusts, In re (1881) 50 L. J. Ch. 425; 17 Ch. D. 266, 44 L. T. 827, 29 W. R. 586.—G.A.

Doe d. Birtwhistle v. Vardill and Skottowe v. Young, *referred to*.
Andros, In re, *Andros v. Andros* (1883) 52 L. J. Ch. 793; 24 Ch. D. 637, 49 L. T. 103, 32 W. R. 30.—KAY, J.

Doe d. Birtwhistle v. Vardill and Don's Estate, In re, *referred to*.
Escallier v. Escallier (1885) 54 L. J. P. C. 1, 10 App. Cas. 812, 53 L. T. 54.—P.C.

Doe d. Birtwhistle v. Vardill, limited.
Skottowe v. Young, *applied*.
Grey's Trusts, In re, *Grey v. Stamford* (Earl) (1892) 61 L. J. Ch. 622, [1892] 3 Ch. 88, 41 W. R. 60.

• *STIRLING, J.*—Now it seems to me that, upon examination of *Doe d. Birtwhistle v. Vardill*, that the rule there laid down [*viz.* that an *ante natus* son cannot inherit English land as heir] relates only to the descent of land on an intestacy and does not affect the case of a devise in a will to children.—p. 61

Wright's Trust, In re (1855) 25 L. J. Ch. 621; 2 K. & J. 595; 2 Jur. (N.S.) 465, 4 W. R. 541.—V.-C., *dicta adopted*.
Goodman's Trusts, In re (1881)—G.A. (*supra*)

Wright's Trust, In re, *discussed*.
Grove, In re, *Vaucher v. Treasury Solicitor* (1888) 58 L. J. Ch. 57, 40 Ch. D. 216; 59 L. T. 337, 37 W. R. 1.—C.A., *affirming*, *STIRLING, J.*

Shaw v. Gould (1868) 37 L. J. Ch. 433; 30 & J. 8 H. L. 55; 18 L. T. 833.—H.L. (E.), *referred to*.

Levy v. Solomon (1877) 37 L. T. 263.—V.-C.; *Goodman's Trusts*, In re (1881)—G.A. (*supra*); *Harvie v. Farnie* (1882) 52 L. J. P. 38; 8 App. Cas. 43, 55.—H.L. (E.); *Andros*, In re, *Andros v. Andros* (1883)—KAY, J. (*supra*)

Freke v. Carbery (Lord) (1873) L. R. 16 Eq. 461; 21 W. R. 335.—L.C., *approved*.
Gentili, In goods of (1875) Ir. R. 9 Eq. 541

Freke v. Carbery (Lord) and *Gentili*, In goods of, *applied*.
Duncan v. Lawson (or *Duncan and Lawson*, In re) (1889) 58 L. J. Ch. 526, 41 Ch. D. 394; 60 L. T. 732; 37 W. R. 524; 33 J. P. 537.—KAY, J.

Freke v. Carbery (Lord), *Gentili*, In goods of, and *Duncan v. Lawson*, *referred to*.
Tevlin v. Gileman [1902] 1 Ir. R. 514.—C.A.

Freke v. Carbery (Lord), *applied*.
Ren v. Ren [1902] 1 Ir. R. 461.—M.R.

Freke v. Carbery (Lord), *Duncan v. Lawson* (or *Duncan and Lawson*, In re), and *De Fogassieras v. Dupont* (1841) 11 L. R. 123, *approved and followed*.
Popin v. Bruyere (1901) 71 L. J. Ch. 39, [1902] 1 Ch. 24, 85 L. T. 161; 50 W. R. 31.—G.A.
 WILLIAMS, ROMER and HARDY, L.J.

Anstruther v. Chalmers (1826) 2 Sim. 1; 1 L. J. (o.s.) Ch. 123; 29 R. 18.—V.-C.; and *Yates v. Thompson* (1835) 3 Cl. & P. 544.—H.L. (G.), *applied*.

Boyes v. Bedale (1863) 1 H. & M. 798; 33 L. J. Ch. 233, 10 Jun. (N.S.) 196; 10 L. T. 131; 12 W. R. 232.—WOOD, V.-C.

Crichton's Trust, In re (1855) 21 L. T. (o.s.) 267.—V.-C.; *Brown's Trust*, In re (1865) 12 L. T. 183.—V.-C.; *Ferguson's Trust*, In re (1874) 22 W. R. 762.—M.R. (IR.); and *Hellmann's Will*, In re (1866) L. R. 2 Eq. 363; 14 W. R. 682.—T.R., *considered*.

Chatain's Settlement Trusts, In re (1899) 68 L. J. Ch. 360, [1899] 1 Ch. 712; 80 L. T. 615; 47 W. R. 516

• *KEKEWICH, J.*—There are two cases, *Crichton's Trust*, *In re*, in the Court of Chancery, and *Ferguson's Trust*, *In re*, decided by the M.R. in Ireland—where the infants were Scotch. In each case the infant had reached the age of puberty, and though not having attained his majority and not *exi juris* in England or Ireland, yet it was proved that the infant was competent to give a discharge in Scotland. That of itself may make a difference, and . . . in the Irish case it was proved that security was given for the due performance of his duties respecting the fund by the curator in Scotland. That seems to me to make a considerable difference. From the other cases I do not think I can get much assistance. In *Boyes's Trust*, *In re*, no doubt the V.-C. made the order. The petitioner adduced evidence to show that by the law of Prussia he was entitled, in his capacity of guardian of the infant, to receive the fund and administer it during the infant's minority—which is exactly what the petitioner says here—and the V.-C., on hearing the evidence, made the order. What further evidence there was, or what influenced his judge, it is extremely difficult to say. It is a very short note of an unopposed petition to which there was no respondent; and I do not think it is a case which can be relied upon as establishing the principle. Then *Hellmann's Will*, *In re*, is still further from doing so.—p. 352.

Enghin v. Wylie (1862) 10 H. L. Cas. 1; 31 L. J. Ch. 402, 8 Jur. (N.S.) 897, 6 L. T. 253; 10 W. R. 467.—H.L. (E.), *explained and distinguished*.

King v. George (1876) 4 Ch. D. 435, 444; 37 L. T. 786.—V.-C.; *affirmed*, (1877) 46 L. J. Ch. 670, 5 Ch. D. 627, 36 L. T. 759; 25 W. R. 688.—G.A.

Enoch v. Wylie, applied.
Travers v. Blundell (1877) 6 Ch. D. 436, 446,
 80 L. T. 344.—C.A.; *Stirling-Maxwell v. Cart-*
wright (1879) 14 L. J. Ch. 562, 11 Ch. D. 522,
 40 L. T. 609; 27 W. R. 850.—C.A.

Enoch v. Wylie, dicta followed.
Rames v. Hacon (1880) 50 L. J. Ch. 182; 16
 Ch. D. 107, 43 L. T. 567, 29 W. R. 259.—
 F.R.J., *affirmed*, (1881) 50 L. J. Ch. 740, 18
 Ch. D. 317, 45 L. T. 196, 29 W. R. 877.—C.A.

Enoch v. Wylie, dicta disapproved.
Ewing v. Orr-Ewing (1883) 9 App. Cas. 34,
 53 L. J. Ch. 185, 50 L. T. 101; 32 W. R. 578.—
 H.L. (E.).

SERLHORST, L.O.—The proposition that the
 Courts of that country only in which a testator
 dies domiciled can administer his personal estate,
 is without support from any authority, except
 certain dicta of Lord Westbury in *Enoch v.*
Wylie, with which the other lords who decided
 that case did not agree. If it were true, it must
 extend (as Lord Westbury extended it) to the
 whole movable estate of the deceased person,
 wheresoever situate, on the principle "*Mobilia*
sequuntur personam." This was not seriously
 contended at on your Lordships' bar.—p. 39

Enoch v. Wylie, dicta disapproved.
Kwong v. Orr-Ewing (1885) 10 App. Cas. 453,
 53 L. T. 826.—H.L. (SC). LORDS SERLHORST,
 BLACKBURN, WATSON and FITZGERALD.

Enoch v. Wylie, adopted.
Concha v. Concha (1886) 56 L. J. Ch. 257; 11
 App. Cas. 511, 562, 55 L. T. 522, 35 W. R. 477.—
 H.L. (B); *Abd-ul-Messih v. Fatin* (1888) 57
 L. J. P. C. 88; 13 App. Cas. 451, 138, 59 L. T.
 106.—P.C.

Enoch v. Wylie and Ewing v. Orr-Ewing
 (1885) 10 App. Cas. 453, 53 L. T. 826.—
 H.L. (SC), *considered*
Tinfot, In re, Trafford v. Blane (1887) 57 L. J.
 Ch. 135; 36 Ch. D. 600, 57 L. T. 674; 36 W. R.
 163.—STIRLING, J.

Enoch v. Wylie, dicta questioned.
Artola, In re, Chale, Ex parte (1890) 59 L. J.
 Q. B. 254; 24 Q. B. D. 640, 62 L. T. 781, 7
 Morrell, 80.—C.A.

Blackwood v. Reg. (1882) 52 L. J. 10, C. 10,
 8 App. Cas. 82, 92, 48 L. T. 441, 31 W. R.
 645.—P.C. and *Wilson v. Dunsany (Lady)*
 (1864) 2 Eq. R. 706, 18 Ben. 204, 23
 L. J. Ch. 492; 18 Jan. 702, 2 W. R. 288.
 —M.R. *observed upon*.

Klohe, In re, Kannerthner v. Gieselbrecht
 (1881) 28 Ch. D. 175; 54 L. J. Ch. 297; 52 L. T.
 19; 33 W. R. 391.

FRANKSON, J.—The other case is that of *Black-*
wood v. The Queen, in the Privy Council. The
 judgment was given by Sir Arthur Hobhouse, he
 says, "It does not appear . . . as is shown by the
 cases of *Proctor v. Proctor* (2 Drew. 286)." I think you may
 take an slight exception to the language of that
 I do not think Sir Arthur intended to say that in
 every country where a deceased man may have
 left assets they are to be distributed so as to give
 the creditors of that country priority, or that he
 means to assert that in Ireland, for instance, an
 Englishman who had been trading with an Irish
 merchant would not have as great a right to be
 paid *pari passum* as anyone else, but whatever the

law in France or India may be, the law of Eng-
 land has always been that you must enforce
 claims in this country according to the practice
 and rules of our Courts, and according to them a
 creditor, whether from the furthest north or
 furthest south, is entitled to be paid equally with
 other creditors in the same class. I must refuse
 to alter that which has always been the law of
 this country, and which I must say, for the sake
 of honesty, I hope will always be the law of this
 country. I may add, that there seems to be some
 mistake in the case of *Wilson v. Lady Dunsany*,
 it is unfortunate that the case was ever reported
 —p. 179.

Blackwood v. Reg. followed.
Stamps Commissioners v. Hope (1891) 60 L. J.
 P. C. 44, [1891] A. C. 476, 65 L. T. 208.—P.C.

Lynch v. Paraguay Government (1871) 40
 L. J. P. 81, L. R. 2 P. 268; 25 L. T. 164,
 19 W. R. 192.—P.W., *followed*.
Aganor's Trusts, In re (1895) 64 L. J. Ch. 521,
 13 R. 677.—ROMER, J.

Sill v. Worswick (1791) 1 H. Bl. 667,
 See

Phillips v. Hunter (1795) 2 H. Bl. 102.—EX.
 CH., *Scott v. Bentley* (1865) 24 L. J. Ch. 244;
 1 Kay & J. 281, 1 Jan. (88) 394, 3 Eq. R.
 128; 3 W. R. 280.—V.-C. Elliott, *In re* (1891)
 89 W. R. 297, *Belcast Ship Owners Co., In re*
 [1894] 1 Ir. R. 392.—C.A., *Delsheim v. London*
and Westminster Bank (1900) 69 L. J. Ch. 443,
 [1900] 2 Ch. 15; 82 L. T. 758, 48 W. R. 501.—
 C.A., *Dulaney v. Meury* (1901) 70 L. J. K. B.
 377, [1901] 1 K. B. 636, 84 L. T. 156; 49
 W. R. 331.—CHANNELL, J.

G. CONTRACTS

Peninsular and Oriental S.S. Co. v. Shand
 (1856) 3 Moore P. C. (N.S.) 272, 6 N. R.
 387, 11 Jur. (88) 771, 12 L. T. 808; 13
 W. R. 1049.—P.C., *distinguished*.
Czech v. General Steam Navigation Co. (1867)
 37 L. J. C. P. 3, L. R. 3 C. P. 14; 17 L. T. 246,
 16 W. R. 130.—C.P.

Peninsular and Oriental S.S. Co. v. Shand,
applied.

The Duero (1869) 38 L. J. Adm. 69, L. R. 2
 A & E 393, 22 L. T. 87, Adm., *Moore v. Harris*
 (1876) 45 L. J. P. C. 55, 1 App. Cas. 318, 331,
 34 L. T. 519, 24 W. R. 887; 3 Asp. M. C. 473.
 —P.C., *Jacobs v. Crédit Lyonnais* (1884)—C.A.
(aff'd); *Missouri Steamship Co., In re* (1880)
 58 L. J. Ch. 721, 42 Ch. D. 321; 58 L. T. 877,
 61 L. T. 316, 37 W. R. 696.—CHITTY, J.;
affirmed, C.A.; *The Glendaroch* (1894) 63 L. J.
 Adm. 89, [1894] P. 226; 6 R. 686; 70 L. T.
 344, 7 Asp. M. C. 420.—C.A. *ESKIER, M.B. LOPEZ*
and DAVEY, L.J.

Jacobs v. Crédit Lyonnais (1884) 53 L. J.
 Q. B. 156, 12 Q. B. D. 689, 50 L. T. 191,
 32 W. R. 761.—C.A. *BRETT, M.R. and*
BOWEN, L.J., adopted

Suse, In re, Dever, Ex parte (1887) 56 L. J.
 Q. B. 552, 18 Q. B. D. 660, 56 L. T. 191,
 32 W. R. 761.—C.A. *MISSOURI*
Steamship Co., In re (1889) 58 L. J. Ch. 731,
 42 Ch. D. 321, 340; 61 L. T. 316, 37 W. R.
 696, 6 Asp. M. C. 423.—C.A.

Jacobs v Crédit Lyonnais, applied.
South African Breweries v. King (1899) 68 L. J. Ch 530, [1899] 2 Ch 173; 81 L. T. 76, 47 W. R. 681—KEENEWICH, J.; *affirmed*, 69 L. J. Ch 171; [1900] 1 Ch 273, 82 L. T. 82, 48 W. R. 289.—C.A. LINDLEY, M.R., WILLIAMS and ROMER, L.JJ.

Hamlyn v Talisker Distillery [1891] A. C. 202, 71 L. T. 1, 58 J. P. 510, 6 R. 188.—H. L. (SC.), *applied*

South African Breweries v. King (1899) 68 L. J. Ch 530; [1899] 2 Ch 173, 81 L. T. 76; 47 W. R. 681—KEENEWICH, J.; *affirmed*, 69 L. J. Ch 171; [1900] 1 Ch 273, 82 L. T. 82, 48 W. R. 289.—C.A. LINDLEY, M.R., WILLIAMS and ROMER, L.JJ.

Hamlyn v Talisker Distillery, followed.
Sperrier v. La Cloche (1902) 71 L. J. P. C. 107; [1902] A. C. 146, 86 L. T. 631.—P.C.

Melan v Fitzjames (Duke) (1797) 1 Bos. & P. 138, *explained and approved*
De la Vega v. Vianna (1880) 1 B. & Ad. 281; 8 L. J. (O.S.) K. B. 388

Talleyrand v. Boulanger (1797) 3 Ves 447, 4 R. H. 68; and **De la Vega v. Vianna** (*supra*), *adopted*
Don v. Lippmann (1837) 5 Cl. & F. 1—H. L. (SC.).

Talleyrand v. Boulanger, observed upon.
De la Vega v. Vianna and Don v. Lippmann, referred to

Liverpool Marine Credit Co. v. Hunter (1868) L. R. 3 Ch 479, 37 L. J. Ch 386; 18 L. T. 749; 16 W. R. 1090.—L.O.

CHELMFORD, L.O.—The case of *Talleyrand v. Boulanger* was cited to show that a party has no right to avail himself of a foreign law which gives him a better remedy than he could be entitled to in the place where the cause of action arises. But that case has really no application [The Lord Chancellor then stated the facts] Lord Loughborough said [in *Talleyrand v. Boulanger*]. "I am not prepared to say how far this Court will finally give redress, but I will not allow the defendant to avail himself of any advantage got by duress which is the sole cause of the new engagement." There was, however no duress in the case in the legal sense of that word, for, although the law of France would not have allowed an arrest, yet the plaintiff was entitled to avail himself of all the remedies which the law of this country afforded him for the recovery of the debt. This very point was decided between two foreigners in the case of *De la Vega v. Vianna*, where Lord Tenterden said "A person suing in this country must take the law as he finds it. He cannot, by virtue of any regulation in his own country, enjoy greater advantage than other suitors here, and he ought not, therefore, to be deprived of any superior advantage which the law of this country may confer;" and in the case of *Don v. Lippmann*, Lord Brougham, in advising the House, said "The law on this point is well settled in this country, where this distinction is properly taken, that whoever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made." The proceedings of the plaintiff in *Talleyrand v. Boulanger* might have been hush, but they were not contrary to law, and, therefore,

there was no more duress in the case than there would be in the case of a person lawfully arrested giving a bail bond to the sheriff to obtain his discharge out of custody. A Court of law would not, under the circumstances (as the Lord Chancellor supposed), have discharged the defendant upon common bail. For this the case already mentioned of *De la Vega v. Vianna* is a direct authority. I do not, therefore, see how equity could properly interfere to restrain the actions which, however oppressive, as Lord Loughborough thought them, arose out of remedies enforced by the plaintiff for the recovery of his debt, of which the law entitled him to avail himself.—p. 186.

De la Vega v. Vianna, principle applied.
Melbourne, in re and Ex parte (1870) 10 L. J. Bk. 27, L. R. 4 Ch. 61, 23 L. T. 578; 19 W. R. 83.—L.J.; Kluke, in re (1881) 64 L. J. Ch 297, 28 Ch. D. 175, 62 L. T. 19; 33 W. R. 391.—PEARSON, J.

Don v. Lippmann, commented upon.
Hamlyn & Co. v. Talisker Distillery (1891) [1891] A. C. 202, 71 L. T. 1, 58 J. P. 510, 6 R. 188—H. L. (SC.).

Huber (or Hubert) v. Steiner (1835) 3 Scott 304, 2 Bing (N.C.) 202; 1 Hodge 206; 2 D. P. C. 781; 4 L. J. O. P. 253.—G.P., *adopted*.
Don v. Lippmann (1837) 5 Cl. & F. 1—H. L. (SC.).

Huber v. Steiner, followed.
Harris v. Quinn (1869) 10 B. & S. 614; 38 L. J. Q. B. 331; L. R. 4 Q. B. 653; 20 L. T. 947; 17 W. R. 967.—Q.B.

Huber v. Steiner, adopted.
Phillips v. Eyre (1870)—EX. CH. (*infra*).

Alcock v. Smith (1892) 61 L. J. Ch. 161; [1892] 1 Ch. 238, 66 L. T. 126.—C.A. LINDLEY, LOPES and KAY, L.JJ., *dicta considered*.
Dulaney v. Meryx (1901) 70 L. J. K. B. 377; [1901] 1 K. B. 536; 81 L. T. 156, 19 W. R. 331; 8 Manson 152—CHANNELL, J.

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Phillips v. Eyre (1870) 10 L. J. Q. B. 228, L. R. 4 Q. B. 1; 22 L. T. 869, 10 R. & S. 1004—EX. CH.; *affirming*, 17 W. R. 375, *adopted*.
The M. Moxham (1876) 46 L. J. P. 17; 1 P. D. 107, 31 L. T. 559; 21 W. R. 650—C.A.

Phillips v. Eyre, considered.
Masgrave v. Pulteney (1879) 19 L. J. P. C. 20; 5 App. Cas. 102, 41 L. T. 629; 28 W. R. 373—P.C.

Phillips v. Eyre, applied
Machado v. Fontes (1897) 66 L. J. Q. B. 512; [1897] 2 Q. B. 231; 76 L. T. 588, 45 W. R. 565.—C.A. LOPES and RIGBY, L.JJ.

Mostyn v. Fabrigas (1774) 1 Cowp. 161, 180, *dictum disapproved*.
Hill v. Bigge (1841) 3 Moore P. C. 465.—P.C.

Mostyn v. Fabrigas, adopted.
Hart v. Gumpach (1872) 42 L. J. P. C. 25; L. R. 4 P. C. 439, 164, 9 Moore P. C. (N.S.) 241;

21 W. R. 365—*P.C.*, Musgrave v. Pulido (1879)
49 J. J. P. 20, 5 App. Cas. 102; 41 L. T.
629, 28 W. R. 373.—*P.C.*, Hawthorne, In re,
Graham v. Massey (1883) 52 L. J. Ch. 730, 28
Ch. D. 718, 18 L. T. 701, 32 W. R. 147.—*KAY, J.*,
Kew v. On-Bwing (1885) 10 App. Cas. 453,
522, 53 L. T. 826—*H.L.* (S.C.).

Moslyn v. Fabrigas, considered

British South African Co. v. Companhia de
Moçambique (1893) 63 L. J. Q. B. 70, [1893]
A. C. 602; 6 R. L. 1, 69 L. T. 604.—*H.L.* (E)

Moslyn v. Fabrigas, applied

Adam v. British and Foreign Steamship Co.
(1898) 67 L. J. Q. B. 811, [1898] 2 Q. D. 430;
79 L. T. 31.—*DARLING, J.*

Whitaker v. Forbes (1875) 15 L. J. Q. P.
110, 1 C. P. D. 51, 33 L. T. 582, 24
W. R. 241.—*C.A.*, applied.

Blackburn, & Co., Building Society, In re,
Graham, Ex parte (1889) 59 L. J. Ch. 183; 42
Ch. D. 313, 61 L. T. 745; 38 W. R. 178.—*C.A.*

Whitaker v. Forbes, considered.

British South Africa Co. v. Companhia de
Moçambique (*supra*)

Companhia de Moçambique v. British South
Africa Co. (1892) 61 L. J. Q. B. 663, [1892]
2 Q. B. 358; 66 L. T. 773, 10 W. R. 650—
C.A., reversed *nom.*, British South Africa Co. v.
Companhia de Moçambique (1893) 63 L. J. Q. B.
70, [1893] A. C. 602; 6 R. L. 1; 69 L. T. 604—
H.L. (E). LORDS HERSCHELL, L.C., HALSBURY,
MACNAGHTEN and MORRIS.

**British South Africa Co. v. Companhia de
Moçambique, applied**

Adam v. British and Foreign Steamship Co.
(1898) (*supra*); Black Point Syndicate v.
Eastern Concessions (1898) 79 L. T. 658,
STIRLING, J., Dard v. Amsteidsch Trustee
Kaukor (1902) 71 L. J. Ch. 618, [1902] 2 Ch.
132; 87 L. T. 22; 50 W. R. 551.—*BYRNE, J.*

Derby (Earl) v. Athol (Duke) (1748) 1 Ves

sen 292.—*L.C. follows*

Bent v. Young (1838) 7 L. J. Ch. 162, 9 Sim.
180; 2 Jur. 202.—*V.C.*

Derby (Earl) v. Athol (Duke), considered

Dreyfus v. Peruvian Guano Co. (1889) 58 L. J.
Ch. 171; 11 Ch. D. 151; 60 L. T. 216; 37 W. R.
394.—*KAY, J.*

Bent v. Young (1838) 7 L. J. Ch. 151, 9

Sim 180; 2 Jur. 202.—*V.C.*, adopted.
Morris v. Morris (1847) 2 Ph. 205, 16 L. J. Ch.
286, 11 Jur. 93.—*J.C.*

Bent v. Young, adopted.

Paul v. Roy (1852) 15 Beav. 133; 21 L. J. Ch.
361.—*M.R.*

Bent v. Young, adopted

Transatlantic Co. v. Pietroni (1860) Johns. 604,
6 Jur. (S.S.) 532.

Bent v. Young, considered

Paul v. Roy and Transatlantic Co. v.
Pietroni, referred to.

Dreyfus v. Peruvian Guano Co. (1889) 58 L. J.
Ch. 171; 11 Ch. D. 151, 60 L. T. 216; 37 W. R.
394.—*KAY, J.*

Macleod v. Att.-Gen. for New South Wales

(1891) 60 L. J. P. C. 55; [1891] A. C.
465, 65 L. T. 321; 17 Cox C. C. 341.—*P.C.*
Rex v. Russell (Earl) or Russell (Earl), In re
(1901) 70 L. J. K. B. 998, [1901] A. C. 416, 85
L. T. 253.—*H.L.* (E)

Carron Iron Co. v. MacLaren (1855) 5 H. L.

Ch. 416, 24 L. J. Ch. 620, 3 W. R. 597
—*H.L.* (E), distinguished
Walker v. Brooks (1856) 4 W. R. 347—
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Carron Iron Co. v. MacLaren, dictum adopted.

Newby v. Van Oppey (1872) 41 L. J. Q. B. 148,
L. R. 7 Q. B. 293, 26 L. T. 164, 20 W. R. 383.—*Q.B.*
S. PROCEDURE.

Worms v. De Valder (1880) 49 L. J. Ch. 261,

11 L. T. 791, 28 W. R. 316.—*FRY, J.*,
considered and followed.
Scot's Trust, In re (1902) 71 L. J. Ch. 192;
[1902] 1 Ch. 488.—*FARWELL, J.*

Bullock v. Caud (1875) 41 L. J. Q. B. 124,

10 L. R. Q. B. 276, 32 L. T. 814, 23 W. R.
827.—*Q.B.*, followed
Doetsch, In re, Matheson v. Ludwig (1896) 65
L. J. Ch. 855, [1896] 2 Ch. 836, 75 L. T. 69;
45 W. R. 57.—*ROMER, J.*

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THAM, J.*; reversed, (1900) 82 L. T. 698.—*C.A.*
SMITH, WILLIAMS and ROMER, L.J., the latter
decision reversed, *nom.* Carr v. Fraser (1901) 85
L. T. 144.—*H.L.* (E). LORDS HALSBURY, L.C.,
MACNAGHTEN, SHAND, BRAMPTON and LINDLEY

Henderson, In re, Nouvion v. Freeman (1887)
35 Ch. D. 704, 56 L. T. 829.—*SMITH, J.*,
reversed, (1887) 57 L. J. Ch. 367; 37 Ch. D.
244, 58 L. T. 242.—*C.A.* COTTON, LINDLEY and
LOPES, L.J.; the latter decision affirmed, (1889)
59 L. J. Ch. 337, 15 App. Cas. 1, 62 L. T. 189;
38 W. R. 681.—*H.L.* (E) LORDS HERSCHELL,
WATSON, BRAMWELL and ASHBOURNE

Patrick v. Shadden (1893) 2 F. & R. 14, 22
L. J. Q. B. 258, 17 Jur. 1154.—*Q.B.*,
applied

Henderson, In re, Nouvion v. Freeman (1889)
59 L. J. Ch. 337, 15 App. Cas. 1, 62 L. T. 189,
38 W. R. 581.—*H.L.* (E) LORDS HERSCHELL,
WATSON, BRAMWELL and ASHBOURNE

Molony v. Gibbons (1810) 2 Camp. 502, 11

R. R. 778, overruled.
Obicini v. Eligh (1832) 1 M. & Sc. 477, 8 Bing.
385, 1 L. J. C. P. 99.—*C.P.*

Oriental Inland Steam Co., In re, Soinde Ry.

Ex parte (1871) 43 L. J. Ch. 699; L. R. 9
Ch. 557, 31 L. T. 5, 22 W. R. 810.—*L.J.*,
distinguished

"Minna Chag" 88 Co. v. Chartered Mercan-
tile Bank of India (1897) 66 L. J. Q. B. 539;
[1897] 1 Q. B. 160, 74 L. T. 810, 45 W. R. 338;
8 Asp. M. C. 211.—*C.A.* RIGBY, L.R., LOPEZ and
CHITTY, L.J.

CHITTY, L.J.—The distinction between this
case and *Oriental Inland Steam Co., In re,
Soinde Ry.*, Ex parte, is that in that case the
proceedings were in *personam*, and not, as here,
in *rem*.—p. 344.

oequet v MacCarthy (1831) 2 B. & A. 951, *referred to*
Meyer v Bulli (1876) 45 L. J. C. P. 741,
 1 C. P. D. 358, 35 T. 838, 24 W. R. 903—
 C.P.D.; *Rossillon v Rossillon* (1880) 49 L. J. Ch.
 388, 11 Ch. D. 351; 42 L. T. 679, 28 W. R.
 628, 44 J. P. 668—*PRY, J.*

Bequet v MacCarthy, distinguished
Shrin Guntyal Singh v Faridkot (Rajah)
 [1894] A. C. 670, 11 R. 340—*P.C.*

Buchanan v Rucker (1807) 9 East 192, 1
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Garcias (1815) 12 (1) & P. 368, 9 Jur.
 1019—*H. L. (S.), applied*
Simpson v Fogo (1863) 32 L. J. Ch. 249,
 1 H. & M. 195, 1 N. R. 422, 9 Jur. (N.S.) 403;
 8 L. T. 61; 11 W. R. 418—*V.C.*

Buchanan v Rucker, distinguished
Castrique v Imrie (1870)—*H. L. (S.) (infra,*
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Buchanan v Rucker, observation dis-
approved
Douglas v Forrest (1828) 4 Bing. 686, 1
 M. & P. 668, 6 L. J. (S.) C. P. 187, 29
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Schlesby v Westenholz (1870) 40 L. J. Q. B.
 73, 1 R. 6 Q. B. 155, 24 L. T. 93, 19 W. R.
 587—*Q.B.*

General Steam Navigation Co. v Guillon
 (1841) 11 M. & W. 877, 13 L. J. Ex 168
 —*H.L., considered.*
Schlesby v Westenholz (1870) 40 L. J. Q. B. 73,
 1 R. 6 Q. B. 155, 24 L. T. 93, 19 W. R. 587—*Q.B.*

General Steam Navigation Co. v Guillon,
referred to.
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 148, 1 L. R. 7 Q. B. 293, 26 L. T. 161, 20 W. R.
 383—*Q.B.*

General Steam Navigation Co. v. Guillon,
applied
The M. Moxham (1876) 46 L. J. P. 17, 1
 P. D. 107, 118; 34 L. T. 559, 24 W. R.
 650—*C.A.*

General Steam Navigation Co. v. Guillon,
dictum dissent from
Vomet v Barrett (1885) 54 L. J. Q. B. 521—
PRY, J.; reversed on facts, (1886) 55 L. J. Q. B.
 19, 34 W. R. 161—*C.A.*

Williams v Jones (1845) 13 M. & W. 628, 2
 D. & L. 680, 14 L. J. Ex 145—*H.L.,*
applied
Godard v Gray (1870) 40 L. J. Q. B. 62, 1 L. R.
 6 Q. B. 189, 21 L. T. 89, 19 W. R. 318—*Q.B.*;
and see Aboulhoff v Oppenheimer (1882)—*C.A.*
(infra, col. 1889)

Williams v Jones and Russell v Smyth
 (1842) 11 M. & W. 810, 1 D. (N.S.) 929, 11
 L. J. Ex 908—*H.L., applied*
Schlesby v Westenholz (1870) 40 L. J. Q. B.
 73, 1 R. 6 Q. B. 155; 24 L. T. 93, 19 W. R. 587,
 —*Q.B.*

Williams v Jones, dictum considered.
Nouvion v Freeman (1884) 59 L. J. Ch. 337,
 15 App. Cas. 1, 62 L. T. 189, 38 W. R. 581—
H.L. (S.). LORDS HERSCHELL, WATSON, BRAM-
WELL and ASHBOURNE.

Novelli v Rossi (1831) 2 B. & A. 757, 9
 L. J. (S.) K. B. 307—*K.H., applied.*
Simpson v Fogo (1863) 32 L. J. Ch. 249, 1
 H. & M. 195, 1 N. R. 422, 9 Jur. (N.S.) 403,
 8 L. T. 61; 11 W. R. 418—*V.C.*

Novelli v Rossi, explained
Godard v Gray (1870) 40 L. J. Q. B. 62; 1 L. R.
 6 Q. B. 189; 24 L. T. 89, 19 W. R. 318—*Q.B.*;
Castrique v Imrie (1870)—*H.L. (S.) (infra).*

Simpson v Fogo (1863) 32 L. J. Ch. 249; 1
 H. & M. 195; 1 N. R. 422; 9 Jur. (N.S.)
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See
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 (1868) 37 L. J. Adm. 33, 1 L. R. 2 P. C. 193; 7
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Simpson v Fogo, distinguished
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 6 Q. B. 189; 24 L. T. 89, 19 W. R. 318—*H.L. (S.).*

Simpson v Fogo, considered
Schlesby v Westenholz (1870) 40 L. J. Q. B.
 73, 1 R. 6 Q. B. 155; 24 L. T. 93, 19 W. R.
 587—*Q.B.*

Simpson v Fogo, considered
Queensland Mercantile and Agency Co., in re,
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 L. J. Ch. 145, [1892] 1 Ch. 219, 66 L. T. 453—
C.A. LINDLEY, BOWEN and PRY, J.J.

Castrique v Imrie (1860) 8 C. B. (N.S.) 1; 29
 L. J. C. P. 321, 2 L. T. 180—*C.P., reversed,*
 (1861) 8 C. B. (N.S.) 405, 30 L. J. C. P. 177.
 4 L. T. 143, 9 W. R. 455—*H.L. (S.); the latter*
decision affirmed, (1870) 39 L. J. C. P. 350, 1 L. R.
 1 H. L. 411, 23 L. T. 48, 19 W. R. 1—*H.L. (S.).*

Castrique v Imrie, considered and applied
Godard v Gray (1870) 40 L. J. Q. B. 62; 1 L. R.
 6 Q. B. 189; 24 L. T. 89, 19 W. R. 318—*Q.B.*

Castrique v Imrie (supra in H.L.), applied.
Messina v Petrocovich (1822) 41 L. L. P. C.
 27, 1 R. 4 P. C. 144, 26 L. T. 561; 20 W. R.
 451.—*P.C.*; *Meyer v Bailly* (1876) 45 L. J. C. P.
 711; 1 C. P. D. 358; 36 L. T. 888, 24 W. R.
 963—*C.P.D.*; and *De Mora v Concha* (1885) 29
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Castrique v Imrie, followed
Doglioni v Crispin (1864) 35 L. J. P. 129;
 1 L. R. 11 L. 301, 15 L. T. 41—*H.L. (S.).*
considered
Trufort, in re, Tiaford v Blanc (1887) 57
 L. J. Ch. 135; 36 Ch. D. 600; 57 L. T. 671; 36
 W. R. 163—*STIRLING, J.*

Headnote—Where a question of legitimacy
 involving the succession to personal estate has
 been decided by a competent foreign tribunal
 assuming to act upon evidence of the English
 law, the Courts of this country will not upon the
 foreign judgment although it may appear that
 all the facts were not in evidence before the
 foreign tribunal

Castrique v Imrie, Doglioni v Crispin;
and Vanquelin v Bougard (1863) 33 L. J.

C P 78; 15 C B (N.S.) 341; 10 Jm (N.S.) 566; 9 L. T. 582; 12 W R 128, 3 N R 122—C.P. applied.
 Pemberton v Hughes (1899) 68 L J Ch. 281; [1899] 1 Ch 781, 80 L. T. 369, 47 W R 354—C.A. LINDLEY, M R, RIGBY and WILLIAMS, L J.

Ashloff v Oppenheimer (1882) 52 L. J. Q. B. 1, 10 Q. B. D. 295; 47 L. T. 325, 31 W R 57—C.A. COLERIDGE, C.J., BAGGALLAY and BRETT, L.J., discussed and followed.
 Vidale v Lawes (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W.R. 594—C.A. LINDLEY and BOWLES, L.J. And see Manger v Cash (1844) 5 Times L R 271.—DENMAN and MANISTY, JJ.

Schibasy v Westenholz (1870) 10 L. J. Q. B. 73, L. R. G. Q. B. 155, 24 L. T. 98, 19 W R 587—Q.B. approved.
 Oelsenben v Paplicher (1878) 42 L. J. Ch. 861, L. R. Ch. 695, 28 L. T. 459, 21 W R. 516—L.C. and L.J.

Schibasy v Westenholz, commented on
 Cogh v Adamson (1874) 22 W R 658, 43 L. J. Ex. 161; L. R. 9 Ex. 345, 31 L. T. 242—KX, approved, (1875) 45 L. J. Ex. 15; 1 Ex. D 17; 33 L. T. 560, 24 W. R. 85—C.A.
 KELLY, D.B., said that he thought the law was well laid down by his brother Blackburn in the above case.

ARMILLET, D.—As laid down by my brother Blackburn, in *Schibasy v Westenholz*, if he is a subject of the country or owes it a qualified allegiance as by residence, he will be bound by the law and procedure of the country, or if he has selected the tribunal himself, or perhaps, if at the time of the contract the defendant was in the foreign country, although I agree with my brother Blackburn that this last proposition requires consideration—p. 660

Schibasy v Westenholz, adopted
 Meyer v Ralli (1876) 45 L. J. C P 741; 1 C. P. D. 368, 35 L. T. 838, 24 W R 963—C.P.D.

Schibasy v Westenholz, considered
 Roussillon v Roussillon (1850) 14 Ch. D. 351; 49 L. J. Ch. 338; 42 L. T. 679, 28 W R 623, 11 J. P. 668

WYLLIE, J.—Then arises the question how far the defendant is bound by it [a decision of a foreign Court], and the law upon this point, I think, I may conveniently take from the case of *Schibasy v Westenholz*, which has been so much discussed in the course of the argument. In that case, the Court considered the principles on which foreign judgments are enforced by Courts of this country, and they said (at p. 169), "We think for the reasons there given . . . is a defence to the action." What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case, and to *Cogh v Adamson* (L. R. 9 Ex. 345), they say, I think, he stated thus Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained, where he was resident in the foreign country when the action began, where the defendant in the character of plaintiff has selected the *forum* in which he is afterwards sued; where he has voluntarily appeared; where he has contracted

to submit himself to the *forum* in which the judgment was obtained, and, possibly, if *Dreghet v MacCuthy* (2 B & Ad 951) be right, where the defendant has really stayed within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction—p. 370

Schibasy v Westenholz, questioned
 Voinet v Barrett (1885) 51 L. J. Q. B. 521 [N.B.—*Voinet v Barrett* was carried to the Court of Appeal (55 L. J. Q. B. 39 (1886), 34 W. R. 161), the judges of which, whilst affirming the judgment of Wills, J. on the point of law which was raised as to the effect of the appearance by the defendant, reversed it as to the particular facts of the case.]

WILLS, J.—In 1870, there was the case, which has been so much discussed, of *Schibasy v Westenholz*. Mr Justice Blackburn, in delivering the judgment of the Court, sums up what he conceives to be the result of the authorities. I do not know that I should go further into this part of the question, except for the fact that undoubtedly there seems to me to have been a misapprehension, in the course of that judgment, as to what had been decided by some of the cases which were under review. Inasmuch as it is very desirable to clear away any misapprehension of that sort, I think it is only right I should point out how it is that, as it appears to me, there was misapprehension as to what was decided in the cases of *The General Steam Navigation Co v. Guillon* and *De Cassa Brasao v. Rathbone*, respectively. The learned judge says, after citing the passage from the case of *The General Steam Navigation Co v. Guillon*, which I have already read, "It will be seen from this that those very learned judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment merely by appearing to defend themselves against it. On the other hand, in *Singapore v. Poon* (1 Hen. & M. 135, 32 L. J. Ch. 249), where the mortgages of an English ship had come into the Courts of Louisiana to endeavour to prevent the sale of their ship seized under an execution against the mortgagors, and the Courts of Louisiana decided against them, the Vice-Chancellor and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the Court of Louisiana would have bound the mortgagors had it not been in contemptuous disregard of English law" (that is to say, the Court there, professing to deal with English law, had correctly stated what they believed to be English law, and then decided against it, although it was said, according to all legal principles, which they admitted, it ought to be decided by English law). "The case of *The General Steam Navigation Co v. Guillon* was not referred to, and therefore cannot be considered as dissented from, but it seems clear that they did not agree in the latter part of the opinion there expressed." I have pointed out already that the case of *De Cassa Brasao v. Rathbone* was cited and relied upon, and in that case *The General Steam Navigation Co v. Guillon* was under discussion, and therefore, although it is not specifically mentioned in the report of the argument, in that sense it is dissented from, because the judgment which had really dissented

from it, and which cannot be considered as anything else than a formal judgment dissenting from it, had been followed and approved. The judgment goes on to say, "We think it is better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal." Now, certainly, unless I misunderstand that sentence in its connection with what goes before, it seems rather to point to the view, that in the case of *Simpson v Fogo* and in the case of *The General Steam Navigation Co v Guillon* in each of those cases the defendant had appeared to try to save some property in the hands of the foreign tribunal, and it was decided one way by one decision and the other by the other. I cannot find in the pleadings in *The General Steam Navigation Co v Guillon* that there was any allegation of that kind, and it seems to me, as far as one can gather from the pleadings in *The General Steam Navigation Co v Guillon* that that was a case, as far as it appears, of a purely voluntary appearance, and under no compulsion or duress, or anything of that kind. "But we must observe," the judgment goes on to say "that the decision in *De Cosse Brissac v Rathbone* is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour, he is bound." I cannot help thinking with Mr. Abrahams, that in that phraseology the voluntary appearance which is attributed to the case of *De Cosse Brissac v Rathbone* really means an appearance voluntary as contradistinguished to one made under that species of duress which consists of the necessity of attempting to save your property from execution if you do not appear at all. Whereas, as I have pointed out, in the case of *De Cosse Brissac v Rathbone* the allegation in the plea was that the defendant had property in France which he wished to save from possible execution and therefore for that reason he appeared. Therefore, it seems to me rather, if the decisions in the case of *The General Steam Navigation Co v Guillon* and that of *De Cosse Brissac v Rathbone* had been misapplied, and the decision which was really that of the latter case attributed to the former, and that of the former case attributed to the latter. If so, it seems to me to be incorrect to say that that particular question was at that time still undecided, because it seems to me that it is impossible to distinguish the case of *De Cosse Brissac v Rathbone* from the present case, and that it is impossible to deny that in this case it was expressly alleged that the appearance of the defendant was not to save property then in the hands of the tribunal, but, what is newly as cogent a species of duress, from the necessity of saving other property from execution in case a judgment by default should be obtained in the Court. It seems to me, therefore, that that question really in the year 1870 was not an open question, and it is not an open question now as far as decisions go—p 524.

Schibsey v Westenholz, referred to
Truist, in re Trafford v Blanc (1887) —
STIRLING, L. (supra, col 1888).

Schibsey v Westenholz, applied.
Meek v Wendt (1888) 21 Q. B. D. 126; 50 L. T. 558; 6 Asp. M. C. 531.—CHARLES, J.

Schibsey v Westenholz, adopted.

Noyon v Fricman (1849) 59 J. Ch. 367, 15 App. Cas. 1; 62 L. T. 349; 33 W. R. 581.—H. L. (U). Turnbull v Walker (1892) 5 R. 142; 67 L. T. 787, 9 Times L. R. 99.—WRIGHT, J.

Schibsey v Westenholz, explained.

Sindar Gindyal Singh v Parikale (Bajah), [1894] A. C. 670; 11 R. 310.—P. G. LORDS SELBORNE, WATSON, HOLBROSE, MACNAGHTEN, MORRIS and SHAND and SIR R. COUCH.

Scott v Bevan (1831) 9 L. J. (O.S.) K. B.

152.—K. B., and Bertram v Duhamel (1838) 2 Moore P. C. 212, considered. *Manners v Pearson* (1898) 67 L. J. Ch. 801; [1898] 1 Ch. 581, 78 L. T. 432, 46 W. R. 498.—O. A. WILLIAMS, J. J., dissenting.

Copin v Adamson (1875) 45 L. J. Ex. 15; 1.

Ex. D. 17, 33 L. T. 560, 21 W. R. 85.—C. A., referred to. *Roussillon v. Roussillon* (1880) 49 L. J. Ch. 338; 14 Ch. D. 311, 12 L. T. 679, 28 W. R. 623; 41 J. P. 663.—FRY, J.

Copin v Adamson, followed.

Roussillon v. Roussillon, dictum followed.
Feyerick v Hubbard (1902) 71 L. J. K. B. 509, 86 L. T. 829, 50 W. R. 557.—WALTON, J.

Bank of Australasia v. Nias, (1851) 20 L. J.

Q. B. 284, 16 Q. B. 717; 15 Jur. 967.—Q. B., observation referred to.

De Cosse Brissac v Rathbone (1861) 6 H. &

N. 301; 30 L. J. Ex. 238.—EX. applied. *Simpson v Fogo* (1863) 32 L. J. Ch. 249; 1 H. & M. 195, 1 N. R. 422, 9 Jur. (N.S.) 403; 8 L. T. 61; 11 W. R. 418.—V.-C.

Bank of Australasia v. Nias, applied.

Yanquelin v. Bonard (1893) 33 L. J. C. P. 78, 15 C. B. (N.S.) 841, 10 Jur. (N.S.) 566, 9 L. T. 582, 12 W. R. 128; 3 N. R. 122.—C.P.

Bank of Australasia v. Nias and De Cosse

Brissac v Rathbone, adopted.
Godard v Gray (1870) 40 L. J. Q. B. 62, 1 R. 6 Q. B. 139, 24 L. T. 89, 19 W. R. 348.—Q. B.

De Cosse Brissac v Rathbone, applied.

Godard v Gray, followed.
Schibsey v Westenholz (1871) 40 L. J. Q. B. 78; 1 R. 6 Q. B. 155, 24 L. T. 98, 19 W. R. 587.—Q. B.

Bank of Australasia v. Nias, approved.

Godard v. Gray, approved, and observations explained.
Ochsensleben v Papelier (1873) 42 L. J. Ch. 861, 1 R. 8 Ch. 695, 2 L. T. 459, 21 W. R. 516.—L. O. and L. J.

Bank of Australasia v. Nias, applied.

Copin v Adamson (1874) 43 L. J. Ex. 161, 1 R. 9 Ex. 845, 352; 31 L. T. 242.—EX.; applied. (1875) 45 L. J. Ex. 15; 1 Ex. D. 17, 33 L. T. 560, 24 W. R. 85.—C. A.

Bank of Australasia v. Nias, Godard v.

Gray, principle applied.
Abouloff v Oppenheimer (1882) 52 L. J. Q. B. 1, 10 Q. B. D. 295, 47 L. T. 525; 31 W. R. 57.—C. A.

De Cosse Brissac v. Rathbone, and Godard v. Gray, *followed*
Vonnet v. Baillet (1885) 54 L. J. Q. B. 521 —
Wills, L.J. affirmed, (1886) 55 L. J. Q. B. 30, 34
 W. R. 161 —C.A. See extract, ante, col. 1390

Bank of Australasia v. Nias, referred to
Valdala v. Lawes (1890) —C.A. (*supra*, col. 1380).

Bank of Australasia v. Nias, De Cosse Brissac v. Rathbone and Godard v. Gray, *followed*
Trickett, In re, Tafford v. Blain (1887) 57
 L. J. Ch. 135, 36 Ch. D. 600, 57 L. T. 674, 36
 W. R. 163 —STIRLING, J. See headnote, ante,
 col. 1388.

Godard v. Gray, *adopted*
Nonvion v. Picemunn (1889) 59 L. J. Ch. 337,
 15 App. Cas. 1, 62 L. T. 189, 38 W. R. 581
 —H. L. (E.).

Ochsenbein v. Papelier (1873) (*supra*), *distinguished*.

London and Provincial Insurance Co. v. Seymour (1873) 13 L. J. Ch. 120; 1 L. R. 17 Eq. 88; 29 L. T. 611, 22 W. R. 201 —V.C.

Ochsenbein v. Papelier, principle applied
Abuloff v. Oppenheimer (1882) —C.A. (*supra*)

Ochsenbein v. Papelier, referred to.
Valdala v. Lawes (1890) —C.A. (*supra*, col. 1389)

INTERPLEADER.

1. BY SHERIFF.

Day v. Carr (1852) 7 Ex. 883.—EX, *disapproved*.

Cooper v. Asprey (1863) 3 B. & S. 932, 32 L. J. Q. B. 209, 9 Jur. (N.S.) 1198, 8 L. T. 355, 11 W. R. 641.—Q.B.

COCKBURN, C.J.—The case of *Day v. Carr* has been relied on in opposition to the rule, and seems in point. However much I may regret that this Court should differ from a decision of the Court of Exchequer, I am bound to say that I cannot assent to the doctrine there laid down. I consider it our bounden duty to protect our officer, when, in the *bona fide* execution of our process, he encounters resistance and violence — p. 597.

Kirk v. Almond (1892) 2 L. J. Ex. 13, *followed*.

Moore v. Hawkins (1894) 15 R. 166, 48 W. R. 235.—FOLLOK, B. and GRANTHAM, J.

Holler v. Laurie (1846) 3 C. B. 334, 4 D. & L. 205, 15 L. J. C. P. 294; 10 Jur. 860, *held overruled*.

Winter v. Bartholomew (1856) 11 Ex. 701, 25 L. J. Ex. 62, 4 W. R. 261, *approved*
Smith v. Critchfield (1885) 14 Q. B. D. 878,
 54 L. J. Q. B. 866, 38 W. R. 920.—C.A.

BOWEN, L.J.—Martin, B., said (in *Winter v. Bartholomew*). "The case of *Holler v. Laurie* seems to me to proceed on the fallacy that there are two rights of action against the sheriff, one for entering the house, and another for seizing the goods; whereas in truth there is but one right of action in respect of the whole transaction, and, as to that, the Interpleader Act enables the Court to stay proceedings. Such

has been the constant practice. If, indeed, the sheriff, in the execution of the writ, has committed any real grievance, the Court will allow the injured party to bring an action, but if he has done no real wrong, the Court will stay proceedings against him." It seems to me impossible not to say that the decision in *Winter v. Bartholomew* has displaced *Holler v. Laurie*, except so far as that case may be treated as distinguishable on the ground on which it was distinguished in *Winter v. Bartholomew*—p. 881.

Forster v. Clowser (1897) 66 L. J. Q. B. 693, [1897] 2 Q. B. 362, 76 L. T. 347, 46 W. R. 82; 4 Manson 328.—C.A. **LINDLEY, M.R.** and **SMITH, L.J.**; **RIGHTS, L.J.** dissenting, *explained*.
Stern v. Tegner (1897) 66 L. J. Q. B. 869; [1898] 1 Q. B. 37; 77 L. T. 347, 46 W. R. 82; 4 Manson 328.—C.A. **LINDLEY, M.R.** and **CHITTY, L.J.**

LINDLEY, M.R.—Where it is doubtful whether the security is sufficient to pay off the second creditor or not, what is the right course to take in that case? The proper course in such a case is for the Court to say, "Unless you, the execution creditor, will guarantee the secured creditor loss by sale, we will not order a sale." Here the execution creditor and the trustee have declined to redeem, and declined to give any guarantee at all against any loss in the case. Upon the evidence, I do not think that a sale would realise sufficient to pay off the bill of sale altogether. Under these circumstances, how can it be just to enforce a sale and deprive him of his security? It would be an abuse of the rule [Order 67, rule 12] not to put it into operation in a case to meet which it was passed. It is said that this view is opposed to a decision of this Court in *Forster v. Clowser*. I do not think so at all. It appears to me perfectly consistent with it. What the C.A. did there was this. They were satisfied that there was enough to pay off the bill of sale holder that which they considered was the sum properly payable to him. I think the Court went a long way in anticipating the date of payment. That is nothing. I am satisfied they never would have deprived him of his security. What they did was this. They were satisfied there was enough to pay principal and interest and costs, in their judgment, according to what they thought was right, they were satisfied, in other words, that upon the sale, and the payment to him in full of what they thought he was entitled to, there would be a surplus left for the execution creditor. That is quite a different case — pp. 861, 862.

Slingsby v. Beulton (1813) 1 V. & B. 334 *commented on*
Dutton v. Funness (1866) 35 Beav. 461; 35 L. J. Ch. 463, 12 Jur. (N.S.) 386, 14 L. T. 319; 14 W. R. 600.—M.R.

Duncan v. Osabin (1875) 44 L. J. U. P. 225; 1 R. 10 C. P. 564; 32 L. T. 497; 23 W. R. 561.—C.P., *adopted*
Engelback v. Nixon (1875) 44 L. J. C. P. 396; 1 R. 10 C. P. 645; 32 L. T. 831.—C.P.

2 IN OTHER CASES.

Laing v. Zeden, 48 L. J. Ch. 239.—V.C. *reversed*, (1874) 48 L. J. Ch. 628, 1 L. R. 9 Ch. 786, 81 L. T. 264.—L.J.

East and West India Docks v Littledale (1848) 7 Haro 57—v.c. *applied*
Paterni v Campbell (1845) 12 M & W. 277, 1 D & L 397, 13 L J Ex 85; 7 Jur 1189.—EX, *dictum* referred to
Credits Germaine v Van Weede (1884) 53 L J Q B 142, 12 Q B D 171, 32 W R 414; 48 J P 184—POLLOCK, B and LOPES, J

Paterni v. Campbell; and Credits Germaine v Van Weede, considered.
Weldon v Gounod (1885) 15 Q. B. D 622—COLERIDGE, C.J. and SMITH, J.; **Busfield, In re, Whaley v Busfield** (1876) 55 L. J. Ch 467, 32 Ch D. 123—C.A.

Fenn v Edmunds (1846) 5 Hare 314—v.c., *disapproved*
Desborough v Harris (1865) 1 Jur (N.S.) 986; 5 De G. M. & G. 439; 3 Eq R 1058; 4 W R. 2—L.C.

CRANWORTH, L.C.—I cannot conceal from myself that in thus holding that the relative position of mortgagee and mortgagor does not give a title to the debtor to file a bill of interpleader I may be disregarding the authority of *Fenn v Edmunds*; but, with all respect to Sir J. Wigram, I must say, if the case is fully and accurately reported, it is one that I cannot follow. It appears to me to proceed on the assumption that assignees in bankruptcy are bound to be active in confirming a prior assignment made by the bankrupt, if called on for the purpose by the person who has to pay, or, if not, that they may be treated as setting up a claim to what has been assigned. I can find no warrant for such a doctrine; it is, in truth, a further assurance which is asked for, and which, except by reason of a special contract, no one is bound to make. I collect from the note of Wood, V.C.'s judgment that he entertained great doubt as to the decision in *Fenn v Edmunds*.—p. 988.

Desborough v. Harris, referred to
Matthew v Northern Assurance Co (1878) 47 L. J. Ch 562, 9 Ch. D. 80; 38 L. T. 468; 27 W. R. 51—M.R.

Tucker v Morris (1832) 1 Cr & M 78, 1 D. P. C. 689; 2 L. J. Ex 1—EX; and **Belcher v Smith** (1832) 9 Bing 82, 2 M & Scott 184, 1 L. J. C. P. 167—C.P., *distinguished*

Thompson v Wright (1884) 54 L. J. Q. B. 32, 13 Q. B. D. 632, 51 L. T. 634, 33 W. R. 96—STEPHEN, J.

Best v Hayes (1868) 1 H & C. 718, 32 L. J. Ex 129, 11 W. R. 71—EX, *followed*
Tanner v European Bank (1866) L. R. 1 Ex. 261; 33 L. J. Ex 161; 12 Jur (N.S.) 414, 14 L. T. 414, 14 W. R. 875—EX.

Best v Hayes and Tanner v European Bank and Maynell v. Angell (1862) 32 L. J. Q. B. 14; 8 Jur (N.S.) 1211, 11 W. R. 122—Q.B., *applied*

Attenborough v St. Katharine's Dock Co (1878) 47 L. J. C. P. 763; 8 C. P. D. 450; 38 L. T. 404, 26 W. R. 583.—C.A.

Best v. Hayes and Tanner v. European Bank, approved.

Robinson v Jenkins (1890) 59 L. J. Q. B. 147, 24 Q. B. D. 275, 62 L. T. 439; 38 W. R. 380.—C.A. ESHER, M.R. and FRY, L.J.

Crawshay v Thornton (1837) 2 My. & Cr. 1, 6 L. J. Ch. 179; 1 Jur. 19.—L.C., *held overruled*

Attenborough v. St. Katharine's Dock Co. (1878) 3 C. P. D. 150, 17 L. J. C. P. 763; 38 L. T. 404; 26 W. R. 583.—C.A.

BRAMWELL, L.J.—The only case at all in favour of the plaintiffs is *Crawshay v. Thornton*. That was a case of a bill of interpleader filed under the practice formerly existing in the Court of Chancery, and it is unnecessary to consider whether it was correctly decided, for in the cases before us the summonses were issued under 1 & 2 Will. 4, c. 58, and, as I have before intimated, the facts appear to fall precisely within the words of that statute. But I wish also to remark that *Crawshay v Thornton* was decided before the passing of the Common Law Procedure Act, 1860, s. 12, and, from my own knowledge, as one of the Common Law Commissioners, I can say that it was intended to do away with the effect of that decision.—p. 455.

Crawshay v Thornton, referred to.
Rogers v. Lambert (1890) 60 L. J. Q. B. 187; [1891] 1 Q. B. 318, 64 L. T. 406; 39 W. R. 114, 55 J. P. 452.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ

Attenborough v London and St. Katharine's Dock Co. 3 C. P. D. 573, 38 L. T. 404; *reversed*, (1878) 17 L. J. C. P. 763, 8 C. P. D. 450; 38 L. T. 404, 26 W. R. 583.—C.A.

Attenborough v. London and St. Katharine's Dock Co., inapplicable
Wright v. Freeman (1879) 48 L. J. C. P. 276; 10 L. T. 134.—C.P.D.; *affirmed*, 40 L. T. 355.—C.A.

Attenborough v. London and St. Katharine's Dock Co., applied
Robinson v Jenkins (1890) 59 L. J. Q. B. 147, 24 Q. B. D. 275; 62 L. T. 439; 38 W. R. 380.—C.A. ESHER, M.R. and FRY, L.J.

Attenborough v London and St. Katharine's Dock Co., applied
De Rothschild v. Morrison (1890) 59 L. J. Q. B. 557; 24 Q. B. D. 750; 63 L. T. 46, 38 W. R. 635.—C.A. ESHER, M.R. and LOPES, L.J.

Attenborough v London and St. Katharine's Dock Co. and Robinson v Jenkins (supra), applied
Rogers v Lambert (1890) 60 L. J. Q. B. 187; [1891] 1 Q. B. 318, 64 L. T. 406; 39 W. R. 114, 55 J. P. 452.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ

Attenborough v London and St. Katharine's Dock Co., distinguished
Henderson v Williams (1894) 64 L. J. Q. B. 308, [1895] 1 Q. B. 521, 14 R. 375, 72 L. T. 98, 45 W. R. 274.—C.A. LORD HALSBURG, LINDLEY and SMITH, L.JJ.

LINDLEY, L.J.—Mr. Pickford, in his very able argument for the defendant, urged that *Attenborough v London and St. Katharine's Dock Co.* was an authority to show that there was no estoppel in this case. But there the defendants had not returned to the plaintiffs, and the attornment made all the difference.—p. 318.

Attenborough v London and St. Katharine's Dock Co., *affirmed*

Robinson v Jenkins, *discussed*
Mersey Docks and Harbour Board, Ex parte (1899) 68 L. J. Q. B. 540; [1899] 1 Q. B. 546; 80 L. T. 114; 47 W. R. 806—C.A. SMITH and COLLINS, L.J.J.

Robinson v Jenkins, *referred to*.
Guthrie, In re (1899) [1900] 2 L. R. 153.—BOYD, J.

3 PRACTICE ON

Plummer v Price, 39 L. T. 38, 26 W. R. 682—C.P.D., *reversed*. (1879) 30 L. T. 657—C.A.

Carne v Brice (1840) 7 M. & W. 183, 10 L. J. Ex. 28, 8 D. P. C. 881, 1 H. & W. 23; 4 Jun. 1115—EX., *distinguished*.
Fleet v Pettitt (1869) 38 L. J. Q. B. 267; L. R. 4 Q. B. 500, 20 L. T. 814—EX. CH.

Carne v Brice, *discussed and approved*
Richards v Jenkins (1886) 55 L. J. Q. B. 133, 17 Q. B. 541, 34 W. R. 739—WILLS and GRANTHAM, JJ., *affirmed* in C.A. (*infra*).
WILLS, J. (for self and GRANTHAM, J.)—The substance of this decision [*Carne v Brice*] is that the execution creditor, having a title *prima facie* lawful, can only be defeated by a person showing a better title of some sort, and that the trustees of the wife's settlement, not being in possession, and having no title themselves, could not give themselves title by showing that someone else had a title superior to that of both themselves and the execution creditor. Let the execution creditor and that person settle the question between themselves.—p. 136

Richards v Johnston (1859) 28 L. J. Ex. 322; 4 H. & N. 660; 5 Jur. (N.S.) 520, 1 P. & F. 447—EX., *followed*.
Richards v Jenkins (1847) 56 L. J. Q. B. 293; 18 Q. B. D. 451; 56 L. T. 591, 35 W. R. 355—C.A. ESHER, M.R., BOWEN and FRY, L.J.J.

Richards v Jenkins (*supra* in C.A.), *distinguished*.

Usher v Martin, Hall, claimant (1889) 59 L. J. Q. B. 11, 24 Q. B. D. 272; 61 L. T. 778—MATHW and WILLS, JJ.

MATHW, J.—But there is a distinction between this case and that of *Richards v Jenkins*, which prevents its application, for at the time when the execution creditor executed the bill of sale to the grantee she had an equity of redemption in them [the goods], and under that later bill of sale the equity passed to the claimant, so that he was entitled to come forward and say to the sheriff that he claimed the goods. The sheriff could not sell as against McCulloch, the mortgagee, and the claimant had the equity of redemption in the goods. Now in *Richards v Jenkins* there was absolutely no title in the claimant. That differentiates the two cases.—p. 12

Richards v Jenkins and Usher v Martin, *referred to*

Jennings v Mather (1900) 70 L. J. Q. B. 68, [1901] 1 Q. B. 108, 83 L. T. 506; 8 Manson 11—KENNEDY and LAWRENCE, JJ., *affirmed*

(1901) 70 L. J. K. B. 1032, [1902] 1 K. B. 1, 85 L. T. 306, 50 W. R. 52, 8 Manson, 329—C.A. COLLINS, M.R., STIRLING and MATHEW, L.J.J.

Burstall v Bryant (1883) 12 Q. B. D. 103, 49 L. T. 712, 32 W. R. 495, 48 J. P. 119—COLLIDGER, C.J. and STEPHENS, J., *overruled*

Robinson v Tucker (1884) 53 L. J. Q. B. 317, 14 Q. B. D. 371, 50 L. T. 880; 32 W. R. 697—C.A. BRETT, M.R., BOWEN and FRY, L.J.J.

[This case is not, specifically referred to in the judgments, although it was cited in the argument. But the effect of the judgments is to overrule it. See also *Dawson v Fair* (1885) 54 L. J. Q. B. 299, 14 Q. B. D. 377, before the C.A.]

Crush v Turner (1878) 47 L. J. Ex. 639, 3 Ex. D. 303, 38 L. T. 595; 26 W. R. 673

—C.A., *referred to*.
Hall v. L. B. & S. C. Ry. (1880) 55 L. J. Q. B. 328, 17 Q. B. D. 230, 54 L. T. 713, 34 W. R. 558, 5 Ry. & Can. Traff. Cas. 28—C.A.

Crush v Turner, *approved*
Thomas v Kelly (1888) 58 L. J. Q. B. 66, 13 App. Cas. 506; 60 L. T. 114, 37 W. R. 363—H. L. (S.).

Dodds v Shepherd (1876) 45 L. J. Ex. 457, 1 Ex. D. 75, 34 L. T. 358, 24 W. R. 322.

—EX. D., *distinguished*.
PATRONS: Tinsling (1877) 46 L. J. C. P. 230; 2 C. P. D. 119; 35 L. T. 851; 25 W. R. 255—C. P. D.

Dodds v Shepherd, *followed*.
Buse v Roper (1879) 41 L. T. 457.—C.A.

Dodds v Shepherd, *approved*
Teggan v Langford (1842) 2 D. (N.S.) 467; 10 M. & W. 556; 12 L. J. Ex. 76.—EX. and Hamlyn v Betsleye (*supra*), *distinguished*

Haimont v Foster (1881) 61 L. J. Q. B. 12, 8 Q. B. D. 82; 45 L. T. 429; 30 W. R. 129—C.A. BRETT, COTTON and LINDLEY, L.J.J.

Dodds v Shepherd, *considered*
Morris, In re, Streeter, Ex parte (1881) 19 Ch. D. 216; 45 L. T. 634, 30 W. R. 127—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.J.J.

JESSEL, M.R.—The ratio decidendi of that case appears to be inconsistent with that of the House of Lords in the subsequent case of *Garnett v Bradley* [3 App. Cas. 941]. And, moreover, it *Dodds v Shepherd* was rightly decided, the provision of sect. 20 of the Appellate Jurisdiction Act of 1876 (39 & 40 Vict. c. 59) would have been unnecessary—p. 220.

[Evans, *amic cur.*, said that since *Garnett v Bradley* the Court of Appeal had, in *Buse v Roper* (41 L. T. 457), followed *Dodds v Shepherd*]

Waterhouse v Gilbert (1886) 54 L. J. Q. B. 440, 15 Q. B. D. 589, 52 L. T. 784,

explained and applied.
Webb v Shaw (1886) 55 L. J. Q. B. 249, 16 Q. B. D. 658, 54 L. T. 216, 34 W. R. 416.—Q. B. D.

Waterhouse v. Gilbert, followed.

Byant v. Reading (1886) 55 L. J. Q. B. 253; 17 Q. B. D. 128, 84 W. R. 496, 54 L. T. 521—*C.A.* **ESHER, M. R. LINDLEY and LOPES, L.J.S.**; *affirming* 54 L. T. 300

McAndrew v. Barker (1878) 17 L. J. Ch.

840 L. J. Ch. D. 701, 37 L. T. 810; 28 W. R. 317—*C.A.*, *distinguished*

Hamlyn v. Betteley (1880) 60 L. J. Q. B. 1;

6 Q. B. D. 63, 43 L. T. 790; 29 W. R. 275.—*C.A.*

Waterhouse v. Gilbert, applied

Lyon v. Morris (1887) 56 L. J. Q. B. 373; 19 Q. B. D. 139; 57 L. T. 324, 35 W. R. 707.—*C.A.*

Belmonte v. Aynard (1879) 4 C. P. D. 352,

27 W. R. 789—*C.A.*, *affirming* 4 C. P. D. 221, 40 L. T. 627, *distinguished*.

Tomlinson v. Land and Finance Corporation (1884) 53 L. J. Q. B. 361; 14 Q. B. D. 539—*C.A.*

Belmonte v. Aynard, Tomlinson v. Land and

Finance Corporation, and Williams v. Crosling (1817) 3 C. B. 957, 4 D. & L.

660, 16 L. J. C. 1, 112—*C.F.*, *applied*

Rhodes v. Dawson (1886) 55 L. J. Q. B. 134, 16 Q. B. D. 548, 81 W. R. 240.—*C.A.* **LINDLEY and LOPES, L.J.S.**

Grazebrook v. Pickford (1842) 10 M. & W.

279, 12 L. J. Ex. 171.—*EX.*, *dictum applied*.

Rooda v. Gun and Shot Wharves Co. (1878) 28 L. T. 635—*Q.B.*

Brown v. Lilley (1891) 7 Times L. R. 427.—

MATHEW and DAY, J.S., *inapplicable and dictum disapproved*.

Stidham v. Stanbridge (1895) 15 R. 406, 64 L. J. Q. B. 473, [1895] 1 Q. B. 870, 43 W. R. 548.—*CAYE and LAWRENCE, J.S.*

CAYE, J.—The sole point to be decided is the meaning of Ord. L.A. 12 of the County Court Rules, 1830, and the question is whether the costs in this case come under the scale of costs above 50l. as the learned judge of the County Court has found, or not. The value of the goods is found by the learned judge to be 51l., and he awarded 10l. as damages. These sums make together the sum of 61l., and on that sum the learned judge has given the claimant costs on the scale above 50l. I do not see how he could have done anything different. It appears, however, that the execution creditor relies upon *Brown v. Lilley*. I need not distinguish it from the present case because it is no authority whatever upon the construction of Ord. L.A. r. 12; the portion of the judgment relied on by the execution creditor is a mere *obiter dictum*, not having anything to do with the point decided. It is clear that the claimant cannot stop when he has proved his title to the goods up to the value of the amount paid into Court. The true test is the value of the whole of the goods seized and claimed by him, and it was therefore necessary for the claimant to go on and prove not only that the goods were of the value of 51l., the sum paid into Court but that the whole of the goods belonged to him. This he did, and

the County Court judge was therefore perfectly right in the order he made.—p. 407.

East India Co. v. Campion (1896) 6 L. J. Ch. 37.—*V.C.*, *reversed in part*, (1837) 4 Cl. & F. 816; 11 Bligh (N.S.) 158—*L.L.* (E.).

INTOXICATING LIQUORS.

- 1 EXCISE DUTY
- 2 SALE BY RETAIL
- 3 QUALIFICATION FOR LICENSORS
- 4 GRANTING OF LICENCES BY JUDGES
- 5 OFFENCES AGAINST LICENSORS
- 6 COVENANTS RESPECTING LICENCED HOUSES.

1. EXCISE DUTY.

Lancashire v. Staffordshire JJ. (1857) 26

L. J. M. C. 171, S. C. *same* Reg. v. Lancashire 7 E. & B. 839, 3 Jur. (N.S.) 1085;

5 W. R. 658—*Q.B.*, *followed*.

Jones v. Whitaker (1870) 39 L. J. M. C. 139; L. R. 5 Q. B. 541, 22 L. T. 535, 18 W. R. 1197.—*Q.B.*

Stallard v. Marks (1878) 17 L. J. M. C. 91,

3 Q. B. D. 112; 38 L. T. 566; 26 W. R. 691—*COLORIDGE, C.J.*, and **MANISTY, J.**, *applied*.

Stephenson v. Rogers (1899) 80 L. T. 193, 63 J. P. 230—*LAWRENCE and CHANNELL, J.S.*

2 SALE BY RETAIL.

Graff v. Evans (1882) 51 L. J. M. C. 25, 8

Q. B. D. 873, 46 L. T. 317; 30 W. R. 380, 46 J. P. 262—*FIELD, J.* and **HUDDLESTON, J.**, *followed*.

Newell v. Hemmings (1888) 58 L. J. M. C. 46; 60 L. T. 544, 16 Cox C. C. 664; 53 J. P. 24—*COLORIDGE, C.J.* and **MANISTY, J.**

Newell v. Hemmings, inapplicable

Bowyer v. Percy Sapper Club (1893); [1893] 2 Q. B. 154, 5 R. 472; 60 L. T. 437, 42 W. R. 29, 17 Cox C. C. 669, 57 J. P. 170

—*MATHEW and WRIGHT, J.S.*, *explained*.

National Sporting Club v. Cope (1900) 82 L. T. 352, 48 W. R. 446; 64 J. P. 310—*CHANNELL and BUCKNILL, J.S.*

Jackson v. Athrill (1793) 1 Peake 180, *over-*

ruled.

Hughes v. Done (or *Doane*) (1811) 1 Q. B. 29; 4 P. & D. 708; 5 Jul. 837.—*Q.B.*

DENMAN, C.J. (for the Court)—It remains for us, however, to notice a case, which certainly is not distinguishable from it, and which must therefore, if its authority be adopted, determine the present *Lord Killybeg* is reported to have held at *Nis Prius* in *Jackson v. Athrill*, that the price of spirituous liquors sold by the agent

of a liquor merchant on his account, to the keeper of an eating-house in quantities under the value of 20s. was recoverable notwithstanding the statute, and the ground of the decision is stated to have been that he "thought this case did not fall within the mischief intended to be remedied by this Act of Parliament, the intent of which was to prohibit the sale of such small quantities to the consumer," that "the liquors were not sold to the defendant for his own consumption, but for the use of guests resorting to his house in the way of his trade, and, therefore, in his lordship's opinion, not within the Act of Parliament."

It now becomes our duty, after argument and upon deliberation (the absence of which circumstances so much impairs the authority of a *Nisi Prius* decision, whatever weight may be justly due to the opinion of the preponderant judge, to give one construction upon this statute. The preamble certainly alludes to the mischief noticed by Lord Kenyon, the increase of immoderate drinking of spirituous liquors by persons of the lowest sort: which is attributed, in a great measure, to the description of persons who had obtained licenses to retail the same, and to those who had presumed to retail the same without any licence. And accordingly, the first eleven sections of the Act are directed to the object of putting these persons under better and more strict regulations. Then comes the 12th section, upon which the question turns, and which has been already quoted. Now that the prohibition is, in terms, of all sales of spirituous liquors to a less amount than 20s., it is impossible to doubt, and to introduce an exception not there to be found, and which, if intended, might have been so easily introduced and expressed is, we think, to entail null and abridge the meaning of plain words in a manner which no rule of construction, of which we are aware, warrants.

We have purposely deferred noticing the language of Lord Tenterden in giving the judgment of the Court in the last cited case of *Buryniel v. Hutehinson* (5 Barn & Ald 241), which is to the following effect. . . .

We agree to this construction, and think we ought to adopt it. The consequence is that our judgment must be for the defendant—p. 300

3. QUALIFICATION FOR LICENCES

Reg. v. De Rutzen (1875) 45 L. J. M. C. 67, 1 Q. B. D. 55; 33 L. T. 726, 24 W. R. 343.—Q.B.D., *applied*.

Reg. v. Cotham (1889) 57 L. J. Q. B. 632, [1898] 1 Q. B. 802, 78 L. T. 108; 46 W. R. 512, 82 J. P. 435.—WILLS and KENNEDY, JJ.

Reg. v. De Rutzen, *referred to*
Reg. v. Cotham, *followed*.

Reg. v. Manchester JJ. (1899) 68 L. J. Q. B. 553, [1899] 1 Q. B. 571, 80 L. T. 531; 47 W. R. 410; 68 J. P. 360.—LAWRANCE and CHARNELL, JJ.

Reg. v. Cotham, *see*

Reg. v. Nicholson (1899) 68 L. J. Q. B. 1034, [1900] 2 Q. B. 455, 81 L. T. 257; 48 W. R. 52.—C.A., **Mackrell v. Brentford, JJ.** (1900) 69 L. J. Q. B. 718, [1900] 2 Q. B. 387, 83 L. T. 31; 48 W. R. 648; 64 J. P. 663.—GRANTHAM and CHARNELL, JJ., **Reg. v. Antrim, JJ.** (1900) [1901] 2 H. H. 123, 176.—C.A.

Reg. v. Vine (1875) 44 L. J. M. C. 60, L. R. 10 Q. B. 185, 31 L. T. 842; 23 W. R. 649; 13 Cox C. C. 43.—Q.B., *inapplicable*.
Hay v. Tower Division JJ. (or **Middlesex JJ.**) (1890) 59 L. J. M. C. 79, 24 Q. B. D. 561, 62 L. T. 290; 38 W. R. 414, 54 J. P. 500.—POLLOCK, B. and HAWKINS, J.

1. GRANTING OF LICENCES BY JUSTICES.

Hargreaves v. Dawson (1871) 24 L. T. 428.—Q.B., *referred to*.

Reg. v. Curzon (1873) 42 L. J. M. C. 155; L. R. 8 Q. B. 400, 29 L. T. 32, 21 W. R. 886.—Q.B.

Hargreaves v. Dawson and Reg. v. Curzon, *followed*.

Froer v. Murray (1894) 63 L. J. M. C. 242; [1894] A. C. 576, 6 R. 287, 71 L. T. 44; 58 J. P. 508.—H.L. (B) **LORDS HERSHELL, L.C., WATSON, ASHBOURNE and GHAND**

Reg. v. Manchester JJ., 51 J. P. 648.—**CHARLES, J.** *reversed*, *non* **Reg. v. King** (1888) 57 L. J. M. C. 20, 20 Q. B. D. 430, 58 L. T. 607; 36 W. R. 600, 52 J. P. 164.—C.A. **ESLER, M.R., FRY and LOPES, L.JJ.**

Reg. v. King, *referred to*
Reg. (or Moore) v. Abbott (1896) [1897] 2 Ir. R. 362.—Q.B.D.; *affirmed*, C.A.

Reg. v. Sykes (or Huddersfield JJ.) (1875) 45 L. J. M. C. 99, 1 Q. B. D. 62, 33 L. T. 566; 24 W. R. 141.—Q.B., *followed*.

Reg. v. Chertsey JJ. (or **Smith, Ex parte**) (1878) 47 L. J. M. C. 104; 3 Q. B. D. 374, 26 W. R. 682.—Q.B.

Reg. v. Sykes (or Huddersfield JJ.) and Reg. v. Chertsey, JJ., *commented on*
Gorman, Ex parte (1895) 63 L. J. M. C. 81; [1894] A. C. 23, 6 R. 89, 70 L. T. 46, 58 J. P. 316.—H.L. (B) **LORDS HERSHELL, L.C., ASHBOURNE and MORRIS**

Reg. v. Yorkshire (W.R.) JJ. (Drake's Case) (1893) 59 L. J. M. C. 17, L. R. 5 Q. B. 83; 10 B. & S. 840, 21 L. T. 430, 19 W. R. 258.—Q.B.; and **Reg. v. Denbighshire JJ.** (1895) 59 J. P. 708.—RUSSELL, C.J., and **GRANTHAM, J.**, *referred to*.

Reg. v. Groom, Cobbald, Ex parte (1901) 70 L. J. K. B. 636; [1901] 2 K. B. 157, 84 L. T. 534; 49 W. R. 484, 65 J. P. 452.—LORD ALVERSTONE, C.J. and **LAWRANCE, J.**

Reg. v. Thornton (1897) 66 L. J. Q. B. 774; [1897] 2 Q. B. 808, 77 L. T. 26, 61 J. P. 470.—**GAVE and RIDLEY, JJ.**, *affirmed*, (1898) 67 L. J. Q. B. 249; [1898] 1 Q. B. 384, 78 L. T. 95, 46 W. R. 241; 82 J. P. 196.—C.A. **SMITH, CHITTY and COLLINS, L.JJ.** *the latter decision reversed*, *non* **Lacey v. Lacey** (1899) 68 L. J. Q. B. 480; [1899] A. C. 222, 80 L. T. 473, 47 W. R. 497; 85 J. P. 371.—H.L. (B) **LORDS HALESBURY, L.C., WATSON, MACNAGHTEN and MORRIS**.

Reg. v. Smith (or Lancashire JJ.) (1878) 42 L. J. M. C. 46; L. R. 8 Q. D. 146, 21

W R 382; *non Reg. v. Southport JJ.*, 28 L T 129.—Q.B., *distinguished*.
Reg. v. Thomas (or Bristol JJ.) (1892) 61 L J M C 141, [1892] 1 Q B 426, 86 L T 289;
 50 W R 178, 66 J P 151 HAWKINS and WILLS, JJ.

HAWKINS, J.—It has been argued that this matter might have been the subject of an appeal to sessions and that, therefore, *mandamus* is not the proper remedy. Perhaps that might have been so if the judgment of the Court had been announced to her, and in that case we should probably have refused to make this rule absolute. But how is an applicant, who does not know the grounds upon which a decision is given, and who denies to appeal to the sessions, to frame her notice of appeal when she does not even know what she is appealing against? All that was said was "*Rex judicata*," and the licence was refused. Was it refused because the house was frequented by disorderly persons, or because the applicant was not the real owner of the house—or on what ground was it refused? I really cannot see how she could appeal against such a decision as this. The circumstances here appear to me sufficiently to distinguish the case from *Reg. v. Smith*, for here the magistrates' society (I do not use the word offensively) avowed that the licence should be refused, and did not, as it seems to me, hear and determine the application according to law. The whole case on both sides must be presented to them, and they will then be in a proper position to adjudicate upon it.—pp 142, 148.

Stringer v. Huddersfield JJ. (1876) 33 L T 568.—Q.B.D., *distinguished*.
Reg. v. Bradford JJ. (1896) 74 L T 287, 60 J. P. 265—LAWRANCE and COLLINS, JJ.

—*Reg. v. Smith (or Smith v. Herefordshire JJ.)* (1878) 48 L J M C 38, 39 L T 604.—Q.B.D., *approved*.
Sharp v. Wakefield (1891) 60 L J M C 73, [1891] 2 C 173, 64 L T 180, 39 W R 561, 35 J P 197.—H L (E) LORDS HALSBURY, L.C., BRANWELL, HERSHELL, MACNAGHTEN and HANNEN.

Sharp v. Wakefield JJ (*supra*), *held inapplicable*.
Evans v. Conway JJ (*infra*), in C.A.

Evans v. Conway JJ. (1900) 69 L J Q B 346; [1900] 2 Q B 5—CHANNELL and BUCKNILL, JJ., *reversed*, 69 L J Q B 636, (1900) 2 Q B 224, 82 L T 704, 48 W R 577, 61 J P 467.—C.A. SMITH, WILLIAMS and ROYER, L.JJ.

Evans v. Conway JJ. (*supra*), in C.A., *distinguished*.
Rex v. Kingston JJ, Davey, Ex parte (1902) 86 L T 689, 66 J P 617—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Ruddick v. Liverpool JJ. (1876) 42 J P 406.—Q.B.D., *followed*.
Reg. v. Anglesey JJ, Williams, Ex parte (1892) 61 L J M C 149, [1892] 1 Q B 850, 36 J P 447—LAWRANCE and WRIGHT, JJ.

Reg. v. Farquhar (1874) L R 9 11, 258.—Q.B., *referred to*.
Reg. v. Merthyr Tydfil JJ (1865) 54 L J M C 78, 14 Q B D 584, 49 J P 213—COLERIDGE, C.J. and SMITH, J.

Reg. v. Farquhar, applied.
Reg. v. Merthyr Tydfil JJ., held inapplicable, and dictum questioned.
Reg. v. Howard (1889) 23 Q B D 502; 60 L T 960, 37 W R 617, 53 J P 451.—MATHEW and GRANTHAM, JJ.

Reg. v. Farquhar, considered.
Reg. v. Merthyr Tydfil JJ., considered, and dictum questioned.
Reg. v. Howard, applied.
Reg. v. Anglesea JJ (1895) 65 L J M C 12, 15 L 614; 59 J P 713—HAWKINS, J.

Reg. v. Farquhar, Reg. v. Merthyr Tydfil JJ., and Reg. v. Howard, explained.
Reg. v. Kingston JJ, Davey, Ex parte (1902) 86 L T 689, 66 J P 547—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

O'Brien, in re, *Reg. v. Lancashire JJ.* (1891) 61 L T 562; 55 J P 279—POLLOCK, B and CHARLES, J., *reversed in part*, 55 J. P. 580.—C.A. ESKER, M R and FRY, L J.

Reg. v. Birmingham JJ. (1876) 40 J. P. 132.—C.A., *approved*.
Reg. v. Lancaster JJ (1891) 56 J P 580—ESKER, M R and FRY, L J.

Simpkin (or Reg. v. Birmingham JJ) (1873) 41 L J M C 102, L R 7 Q B 482; 26 L T 620, 20 W R 702.—Q.B., *followed*.
White v. Coquetdale JJ. (1881) 50 L J M C 128, 7 Q B D 238; 44 L T 715; 30 W R 16; 15 J P 539—FIELD and BOWEN, JJ.

Todd, in re, and *Ex parte* (1878) 47 L J M C 89; 3 Q B D 407.—Q.B.D.; and *White v. Coquetdale JJ.* (*supra*), *overruled*.

Reg. v. Liverpool JJ (or *Lancashire JJ.*, or *Lawrence*) (1885) 52 L J M C 114; 11 Q B D 638, 19 L T 244; 32 W R 20, 47 J P 506.—C.A. BRETT, M R, COTTON and BOWEN, L.JJ. See judgment.

Reg. v. Liverpool JJ (or *Lancashire JJ.*, or *Lawrence*) (1885) 52 L J M C 111, 11 Q B D 638; 49 L T 244; 32 W R 20; 47 J P 596.—C.A. BRETT, M R, COTTON and BOWEN, L.JJ., *distinguished*.

Stevens v. Green (or Sharnbrook JJ., or Redfordshire JJ) (1889) 58 L J M C 167; 23 Q B D 143; 61 L T 240; 37 W R 605; 53 J P 423—FIELD and CAVE, JJ.

FIELD, J.—In that case the tenant of premises in respect of which a licence had been previously granted applied for a renewal, on the ground that the previous tenant had neglected to apply at the general sessions for the licence to be renewed, and that under sect 14 of 9 Geo 4, c 61, it was open to the justices, whose the previous tenant had neglected to apply, to grant the renewal. In the present case, however, there is no ground for

claiming the benefits of sect. 14, which apply only to cases of neglect or wilful omission on the part of the previous occupier. The appellant is seeking to read into sect. 15 [of 37 & 38 Vict. c. 49] the provisions of sect. 14 of the Licensing Act, 1828, which apply to an entirely different set of circumstances. Under the latter section [sect. 15], when a licensed person has, by reason of a conviction for felony, become personally disqualified or had his licence forfeited, application may be made by or on behalf of the owner of the premises to a Court of summary jurisdiction for authority to carry on the business on the premises "until the next special sessions for licensing purposes," when a further application for the grant of a licence must be made. If the Legislature had intended that all the provisions of sect. 14 of Geo. 4, c. 61, should apply, they would have said so, but though certain procedure of sect. 14 is adopted, sect. 15 of the Act of 1874 expressly limits applications to the "next special sessions for licensing purposes," and not to any special sessions, as under sect. 14 of the Act of 1828—p. 169.

Reg. v. Liverpool JJ. (or Lancashire JJ., or Lawrence), *followed*.

Reg. v. Powell (1891) 60 L. J. Q. B. 594; [1891] 2 Q. B. 699, 65 L. T. 210; 39 W. R. 680.—C.A. — LOPES and KAY, *L.J.*

Reg. v. Liverpool JJ. (or Lancashire JJ., or Lawrence), *considered and followed*.
Baldwin v. Dover JJ. (1892) 61 L. J. M. C. 215; [1892] 2 Q. B. 421; 56 J. P. 423 — POLLOCK, B. and WILLIAMS, J.

Reg. v. Liverpool JJ. (or Lancashire JJ., or Lawrence), and **Reg. v. Powell**, *inapplicable*.

Price v. James (1892) 61 L. J. M. C. 203; [1892] 2 Q. B. 428; 67 L. T. 543; 41 W. R. 57, 56 J. P. 471.—C.A. — ESHER, M.R., BOWEN and KAY, *J.*

Reg. v. Liverpool JJ. (or Lancashire JJ., or Lawrence) *followed*.

Symons v. Wedmore (1893) 63 L. J. M. C. 44; [1894] 1 Q. B. 401; 10 R. 118; 69 L. T. 801; 42 W. R. 301, 58 J. P. 197.—COLERIDGE, C.J. and COLLINS, J.

LORD COLERIDGE, C.J.—We decided *Reg. v. Market Bosworth JJ.* [56 L. J. M. C. 96] upon facts exactly like the present. We decided it upon the authority of *Reg. v. Liverpool JJ.*, and our decision has never been questioned. If the matter were *res integra*, I should probably not decide as I am deciding, but in a matter of this kind it is very important to abide by former decisions, and as the applicant in the present case was in the position in which McGrath would have stood, we are bound to follow the decision of the C.A., and to hold that the justices were wrong. They ought to have followed the decision in *Reg. v. Liverpool JJ.*, and should have heard the appellant when he applied for a renewal of the licence.—p. 47.

Price v. James (1892) 61 L. J. M. C. 203; [1892] 2 Q. B. 428; 67 L. T. 543, 41 W. R. 57; 56 J. P. 471.—C.A. — ESHER, M.R., BOWEN and KAY, *L.J.*, *followed*.

Reg. v. Gloucester JJ., **Reg. v. Bristol JJ.** (1893) 5 R. 276, 68 L. T. 225; 41 W. R. 379; 57 J. P. 486.—COLERIDGE, C.J. and CAVE, J.

Price v. James, discussed

Symons v. Wedmore (1893) 63 L. J. M. C. 44, [1894] 1 Q. B. 401, 10 R. 118; 69 L. T. 801, 42 W. R. 301, 58 J. P. 197.—COLERIDGE, C.J. and COLLINS, J.

Reg. v. Newcastle-upon-Tyne JJ. (1886) 51 J. P. 101 — DENMAN and HAWKINS, *J.*; *reversed*, (1887) 51 J. P. 244 — C.J. — ESHER, M.R. and FRY, *J.*

Murray v. Freer (1893); [1893] 1 Q. B. 281 — POLLOCK, B. and WILLIAMS, J., *reversed*. (1893) 62 L. J. M. C. 100, [1893] 1 Q. B. 635, 4 R. 339; 68 L. T. 507, 41 W. R. 450, 57 J. P. 583.—C.A. — ESHER, M.R., LINDLEY and LOPES, *L.J.*, the latter decision affirmed, *non*.
Freer v. Murray (1894) 63 L. J. M. C. 242, [1894] A. C. 576, 6 R. 237, 71 L. T. 444, 58 J. P. 508.—H.L. (R.). LORDS HERSHELL, L.C., WATSON, ASHBOURNE and SHAND.

Freer v. Murray (1894) 63 L. J. M. C. 242; [1894] A. C. 576, 6 R. 237, 71 L. T. 444, 58 J. P. 508.—H.L. (R.), *principle applied*.
Igoe v. Shann (1902) (*infra*), *in* C.A.

Igoe v. Shann (1901) 70 L. J. K. B. 616, [1902] 2 K. B. 740, 84 L. T. 656; 49 W. R. 559, 65 J. P. 583 — LORD ALVERSTONE, C.J. and LAWRENCE, J., *reversed*, (1902) 71 L. J. K. B. 811, [1902] 2 K. B. 467, 87 L. T. 346; 51 W. R. 38; 56 J. P. 614.—C.A. — COLLINS, M.R., MATHEW and HARDY, *L.J.*

Reg. v. Rowell (1872) 41 L. J. M. C. 175; L. R. 7 Q. B. 490, 26 L. T. 732—Q.B., *followed*.

Reg. v. Moore (or Herefordshire JJ.) (1881) 50 L. J. M. C. 121; 7 Q. B. D. 542; 45 J. P. 768 — Q.B.D.

Att.-Gen. Newcastle-upon-Tyne Corporation (1889) 60 L. T. 791, 53 J. P. 421.—WILLS, J.; *reversed*, (1889) 58 L. J. Q. B. 558, 23 Q. B. D. 492.—C.A., the latter decision affirmed *non*.
Newcastle-upon-Tyne Corporation v. Att.-Gen. (1892) 62 L. J. Q. B. 72, [1892] A. C. 568, 1 R. 31; 67 L. T. 728, 56 J. P. 836.—H.L. (R.).

Newcastle-upon-Tyne Corporation v. Att.-Gen., *adopted*.

Att.-Gen. v. Tynemouth Corporation (1898) 67 L. J. Q. B. 489, [1898] 1 Q. B. 804, 78 L. T. 372; 46 W. R. 518; 62 J. P. 292.—C.A. — Att.-Gen. v. L.C.C. (1901) 70 L. J. Ch. 367; [1901] 1 Ch. 781, 788, 84 L. T. 245.—C.A.

Reg. v. Kent JJ. (1896) 65 L. J. M. C. 171, [1896] 2 Q. B. 306, 75 L. T. 11, 45 W. R. 4, 66 J. P. 597.—C.A. — ESHER, M.R., KAY and SMITH *L.J.*, *reversed non*.
Boulter v. Kent JJ. (1897) 66 L. J. Q. B. 787, [1897] A. C. 556; 77 L. T. 288, 46 W. R. 111; 61 J. P. 522.—H.L. (R.). LORDS HALSBURY, L.C., WATSON, HERSHELL SHAND and DAVEY.

Reg. v. Glamorganshire JJ. (1892) 61 L. J. M. C. 169; [1892] 1 Q. B. 621; 66 L. T. 444, 40 W. R. 436, 56 J. P. 437.—C.A. — ESHER, M.R., FRY and LOPES, *L.J.*, *in* C.A.
Reg. v. Pontypool JJ., *ib.* *followed*.

Reg. v. Gloucester JJ., **Reg. v. Bristol JJ.** (1893) 5 R. 276; 68 L. T. 225; 41 W. R. 379; 57 J. P. 486.—COLERIDGE, C.J. and CAVE, J.

Reg. v. Glamorganshire JJ., *overruled*.

Reg. v. Pontypool JJ., *commented on*
 Boulter v. Kent JJ (1897) 66 L. J. Q. B. 787,
 [1897] A. C. 556, 77 L. T. 288, 46 W. R. 111,
 81 J. P. 532—H. L. (E) LORDS HALSBURY, L. C.,
 WATSON, HERSCHELL, SHAND and DAVEY
 LORD HERSCHELL.—It is said that the effect
 of the provision contained in the (Summary
 Jurisdiction) Act, 1884 (sect. 7), was to make the

that the words "conviction or order" are not
 even used as meaning the decision that a conviction
 shall take place or an order be made, but
 refer to the conviction and order themselves, in
 their technical sense. The refusal to grant a
 licence may be regarded as a decision of the
 licensing justices, but what is the "order"
 founded thereon? Sub-sect. d, in my mind, puts
 the matter beyond doubt. No allusion was made

sect. 31 of the Act of 1879, which limits the
 operation of that section to persons entitled to
 appeal from the "the conviction or order" of a
 Court of Summary Jurisdiction. It seems to
 have been assumed by the learned judges that if
 the licensing justices were a Court of Summary
 Jurisdiction, it necessarily followed that all
 appeals from these decisions came within the
 terms of and were regulated by the provisions of
 sect. 31. I do not think so.

An applicant to whom a licence is refused has
 undoubtedly by the Act of 1828 a right of
 appeal, for that statute confers on him a right to
 appeal from "any act" of the licensing justices.
 But can it be said that he is thereby authorised to
 appeal from a "conviction or order?" The
 appeal authorised is certainly not one from a
 "conviction;" is it an appeal from an "order?"
 Even if I had to construe the language of the
 introductory part of sect. 31 alone, without the
 light thrown upon it by the subsequent provisions,
 my answer must be in the negative.

Sect. 31 forms part of an Act to amend the law
 relating to the summary jurisdiction of magis-
 trates. What is meant by the summary jurisdic-
 tion of magistrates is, of course, perfectly well
 understood by every lawyer, and in relation to
 that jurisdiction the words "conviction" and
 "order" have a well defined meaning. The con-
 viction follows on an information, the order on
 a complaint. When the licensing justices grant
 an application for a licence they sign a certificate
 by means of which the licence is obtained. But
 where they refuse the application they make no
 order at all. They simply do not grant the
 licence applied for. An order is never drawn
 up, and to speak of the act of the justices in not
 granting a licence as an order would be, I think,
 a misuse of the term. When the other provisions
 of sect. 31 are examined the matter becomes even
 clearer. The first sub-section prescribes that the
 appeal must be made to the next quarter sessions
 holden not less than fifteen days "after the day
 on which the decision was given, upon which the
 conviction or order was founded," thus showing

point of law, may require a case to be stated.
 The words "determination or other proceeding"
 are here added, indicating that every determina-
 tion of justices was not regarded as comprised in
 the word "order."

I have not yet referred to sub-sect. 2 of sect. 31,
 which was much discussed in the argument at
 the Bar. That sub-section prescribes that the
 appellant shall give notice of appeal to "the
 other party." There is no difficulty in applying
 this provision in cases where magistrates exercise
 summary jurisdiction as commonly understood.
 Where proceedings are taken by way of informa-
 tion or complaint which end or may end in a
 conviction or order, there are always two parties
 —the person instituting the proceedings and the
 person against whom the proceedings are taken.
 It has been held that, where the appeal is against
 the refusal to grant a licence, a person who has
 objected to the grant of the licence before the
 licensing justices is "the other party" within
 the meaning of sect. 31. No doubt, if it be
 assumed that the section includes such a case
 the words "the other party" could not very well
 apply to any one else. But, to me, the provision
 for notice to the other party is an additional
 reason for thinking sect. 31 inapplicable to
 appeals against the refusal of justices to grant a
 licence. Persons objecting to the grant of a
 licence are not, I think, parties to the proceed-
 ings on the application in any proper sense of
 the term. The question is not one *inter partes*
 at all. The justices have an absolute discretion
 to determine, in the interest of the public, whether
 a licence ought to be granted, and every mem-
 ber of the public may object to the grant
 on public grounds, apart from any individual
 right or interest of his own. The applicant
 seeks a privilege. A member of the public who
 objects merely informs the mind of the Court to
 enable it rightly to exercise its discretion whether
 to grant that privilege or not. A decision that a
 licence should not be granted is a decision that
 it would not be for the public benefit to grant it.
 It is not a decision that the objector has a right

to have it refused. It is not, properly speaking, a determination in its favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all then become "the other party"? There is, in truth, no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in sub-sect. 2 seems to me an additional reason for holding that an appeal from the "act" of the justices in refusing a licence is not an appeal from a conviction or order of a Court of summary jurisdiction.

I see no inconvenience in such a conclusion, quite the reverse. It is said that the object of sect. 31 was to introduce uniformity of procedure in appeals to quarter sessions. A laudable object, and calculated to be useful when applied to a class of cases similar in their character. But there does not appear to me to be any reason for straining the language of sect. 31 so as to make it embrace a very different class of cases provided for by special legislation. That legislation has never been expressly repealed, and I do not think it has been repealed by necessary implication, for an enactment which regulates appeals against a "conviction or order" of a Court of summary jurisdiction, does not, in my opinion, conflict with an enactment which prescribes the method and conditions of an appeal against "any act" of the licensing justices.

The Court of Appeal arrived at the conclusion that they did in the *Glamorganshire* case and in the present case because they felt bound to attribute to the words of the definition clause their natural meaning. I have been guided by the same principle in interpreting the language of sect. 31 of the Act of 1879, which seems to me to have been somewhat lost sight of.

Although the views I have expressed involve the decision that *Reg. v. Glamorganshire JJ* was wrongly decided, they do not necessarily conflict with the judgment in *Reg. v. Forty-spool JJ*, in which it was held that the licensing justices were bound under sect. 33 of the Act of 1879 to state a case for the opinion of the Court. That section, as I have already pointed out, entitles an aggrieved party who desires to question any "determination" of a Court of summary jurisdiction as erroneous in point of law to have a case stated. And a decision not to grant a licence is undoubtedly a "determination" of such Court if the licensing justices are a Court of summary jurisdiction. Though it is not necessary to decide this point, I feel bound to say that, as at the present advised, I am not satisfied that the conclusion arrived at on this point in the Courts below is a sound one. Looking at the scope of the Act of 1879, at the fact that sect. 7 of the Act of 1884 purports to be declaratory and not enacting, and that it is difficult to suppose that it was intended to enact that every justice when doing any act under any authority which he possesses is a Court of summary jurisdiction, my present impression is that the enactments defining a Court of summary jurisdiction may well be construed as meaning no more than this—that every justice is a Court of summary

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jurisdiction within the meaning of the Act of 1879, or any other law relating to summary jurisdiction, in all matters pertaining to the exercise of summary jurisdiction by magistrates, however he may have derived his authority to exercise that jurisdiction—*p* 792—798.

Boulter v. Kent JJ, (1897) 68 L. J. Q. B. 787; [1897] A. C. 556; [1897] L. T. 283; 46 W. R. 114, 61 J. P. 532.—H. L. (E), *considered*.

Reg. v. Yorkshire (W. R.) JJ, *Shaw, Ex parte* (1898) 67 L. J. Q. B. 279, [1898] 1 Q. B. 503; 78 L. T. 47, 46 W. R. 334, 62 J. P. 197.—MATHEW and KENNEDY, JJ.

KENNEDY, J.—A question has been raised as to the power of the Court to award costs to the respondent who appears here as the successful opponent of the rule *aux*; for the *mandamus* being made absolute. The Court has always exercised its discretion in such cases, but the discretion has generally been exercised in favour of granting costs to a successful respondent if he is such a person as the Court deems to be entitled to appear by reason of his interest in the matter before the Court. The decision of the H. L. in *Boulter v. Kent JJ* does not appear to have interfered with such discretion. This is not the case of a successful appellant to quarter sessions asking for an order that the objector who has not appeared on the appeal should pay the costs of the appeal. In the present case we have a party opposing who has appeared, has been heard, is interested, and has asked for his costs in respect of his opposition to the application to this Court. We think that the respondents were justified in appearing, and the order of the Court is that they be allowed their costs—*p* 283.

Boulter v. Kent JJ, *referred to*
Reg. v. Sharman, Deulon, Ex parte (1898) 67 L. J. Q. B. 460; [1898] 1 Q. B. 578; 78 L. T. 320, 46 W. R. 367, 62 J. P. 296.—WRIGHT and DARLING, JJ.

Boulter v. Kent JJ, *applied*,
Reg. v. Staffordshire JJ, (1898) 67 L. J. Q. B. 931, [1898] 2 Q. B. 231; 79 L. T. 142; 62 J. P. 741.—WILLS and CHANNELL, JJ.

Boulter v. Kent JJ, *distinguished*,
Reg. v. Manchester JJ (1899) 68 L. J. Q. B. 553; [1899] 1 Q. B. 571, 80 L. T. 531, 47 W. R. 410, 63 J. P. 360.—LAWRANCE and CHANNELL, JJ.

CHANNELL, J.—It is obviously convenient that the matter should be treated by *certiorari*. We are bound by the decisions in *Boulter v. Kent JJ*, [66 L. J. Q. B. 787, (1897) A. C. 556] and *Reg. v. Sharma*, but a section in the Licensing Act, 1872, has been pointed out, which applies to this case, and distinguishes it from those decisions. It was pointed out by counsel for the prosecutor that, under sect. 43 of the Act of 1872, the objector is expressly made a party to the proceedings before the confirming authority, and that that authority has power to award costs to the successful party. That seems to me sufficient to dispose of the point that this was not a judicial proceeding *inter partes*, and a rule for a *certiorari* as to the decision of the confirming authority must therefore be made absolute.—*p* 360.

Boulter v. Kent JJ, *discussed*,
Tynemouth Corporation v. Att.-Gen. (1899) 68 L. J. Q. B. 752; [1899] A. C. 293, 80 L. T. 633;

3 J. P. 404.—H L (R) LORDS MACNAGHTEN, MORRIS, SHAND and DAVEY; *affirming* S C non. Att.-Gen. v Tynemouth Corporation (1898) 67 L. J. Q. B. 489; [1898] 1 Q. B. 604; 78 L. T. 872; 46 W. R. 518; 62 J. P. 292.—C A SMITH, CHITTY and COLLINGS, L.JJ.

LORD DAVEY.—I am of opinion that the decision of this case is settled by the judgment of this House in *Boulter v Kent JJ*. The only proper respondents to an appeal are the justices themselves, who are served and may appear in the interests of the public to support their own order.—p 758

Boulter v Kent JJ, *followed*
Tynemouth Corporation v Att.-Gen., *considered*
Reg. v Yorkshire (West Riding) JJ (1899) 69 L. J. Q. B. 18; [1900] 1 Q. B. 291.—RIDLEY and DARLING, JJ

Boulter v Kent JJ and Tynemouth Corporation v Att.-Gen., *inapplicable*.
Evans v Conway JJ, (1900) 69 L. J. Q. B. 686; [1900] 2 Q. B. 224; 82 L. T. 704; 48 W. R. 577; 64 J. P. 467.—C A SMITH, WILLIAMS and ROMER, L.JJ.

Boulter v Kent JJ, *considered*
Reg. v Manchester JJ (1893) 68 L. J. Q. R. 558; [1899] 1 Q. B. 571; 80 L. T. 531; 47 W. R. 410; 63 J. P. 860.—LAWRANCE and CHANNELL, JJ, *approved*.

Rex v Sandeford JJ (1901) 70 L. J. K. B. 946; [1901] 2 K. B. 357; 85 L. T. 153; 65 J. P. 689.—C A SMITH, M. R., WILLIAMS and STEIRLING, L.JJ.

Reg. v Yorkshire (W. R.) JJ, (1899) 69 L. J. Q. B. 18; [1900] 1 Q. B. 291.—RIDLEY and DARLING, JJ, *considered*.
Rex v Warrwickshire JJ (1902) 71 L. J.

Reg. v Sharman and *Reg. v* Bowmen, *followed*

Reg. v Cotham (1898) 67 L. J. Q. B. 282; [1898] 1 Q. B. 802; 78 L. T. 408; 46 W. R. 512; 62 J. P. 435.—WILLS and KENNEDY, JJ.

Reg. v Sharman, *distinguished*.

Reg. v Manchester JJ, (1899) 68 L. J. Q. B. 568; [1899] 1 Q. B. 571; 80 L. T. 531; 47 W. R. 410; 63 J. P. 360.—LAWRANCE and CHANNELL, JJ. See extract, ante, col. 1410

5 OFFENCES AGAINST LICENSOR.

Mullins v Collins (1874) 43 L. J. M. C. 67; L. R. 9 Q. B. 292; 29 L. T. 838; 22 W. R. 297.—Q. B., *discussed*
Somersett v Hart (1884) 12 Q. B. D. 360; 53 L. J. M. C. 77; 48 J. P. 327.—Q. B. D.

COLERIDGE, O.J.—The only case cited for the appellant which raises any difficulty in my mind is that of *Mullins v. Collins*, where, however, I observe the late Mr Justice Atchulbald says that he does not intend in any way to interfere with the maxim that before a person can be criminally convicted he must be shown to have a *mens rea*. But the true effect of that case may, I think, be summed up by saying that since the judgment was in affirmance of a conviction. The justices had heard the whole case, and had the witnesses before them, and they had come to the conclusion on the facts that the appellant had been guilty of an offence. It may be observed that it is stated in the case that the appellant called no witnesses, but relied entirely on certain points of law, and it may be that the justices thought under the circumstances of that case that, as the appellant would not raise any affirmative case on his own behalf, he had none to raise, and the merits were in truth against him, and that they

R. I. J. J.

L.JJ.
SMITH, L.J.—That case was decided upon the view that licensing justices were a Court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879, but the basis of that decision has been swept away by the judgment of the House of Lords in *Boulter v Kent JJ* where it was held that licensing justices are not a Court of summary jurisdiction, and that sect. 31 of that Act did not apply.—p 578

Reg. v Sharman, Denton, Ex parte (1898) 67 L. J. Q. B. 460; [1898] 1 Q. B. 578; 78 L. T. 820; 46 W. R. 567; 62 J. P. 290.—WRIGHT and DARLING, JJ, *followed*
Reg. v Bowman, Patton, Ex parte (1898) 67 L. J. Q. B. 463; [1898] 1 Q. B. 563; 78 L. T. 280; 62 J. P. 874.—WILLS and DARLING, JJ.

consent to admit very much as weight as an authority for the proposition that the magistrates would have been wrong under such circumstances in refusing to convict, and that this Court ought, if they had so refused, to have sent back the case to them with the opinion of the Court that they ought to convict, for that is what we are asked to do here.—p 362.

Mullins v Collins, *commented upon*

Roberts v Woodward (1890) 59 L. J. M. C. 129; 25 Q. B. D. 112; 63 L. T. 269; 38 W. R. 770; 17 Cox C. C. 189.—POLLOCK, B. and SMITH, J.

Somersett v Hart (1884) 53 L. J. M. C. 77; 12 Q. B. D. 360; 48 J. P. 327.—Q. B. D., *distinguished*

Bond v Evans (1888) 57 L. J. M. C. 105; 2

GA B D 249; 59 L T 411; 36 W R 767; 52 J P 612

STEPHEN, J.—There the peculiar fact was that the appeal was against an acquittal, the justices having held that the respondent was entirely ignorant of the gambling, and the servant who it was proved did know was only a potman and not in charge of the premises. There was, therefore, no delegation of authority, and the case did not therefore come within the principle of the former cases, and the Court dismissed the appeal. That case seems to me not to conflict, but to be in accordance with the other cases. The L.C. distinguished the case from *Mullins v Collins*, on the ground that in that the servant was in charge and knew, or was wilfully blind; while in *Somerset v Hart* the potman merely knew of it as a fact, but not in discharge of his duty, nor being in charge at the time.—p. 108

Somerset v Hart, approved and followed.

Bond v Evans, explained.

Somerset v Wade (1891) 63 L J M C 126, [1894] 1 Q B 571, 10 R 105; 70 L T 452, 42 W R 399; 58 J P 231.—**MATHEW** and **COLLINS, JJ.**

Leser v Torrens (1877) 46 L J M C 280 2 Q B D 403, 25 W R 691.—Q B D, considered

Reg v Lilly (1897) 66 L J Q B 519, [1897] 2 Q B 38; 76 L T 467, 45 W R 504, 61 J P 373.—**HAWKINS** and **LAWRANCE, JJ.**

Reg v Charlesworth (1851) 20 L J M C 181, 2 L M & P 117.—Q B, commented on

Washington v Scott (1855) 6 B & S 617.—Q B

COOKBURN, CJ (during the argument)—The word "place" in sect. 15 (3 & 4 Vict. c 61) must be something analogous to a parish. The dictum of Erle, J., in *Reg v Charlesworth*, was ex-judicial, for the hamlet of G was also part of the parish of Kirkburton, which contained more than 25,000 inhabitants, and, therefore, the appellant was entitled to keep his house open until 11 o'clock, whatever was the right construction of the word "place" in sect. 15.

Smith v Redding (1866) 35 L J M C 202, L R 1 Q B 480; 6 B & S 617, 12 Jur. (N.S.) 618, 14 L T 858.—Q B, dicta adopted

Reg v Local Government Board (or Grasmere Local Board), Taylor, Ex parte (1873) 42 L J Q B 131, L R 8 Q B 227, 21 W R 445.—Q B.

Oldham v Sheehy (1891) 60 L J M C 81; 65 J P 214.—**GAVE** and **WILLIAMS, JJ.**, followed

Cowap v Atherton (1892) [1893] 1 Q B 49; 5 B 86; 68 L T 88, 11 W R 158, 57 J P 8.—**POLLICK, B** and **HAWKINS, J.**

Cowap v Atherton, inapplicable

Penn v Alexander (1895) 62 L J M C 65; [1898] 1 Q B 522, 5 R 251, 68 L T 355, 41 W R 392, 17 Cox C C 615, 67 J P 118.—

COLLEDGE, CJ, **HAWKINS, DAY** and **COLLINS, JJ**; **GAVE, J.** dissenting

Taylor v Humphries (1864) 17 C B (N.S.) 539; 34 L J M C 1; 10 Jur (N.S.)

1153; 11 L T 376; 13 W R 136.—C.P., adhered to.

Davis v Seave (1889) L R 4 C P 172; 88 L J M C 79, 19 L T 789; 17 W R 411.—C P

KEATING, J.—I am unable to distinguish this case from *Taylor v Humphries*. It has been strongly pressed upon us, that, inasmuch as the report of that case in the *Law Journal* makes no mention of sect 14 of the 11 & 12 Vict c 43, and the Lord Chief Justice does not allude to it in his judgment, we ought to assume that the attention of the Court was not called to it, and therefore we ought not to hold ourselves bound by that decision. Looking, however, at the report in 17 C B (N.S.) we can entertain no doubt that that provision was distinctly brought to the attention of the Court, and was present to the mind of the Chief Justice when he prepared the judgment. Not only was the statute referred to, but a case of *Tenant v Chamberland* (23 J P 51), where it was held that the burthen of proof lay upon the innkeeper, was cited. *Taylor v Humphries*, therefore, must stand unless we can see clearly that it proceeded upon a mistake. I agree with Mr White as to the serious consequences which may ensue from our pronouncing a decision which may have the effect of repealing the proviso in question. The Court has no intention to do so upon the present occasion. Neither did Erle, CJ, in *Taylor v Humphries* intend to do anything of the kind. All the Court there intended to decide was that under the peculiar words of the statute then under consideration, that which appeared to be an exception was in truth not an "exemption, exception, proviso, or condition," within the proviso in sect 14 of Jervis's Act, 11 & 12 Vict c 43. And I think a contrary decision would cast upon the innkeeper an intolerable burthen; for he would then be precluded from supplying refreshment to any person whom he did not personally know. Under these circumstances I think it right to adhere to the decision in *Taylor v Humphries*—p. 176

MONTAGUE SMITH and **BRETT, JJ.** to the same effect

Davis v Seave, followed.

Morgan v Hedger (1870) 40 L J M C 13; L R 5 C P 485.—C.P.

Dewart v Neilson (1900) 2 F (Just. Cas.)

67.—C.T. OF SESS, commented on
Neilson v Dunsmuir (1900) 3 F (Just. Cas.) 6.—C.T. OF SESS.

Stretch v White (1861) 25 J P 485.—Q B, disavowed from.

Pletts v Campbell (1895) 64 L J M C 223; [1895] 2 Q B 229; 15 R 493, 73 L T 344; 43 W R 634, 59 J P 502.—**WILLS** and **WRIGHT, JJ.**

WILLS, J.—We were pressed with the case of *Stretch v White*. One would have expected that so important a case would be found in the regular reports. I can hardly believe that if the regular reports. I do not think it is a satisfactory report. There was no considered detailed judgment. I cannot help thinking that there was a sale and a transmutation of property when the butter was set aside at the farmer's residence for delivery. If so, it is no authority binding

INTOXICATING LIQUORS—JUDGMENT.

upon us. I do not think the decision as reported in the Justice of the Peace at all satisfactory, and we are therefore at liberty to decide this case upon the plain words of the statute. Upon the words of the statute I cannot entertain any doubt at all—p 237.

Pletts v. Campbell, distinguished.
Pletts v. Beattie (1896) 65 L. J. M. C. 86, [1896] 1 Q. B. 519; 74 L. T. 148, 18 Cox C. C. 264; 60 J. P. 185.—DAY, WILLS and WRIGHT, JJ.
 WILLS, J.—I have no doubt that the magistrates were intending loyally to follow our previous decision in *Pletts v. Campbell*. But it seems to me that when Ramsbottom selected the six bottles and put them in for Nelson, those six bottles were appropriated, and that therefore there is no difficulty presented by the statement of the case upon that point.—p 88

Pletts v. Campbell and Guild v. Freeman (1898) 36 Re L. R. 6—OT. OF SESS., applied.

Pletts v. Beattie, considered.
Stephenson v. Rogers (1899) 80 L. T. 193; 63 J. P. 230.—LAWRANCE and CHANNELL, JJ.

6. COVENANTS RESPECTING LICENSED HOUSES.

St. Albans (Bishop) v. Battersby (1878) 47 L. J. Q. B. 571, 3 Q. B. D. 359, 38 L. T. 885; 26 W. R. 678.—Q. B. D., approved.
London and Suburban Land and Building Company v. Field (1881) 60 L. J. Ch. 549; 15 Ch. D. 645, 44 L. T. 444.—O. A.
 JESSUP, M.R., in the Inferior Court, treated the case as concluded by *St. Albans (Bishop) v. Battersby*. The defendant appealed, but the C. A. supported the M.R.'s decision.

JUDGMENT.

Bailey's Trusts, In re (1869) 38 L. J. Ch. 287, 30 L. T. 168, 17 W. R. 398—V. O., referred to.

Mildred v. Austin (1869) L. R. 8 Eq. 220, 20 L. T. 939; 17 W. R. 638—M.R.

Bailey's Trusts, In re, referred to.
Cork (Earl) v. Russell (1871) 41 L. J. Ch. 226, L. R. 18 Eq. 210; 26 L. T. 280.—V. O.

Bailey's Trusts, In re, and Cork (Earl) v. Russell (1871) 41 L. J. Ch. 226, L. R. 18 Eq. 210, 26 L. T. 280, 20 W. R. 164.—V. O., followed.

Cowbridge Ry., In re (1868) 37 L. J. Ch. 306, L. R. 5 Eq. 418, 18 L. T. 102, 16 W. R. 506—V. O., dissented from.

Hatton v. Haywood (1878) 29 L. T. 385; 22 W. R. 53

MALINS, V. O.—In the case of *In re Cowbridge Ry. Co.*, Lord Hatherley, then Vice-Chancellor Wood, gave utterance to an opinion as to the meaning of the Act (37 & 38 Vict. c. 112), in which I cannot concur, and I must follow the view formerly taken by me in the cases of *In re Bailey's Trusts* and *Earl of Cork v. Russell*—p 68.

Thornton v. Finch (1865) 4 Giff 515, 34 L. J. Ch. 486.—V. O., observed upon.

Hatton v. Haywood (1874) 43 L. J. Ch. 372, L. R. 9 Ch. 255, 30 L. T. 279, 22 W. R. 366.—L. C. and L. J.

SELBORNE, L. C.—The case of *Thornton v. Finch* shows that though the land was, such as sold not be specifically bound under the Act, until actually delivered in execution, yet the equitable right arising from the judgment and the 1 & 2 Vict. c. 110, is such as can be the foundation of a bill in equity to make it a perfect charge.—p 376.

Thornton v. Finch and Hatton v. Haywood (supra), applied.
Anglo-Italian Bank v. Davies (1878) 47 L. J. Ch. 833, 9 Ch. D. 275; 39 L. T. 244, 27 W. R. 8.—O. A., affirming, V. O.

Garth v. Brsfield Sir J. Bridgman's Reports, 22, *Girling v. Lowther* (1882-1883) 2 Ch. Rep. 136; and *Watts v. Porter* (1854) 8 El. & Bl. 743; 2 O. L. R. 1553, 23 L. J. Q. B. 345, 1 Jur. (N.S.) 133.—Q. B., observed upon.

Beavan v. Oxford (Earl) (No 2) (1866) 6 De G. M. & G. 507, 26 L. J. Ch. 293, 2 Jur. (N.S.) 121, 4 W. R. 275.—L. C. and L. J.

ORANWORTH, L. C.—I am bound to say that I do not at all feel confident that the case in *Bridgman* would be so decided at the present day. The other authority cited, an old case in the 2nd Volume of Reports in *Chancery*, is exceedingly loosely reported, and if it means that which Mr. Walker contends it means, as very likely it does, all I can say is that it is inconsistent with what has been taken to be the state of the law in the subsequent cases—p 520.

KNIGHT BRUCE, L. J.—If it be necessary to give any opinion on that case, I confess that, on examining it, I find it difficult to distinguish that case from the present satisfactorily. . . . On looking at the judgments I prefer that of Erle, J., to that of the other three judges on this point (i.e. equitable mortgage). . . . It seems to me, with great deference to the opinion of the Court of Queen's Bench in that case, that sufficient attention was not paid to the distinction between the existence of the trusts and the remedy against the trustee.—pp. 532, 533.

Watts v. Porter, disapproved and not followed.

Kendrew v. Jervis (1856) 26 L. J. Ch. 538; 22 Bear 1, 2 Jur. (N.S.) 602; 4 W. R. 579.

ROMILEY, M.R.—Considering the difference of opinion among the judges (in *Watts v. Porter*) themselves, the conflicting character of that decision with the decisions previously referred to and the consequences to which it would lead, not the least serious of which is the blow it strikes at the foundation of morality upon which all laws are, or ought to be, based, it can hardly be expected to govern subsequent cases without confirmation. . . . The Lord Chancellor (in *Bruce v. Oxford*) endeavored to distinguish *Watts v. Porter*, but, if not distinguishable, it was dissented from. It was also commented on and disapproved of by Turner, J., I concur in the decision of *Beavan v. Oxford*, and consider that the decision in *Watts v. Porter* cannot govern the present case.—p 544.

Watts v. Porter, commented on.
Scott v. Hastings (Lord) (1868) 4 Kay & J. 638; 5 Jur. (N.S.) 450; 6 W. R. 862.

WOOD, V. O.—Even if the charging order had been made absolute before notice of the mortgage, it would be impossible for me to give priority to

the charge of the judgment creditor without disregarding the *dicta* in *Beavan v Oxford* (Earl) (4 De G. M. & G. 521, 525, 582), in inference to the decision of the Court of Q.B. in *Watts v Porter*. It is true they are but *dicta*, for the facts in *Beavan v Oxford* (Earl) are distinguishable from the present case; the charge there being a charge on land. Nevertheless they are the *dicta* of a superior Court, and Lord Cranworth expressly and decidedly preferred the view taken in *Watts v Porter* by Erie, J., which is in accordance with that I have adopted, to the decision of the other learned judges, by whom that case was decided in a contrary manner. Turner, L.J. goes somewhat further, resting his decision upon an opinion directly contrary to that which was adopted in *Watts v Porter*. He says, in effect, that, in principle, the two cases could not be distinguished (that there was a distinction is clear, because in *Watts v Porter*, as here, the charge was upon personality, whereas in *Beavan v Oxford* (Earl) it was on real estate), and he concurs with Lord Cranworth, in giving a decided preference to the opinion of Erie, J. over that of the other judges. My judgment coincides with that of Erie, J. and . . . I must hold that, as against the mortgages in this case, no lien was acquired by the charging order, that order having been made after the execution of the mortgage.—p. 683.

Watts v Porter, discussed.

Benham v. Keane (1861) 31 L. J. Ch. 129; 3 De G. F. & G. 318, 8 Jur. (N.S.) 604; 5 L. T. 189; 10 W. R. 67.—WOOD, V.-C.

Watts v Porter, questioned.

Pickering v. Ilfracombe Ry. (1868) L. R. 3 C. P. 285; 87 L. J. C. P. 118, 17 L. T. 650; 16 W. R. 458.—C.P.

WILLIAMS, J.—The opinion of the majority of the Court in *Watts v Porter* created an exception on the 1 & 2 Vict. c. 110, s. 14, to the rule which applies generally, and which was applied in this Court more than a hundred years ago in the case of the statutory execution under the bankrupt law, that the creditors can have no more than the debtor was entitled to at law as well as in equity. But, since the cases of *Beavan v Lord Oxford* and *Kinderley v Jervis*, it is open to grave doubts whether the opinion of Erie, C.J., in *Watts v Porter* was not the more correct one.—p. 251.

Watts v Porter, referred to.

Robinson v. Nesbitt (1868) 37 L. J. C. P. 124, L. R. 3 C. P. 284; 17 L. T. 658; 16 W. R. 548.—C.P. Gill v. Continental Union Gas Co. (1872) 41 L. J. Ex. 176; L. R. 7 Ex. 332, 338, 27 L. T. 424; 21 W. R. 111.—EX. v. Panchard v. Tompkins (1882) 31 W. R. 287.—CHITTY, J.; General Horticultural Co. In re, Whitehouse, Ex parte (1886) 55 L. J. Ch. 608, 82 Ch. D. 512; 51 L. T. 598; 34 W. R. 681.—CHITTY, J.

In re Hamilton (1859), 9 Ir. Ch. R. 712, dis-sented from

Eyre v. McDowell (1861) 9 H. L. Cas. 619.—CHITTY, J.

Hickson v Collis (1811) 1 Jo & Lat 94, 113; 6 Ir. Eq. R. 521.—L.C., approved

Shaw v. Neale (1855) 24 L. J. Ch. 363; 20 Beav. 656, 1 Jur. (N.S.) 167.—M.R.

reversed (*infra*)—H.L., observed upon and not followed

Beavan v. Oxford (Earl) (1855) (No. 1), 6 De G. M. & G. 492; 1 Jur. (N.S.) 1121, 4 W. R. 112.—L.C. and L.J.

CRANWORTH, L.C.—I am aware that the Master of the Rolls seems to have taken a different view of the subject in his recent case of *Shaw v. Neale*. It does not, however, appear that the Irish case (*Hickson v Collis*) was brought under the consideration of his honour.

This was a decision at variance with what Lord St. Leonards stated in *Hickson v. Collis*, and which seems to me more in unison with the spirit and language of the enactment than the construction adopted by his honour. It does not appear to have been pointed out in argument that the provisions of the statute never could be complied with as to mortgages complete before the re-registration. It is impossible to re-register within five years previously to the date of the deed creating a mortgage prior to the re-registration.—p. 503

Shaw v. Neale (1855) 20 Beav. 666; 24 L. J. Ch. 363; 1 Jur. (N.S.) 167.—M.R., reversed, (1858) 6 H. L. Cas. 581; 27 L. J. Ch. 444; 4 Jur. (N.S.) 695, 6 W. R. 685.—H.L. (E)

Shaw v. Neale (*supra*, in H.L.), referred to, North v. Stewart (1890) 15 App. Cas. 452, 457; 63 L. T. 718.—H.L. (S)

Kinderley v Jervis (1856) 25 L. J. Ch. 538; 22 Beav. 1; 2 Jur. (N.S.) 602, 4 W. R. 579.—M.R., referred to

Pickering v. Ilfracombe Ry. (1868)—C.P. (*supra*, col. 1417); Price v. Price (1857) 56 L. J. Ch. 530, 35 Ch. D. 297, 56 L. T. 842; 35 W. R. 386.—KAY, J.

Beavan v. Oxford (Earl) (No. 1) (1855) 6 De G. M. & G. 492, 25 L. J. Ch. 289, 1 Jur. (N.S.) 1121, 4 W. R. 112.—L.C. and L.J., referred to

Pickering v. Ilfracombe Ry. (1868)—C.P., (*supra*, col. 1417).

Beavan v. Oxford (Earl) (No. 1), applied. Kensington (Lord), in re, Baccor v. Ford (1868) 54 L. J. Ch. 1085, 29 Ch. D. 627; 53 L. T. 19; 33 W. R. 689.—CHITTY, J.

Beavan v Oxford (Earl) (No. 2) (1856) 6 De G. M. & G. 507, 25 L. J. Ch. 290, 2 Jur. (N.S.) 121, 4 W. R. 276.—L.C. and L.J., followed.

Kinderley v Jervis (1856) 25 L. J. Ch. 538; 22 Beav. 1; 2 Jur. (N.S.) 602; 4 W. R. 579.—M.R. [*see supra*, col. 1414].

Beavan v. Oxford (Earl) (No. 2), distinguished. Scott v. Hastings (Lord) (1853) 4 Kay & J. 638; 5 Jur. (N.S.) 450; 6 W. R. 862.—WOOD, V.-C. [*see supra*, col. 1414].

Beavan v. Oxford (Earl) (No. 2), discussed. Benham v. Keane (1861) 1 J. & H. 685; 7 Jur. (N.S.) 1096.—V.-C.; affirmed, 31 L. J. Ch. 129; 3 De G. F. & G. 318, 8 Jur. (N.S.) 604; 5 L. T. 439, 10 W. R. 67.—L.J.

Beavan v. Oxford (Earl) (No. 2), applied. Panchard v. Tompkins (1882) 31 W. R. 287.—CHITTY, J., and Bell, in re, Carter v. Stalden (1886) 54 L. T. 570, 54 W. R. 363.—KAY, J.

Hirsch v Coates (1856) 25 L. J. Q. B. 815; 18 C. B. 767; 4 W. R. 656—*C. P., principle applied*
General Horticultural Co., In re, Whitehouse, Ex parte (1886) 55 L. J. Ch. 608; 82 Ch. D. 512; 54 L. T. 898, 84 W. R. 681.—CHITTY, J.

Hirsch v Coates and General Horticultural Co., In re, Whitehouse, Ex parte, principle applied
Davis v. Preshly (1890) 59 L. J. Q. B. 818, 24 Q. B. D. 519—*C. A.* COLERIDGE, C.J., **REVEREN**, M.R. and FRY, L.J.

Perrin, In re (1842) 2 Dr. & War. 147, 1 Cox. & L. 567, 4 Ir. Eq. R. 362—*L.G., held accented*
Boyle, In re, and Ex parte (1863) 22 L. J. Bk. 78; 3 De G. M. & G. 515, 17 Jur. 979.—*L.J.*

Perrin, In re, distinguished.
Simpson v. Morley (1858) 2 Kay & J. 71, 1 Jur. (S.S.) 1178.

WOOD, V.C.—*In re Perrin* was a very different case. It was a question of construction of a statute upon words which seem so plain that I am not surprised that Lord St. Leonards said he had no doubt upon the point, and only reserved his judgment as to how far the previous statute, 6 Will. 4, c. 14, had affected the question. By that statute it was enacted, that a judgment creditor who had obtained a judgment by confession, should be in the same position in bankruptcy as a simple contract creditor. There was an Irish Act which included in one clause several things which are more distributed in the corresponding Act relating to this country, and gave certain rights to the judgment creditor, and in that Act, after giving a judgment the effect of a charge upon land, this provision occurs:—"nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom such judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy; provided also, that, as regards purchases, mortgages, or creditors who shall have become such before the time appointed for the commencement of the Act, such judgment shall not affect lands, tenements, or hereditaments otherwise than as the same would have been affected by such judgment if this Act had not been passed;" and the very case had arisen of creditors under a bankruptcy, which was the case contemplated by the first part of the clause which I have read. The judgment creditor claimed to have certain rights in respect of a bankrupt's property, and urged that the simple contract creditors had no right to oppose, because the word "creditor" must be taken to mean persons who were, like himself, in the position of judgment creditors. Lord St. Leonards said that was not so, for the preceding clause dealt with the case of creditors in bankruptcy. The bankruptcy was a statutory execution for the benefit of all the creditors by simple contract or otherwise equally, including judgments registered within a year before the bankruptcy and judgments obtained by confession. Any claim of priority by such judgment creditor was the mischief intended to be prevented. The Act provided, that every judgment creditor must register his judgment within

a year before the bankruptcy; and, as to creditors before the passing of the Act, judgments were not to affect lands at all. The statute did not indicate in this case, to the conclusion that the Act 2 & 3 Vict. c. 11, providing that an unregistered judgment shall be void against lands in respect of creditors, can only mean to refer to creditors having an interest in the lands. It provides that the judgment shall be void unless the judgment creditor re-registered it within five years before the creditor's right accrued. That must be the right of the creditor in that thing, in respect of which, unless the re-registration is made, the judgment is to be void—that is to say, "lands, tenements, and hereditaments." In so deciding, I construe the statute in the mode which the preceding words render necessary, as Lord St. Leonards did regard to the statute which he had to consider in the case I have referred to—p. 70.

Beere v. Head, 8 Ir. Eq. R. 647.—M.R.; *reversed*, (1846) 3 Jo. & Lat. 340, 9 Ir. Eq. R. 76—*L.C.*

Slater v. Mackay (or Mackie) (1819) 81 L. B. 553; 19 L. J. Q. B. 88, 13 Jur. 1081; 7 D. & L. 255—*V. doubted*.

Bell v. Walden (1815) 9 Jur. 510—WRIGHT, M.A., *followed*.

Adams v. Ready (1861) 6 Ll. & N. 261; 7 Jur. (N.S.) 267, 8 L. T. 892; 9 W. R. 438.—*ACC.*

MARTIN, B. (delivering the judgment of the Court).—We have been pressed by the authority of this case (*Slater v. Mackay*). In that case the application was for the costs of an action on a judgment, and as the defendant had pleaded to that action *and tria revocata*, the Court of Common Pleas considered that that circumstance enabled them to exercise a discretion under the 13 Geo. 3, c. 16, s. 4, and that the proper course was to give the plaintiff his costs. The judgment of the Court of Common Pleas is entitled to the greatest respect, and we have considered it accordingly, but cannot understand it. The question in those cases is, as the bringing an action in the judgment is an evasion of the 7 & 8 Vict. c. 96, s. 57? And how that can be effected by the defendant pleading a false plea to the action we cannot see; although certainly, if we could give the plaintiff his costs on a judgment obtained after a false plea had been pleaded by his adversary, we would do so. As an authority on the other side, we have *Bell v. Walden*, where Wrightman, J., obviously considered that if a party is guilty of an evasion of the 7 & 8 Vict. c. 96, s. 57, the Court is bound not to give him costs; and in that case he refused to do so. For these reasons we think that we shall best exercise the jurisdiction we possess in refusing to give costs in the present instance—p. 204.

Adams v. Ready, dissented from

Dickinson v. Angell (1863) 32 L. J. Q. B. 188; 3 B. & S. 840, 8 L. T. 313, 11 W. L. 667—*Q.B.*
COCKBURN, C.J.—I dissent from the opinion expressed by the Court of Exchequer that the discretion which was vested in the Courts by 4 Geo. 3, c. 46, s. 4, to order that the plaintiff should have his costs in an action brought upon a judgment, is taken away by the 7 & 8 Vict. c. 96, s. 57—p. 184.

JUSTICE OF THE PEACE.

- 1 JURISDICTION AND DUTY.
- 2 PROCEEDINGS BEFORE
- 3 APPEAL.
- 4 LIABILITY OF THE ACTION
- 5 CLERKS OF THE PEACE

1 JURISDICTION AND DUTY

Reg. v. Essex JJ (1816) 5 M & S 513—K.B., and **Reg. v. Bolingbroke** (1803) 62 L J M C 180, [1803] 2 Q B 317, 5 R 336, 69 L T 717, 42 W R 128, 58 J P 118.—CAVE and WRIGHT, JJ., *followed*.

Workington Overseers, Ex parte (1803) [1891] 1 Q B 416, 9 R 135, 70 L T 143, 42 W R 177, 58 J P 381.—C.A. LOPES and KAY, JJ.

Reg. v. Milledge (1879) 48 L J M C 139; 1 Q B D 332, 40 L T 748; 27 W R 669.—Q.B.D., *followed*.

Reg. v. Gibbon (1880) 6 Q B D 168, 29 W R 412.—COCKBURN C.J. and MANISTY, J., *distinguished*. **Reg. v. Deal Corporation** (1881) 45 L T 139; 30 W R 154, 16 J P 71.—FIELD and CAVE, JJ. **Reg. v. Handsley** (1881) 61 L J M C 137, 8 Q B D 383; 30 W R 868, 46 J P 119.—FIELD and CAVE, JJ., **Reg. v. Powell** (1881) 61 L T 92, 48 J P 749.—STEPHEN N and MATHEW, JJ.

Reg. v. Milledge, followed

Reg. v. Gustford (1891) 61 L J M C 50, [1892] 1 Q B 381, 66 L T 21, 56 J P 217.—MATHEW and SMITH, JJ.

Reg. v. Gibbon (1880) 6 Q B D 168; 29 W R 412.—COCKBURN, C.J. and MANISTY, J., *distinguished*.

Reg. v. Handsley (1881) 8 Q B D 383; 51 L J M C 137; 30 W R 868, 46 J P 119.—Q.B.D.

CAVE, J.—**Reg. v. Meyer** (*infra*), was not cited there [in **Reg. v. Gibbon**], and the Court does not advert to the distinction established by that case between a substantial interest likely to cause a real bias and the mere possibility of a bias. Still we might have felt ourselves bound by the decision in that case had it not been that in **White v. Redfern** (reported, but not on this point, in 5 Q B D 15) the same question arose, and was decided the other way. Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present, where such a section as sect. 502 of this local Act exists in order to disqualify the justice, it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.—p. 386.

Reg. v. Lee (1882) 9 Q B D 594; 30 W R 750; 47 J P 118.—FIELD and CAVE, JJ., *followed*.

Reg. v. Henley (1892) 61 L J M C 133; [1892] 1 Q B 501, 65 L T 675, 40 W R 383; 16 Cox (C 518; 56 J P 391.—LAWRANCE and WRIGHT, JJ.

Reg. v. Rand (1866) 35 L J M C 137, L R 1 Q B 230.—Q.B., *repealed and distinguished*.

Reg. v. Meyer (1875) 143 D D 173; 84 L T 217; 24 W R 302.—Q.B.D.

Reg. v. Rand; Reg. v. Meyer, and Reg. v. Alcock (1878) 37 L T 829.—Q.B.D., *advised*.

Reg. v. Deal Corporation (1881) 45 L T 439, 30 W R 154, 46 J P 71.—FIELD and CAVE, JJ.

Reg. v. Meyer, not followed.

Reg. v. Handsley (1881)—FIELD and CAVE, JJ. (*supra*).

Reg. v. Rand and Reg. v. Meyer, adapted.

Reg. v. Parnett (1887) 57 L J M C 17; 20 Q B D 58; 57 L T 880; 36 W R 184; 52 J P 110.—STEPHEN and CHARLES, JJ.

Reg. v. Rand, rule applied.

Reg. v. Cumberland JJ, Mulland Ry. Ex parte (1888) 58 L T 491; 52 J P 502.—MATHEW and SMITH, JJ.

Reg. v. Rand and Reg. v. Meyer, rule applied.

L. C. C. v. Parkinson, Edwaudd, Ex parte (1891) 15 R 66; 71 L T 638.—CHARLES and WRIGHT, JJ.

Reg. v. Rand and Reg. v. Meyer, approved.

Reg. v. Stockport JJ (1896) 60 J P 352.—DAY and LAWRENCE, JJ., *approved*.

Reg. v. Sunningwell JJ (1901) 70 L J K B 916, [1901] 2 K B 357, 85 L T 183, 65 J P 599.—C.A. SMITH, M.A., WILLIAMS and STRLING, L.J.

Reg. v. Sunderland JJ, applied.

Reg. v. Tempest (1902) 86 L T 585; 66 J P 472.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Reg. v. Allan (or Hodgson) (1864) 33 L J.

M C 98, 4 B & S 915; 10 Jm (S) 796, 9 L T 761, 12 W R 422.—Q.B., *distinguished*.

Lesson v. General Council of Medical Education (1880) 59 L J Ch 238, 43 Ch D 366; 6 Q L T 849, 38 W R 303.—C.A.

Reg. v. Deal Corporation (1881) 45 L T 439,

30 W R 154, 46 J P 71.—FIELD and CAVE, JJ., *applied*.

Reg. v. Henley (1892) 61 L J M C 135;

[1892] 1 Q B 504; 66 L T 675, 40 W R 383, 17 Cox C C 518; 56 J P 391.—LAWRANCE and WRIGHT, JJ., and

Reg. v. Huggins, Glancy, Ex parte (1895)

61 L J M C 149, [1895] 1 Q B 604; 15 R 203, 72 L T 193, 43 W R 829; 59 J P 104.—WILLS and WRIGHT, JJ., *distinguished*.

Reg. v. Burton, Young, Ex parte (1807) 66 L J Q B 331, [1897] 2 Q B 168; 77 L T 364, 46 W R 127, 61 J P 727.—LAWRENCE and COLLINS, JJ.

Reg. v. Pearson (1870) 39 L J M C 76,

L R 5 Q B 237; 22 L T 126, 11 Cox C C 493.—Q.B., *distinguished*.

Reg. v. French, Roberts, Ex parte (1902) 71 L J K B 382, [1902] 1 K B 637; 86 L T 587, 60 W R 555, 66 J P 187.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

White v. Feast (1872) 41 L J M C 81,

L R 7 Q B 353, 26 L T 611, 20 W R 382.—Q.B., *applied*.

Reg. v. Mussett (1872) 26 L T 429, 30 W R

670.—Q.B., **Bennie v. Marshall** (1876) 35 L T 373.—D.

White v. Feast, distinguished
 Denny v. Thwaites (1876) 46 L. J. M. C. 141,
 2 Ex. D. 21; 35 L. T. 628—D.
Distinguished on the ground that in White v. Feast a private individual did the damage, whereas in the present case damage was done by a surveyor of highways, having a control over and an interest in the drains, and that in dealing *bona fide* with the drains he was not guilty of wilful or malicious damage.

White v. Feast, followed
 Brooks v. Hamlyn (1894) 79 L. T. 734, 63 J. P. 216; 19 Cox C. C. 231—LAWRANCE and CHANNELL, JJ.

Reg. v. Burrow (1869) 34 Z. P. 53.—Q.B., commented on and distinguished.
 Mussett v. Burch (1876) 35 L. T. 486.—Q.B.D. and Reeco v. Miller (1882) 61 L. J. M. C. 64; 8 Q. B. D. 626; 47 J. P. 37—GROVES and STEPHEN, JJ.

Reg. v. Taylor (1702) 2 Ld. Raym. 767, overruled.
 Rex v. Strong (1767) 1 Burr. 261.—K.B.

Beatty v. Gillbanks (1882) 15 Cox C. C. 138—FIELD and CAVE, JJ., explained.

Reg. v. Londonderry JJ. (1891) 28 L. R. Ir. 440.—Q.B.D.; *Reg. v. Cork JJ.* (1882) 15 Cox C. C. 78.—Q.B.D. (Ir.), and *Reg. v. Cork JJ.* (1882) 15 Cox C. C. 140.—Q.B.D. (Ir.), observations applied.

Wise v. Dunning (1901) 71 L. J. K. B. 166, [1902] 1 K. B. 167; 85 L. T. 721, 50 W. R. 317, 66 J. P. 212—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Reg. v. Totnes JJ. (or Deny) (1851) 2 L. M. & P. 230; 20 L. J. M. C. 189, 15 Jur. 227.—BAIL COURT, applied.

Nicholson v. Rpoth (1888) 57 L. J. M. C. 43; 58 L. T. 187; 16 Cox C. C. 373; 52 J. P. 602.—HAWKINS and GRANTHAM, JJ.

Kasper v. Brown (1876) 45 L. J. C. P. 203, 1 C. P. D. 97, 34 L. T. 251, 24 W. R. 369.—C.P.D., followed.

Golden v. King (1878) 46 L. J. Ex. 75; 35 L. T. 479; 25 W. R. 62.—EX. D.

2. PROCEDURE BEFORE.

Beauford v. Sims (1898) 67 L. J. Q. B. 655; [1898] 2 Q. B. 641; 78 L. T. 718; 47 W. R. 46.—MIDLEY and CHANNELL, JJ., dictum applied.

Callow v. Tillstone (1900) 83 L. T. 411; 64 J. P. 823.—LAWRANCE and KENNEDY, JJ.

Reg. v. Adamson (or Tynemouth JJ.) (1876) 45 L. J. M. C. 46, 1 Q. B. D. 201; 33 L. T. 840, 24 W. R. 250.—Q.B.D. and Wason, Ex. parte (1869) 38 L. J. Q. B. 302; L. R. 4 Q. B. 873; 17 W. R. 881.—Q.B., applied.
Lewis, Ex. parte (1885) 67 L. J. M. C. 108; 21 Q. B. D. 191, 59 L. T. 388, 37 W. R. 13; 16 Cox C. C. 449, 52 J. P. 778—WILLS and GRANTHAM, JJ.

Lewis, Ex. parte, not followed.
 Wallace, Ex. parte (1902) 71 L. J. K. B. 788; [1902] 2 K. B. 468; 50 W. R. 678.—O. A. COLLINS, M.R., MATHEW and COLENS-HARDY, L.JJ.

Reg. v. Adamson, followed.
Reg. v. Evans (1890) 62 L. T. 590; 17 Cox C. C. 81; 54 J. P. 171.—COLBRIDGE, C.J. and ESSER, M.R.

Reg. v. Adamson and Lewis, Ex. parte, applied.

Reg. v. Wisbech Corporation (1890) 7 Times L. R. 21.—HAWKINS and STEPHEN, JJ., distinguished.

Reg. v. Hyrie (1890) 60 L. J. M. C. 17, 63 L. T. 645, 39 W. R. 171, 17 Cox C. C. 187, 65 J. P. 319.—STEPHEN and WILLIAMS, JJ.

Reg. v. Adamson, observation applied.
Reg. v. Edlin (1891) 65 L. T. 83; 55 J. P. 700—SMITH and CHARLES, JJ.

Reg. v. Scotton (1811) 5 Q. B. 493, D. & M. 501; 18 L. J. M. C. 65; 1 New Series Cas. 27, 8 Jur. 400.—Q.B., considered.

Reg. v. Hughes (1879) 48 L. J. M. C. 151; 4 Q. B. D. 614; 10 L. T. 685; 11 Cox C. C. 281.—C.C.R.

Turner (or Shepherd) v. Postmaster-General (1864) 5 B. & S. 756; 34 L. J. M. C. 16; 11 Jur. (N.S.) 137; 11 L. T. 369; 13 W. R. 89; 10 Cox C. C. 15.—Q.B., referred to;

Eglington v. Pearl (1876) 33 L. T. 128.—C.P.; *Blake v. Beech* (1876) 45 L. J. M. C. 111; 1 Ex. D. 320, 31 L. T. 764.—EX. D., FIELD, J. dissenting.

Turner v. Postmaster-General, applied.
Reg. v. Hughes (1879) 48 L. J. M. C. 151; 4 Q. B. D. 614; 10 L. T. 685; 11 Cox C. C. 281.—C.C.R.

Turner v. Postmaster-General, applied.
Reg. v. D'Eyncourt (1888) 57 L. J. M. C. 61; 21 Q. B. D. 109; 87 W. R. 59; 82 J. P. 628.—FIELD and WILLS, JJ.

Blake v. Beech (1876) 45 L. J. M. C. 111; 1 Ex. D. 320; 34 L. T. 764.—EX. D., adopted.

Reg. v. Hughes (1879) —C.C.R., (*supra*); *Reg. v. Paget* (1881) 51 L. J. M. C. 9, 8 Q. B. D. 151; 45 L. T. 794, 30 W. R. 336, 46 J. P. 151.—Q.B.D. and *Reg. v. D'Eyncourt* (1888)—Q.B.D. (*supra*).

Reg. v. Shaw (1866) 1 L. & C. 579; 34 L. J. M. C. 169; 11 Jur. (N.S.) 415; 12 L. T. 470; 13 W. R. 692; 10 Cox C. C. 56.—C.C.R., considered.

Blake v. Beech (1876) 45 L. J. M. C. 111; 1 Ex. D. 320; 34 L. T. 764.—EX. D.; *FIELD, J. dissenting*; *Reg. v. Hughes* (1879) 48 L. J. M. C. 151; 4 Q. B. D. 614; 10 L. T. 685, 11 Cox C. C. 281.—C.C.R.

Reg. v. Shaw and Reg. v. Hughes (supra).
See
Maltby, In re (1881) 50 L. J. Q. B. 413; 7 Q. B. D. 18; 44 L. T. 711; 29 W. R. 678; 14 Cox C. C. 600; 45 J. P. 681.—Q.B.D.

Reg. v. Hughes, applied.
Reg. v. Fletcher (1854) 61 L. T. 334, 32 W. R. 828, 48 J. P. 407.—MATHEW and DAX, JJ.; *Reg. v. D'Eyncourt* (1888) 67 L. J. M. C. 64; 21 Q. B. D. 109; 87 W. R. 59; 82 J. P. 628.—FIELD and WILLS, JJ.

Reg. v. Shaw and Reg. v. Hughes, distinguished.

Dixon v. Wells (1890) 59 L. J. M. C. 110; 20 Q. B. D. 249; 62 L. T. 812, 31 W. R. 606; 17 Cox C. C. 48; 54 J. P. 725.—COLBRIDGE, C.J. and MATHEW, J.
 COLBRIDGE, C.J.—Two distinctions have been pointed out to us which, in my opinion, separate the case before us from those cited. In those cases there was no substantive preliminary

proceeds by the defendants, but here there was a protest . . . There is, however, a second distinction . . . arising out of the special provision as to time for proceedings enacted by sect. 10 of the [Sale of Food and Drugs] Act of 1879 . . . Here, therefore, is a condition precedent to the trial of the offence, carefully securing to a person charged, in respect of a perishable article, an opportunity of defending himself. It appears to me that this limit of time prescribed by the Act cannot be disregarded—pp 118, 119.

Paine, In re (for Reg. v. Outbush) (1867) 36 L. J. M. C. 70, L. R. 2 Q. B. 379; 8 B. & S. 819, 16 L. T. 282; 15 W. R. 742; 10 Cox C. C. 489.—*Q. B., explained*

Castro v. Reg. (1881) 50 L. J. Q. B. 497, 6 App. Cas. 229; 44 L. T. 350, 29 W. R. 669; 14 Cox 516; 45 J. P. 462.—*H. L. (B)*

Williams, In re (1851) 21 L. J. M. C. 46, 2 L. M. & P. 580, 16 Jur 1060—*BAILEY OT., observed upon*

William Smith, In re (1875) L. R. 10 Q. B. 804; 32 L. T. 894; 23 W. R. 523.—*Q. B.*

MELLOCK, J.—It is difficult to put a consistent construction on the first and second sections, but I think the provision which allows a summons to be left at a person's most usual place of abode must have been intended to apply to such a case as that of a tradesman or labourer, or, as in the case which has been cited (*Re Williams*), of a man working in a mine who would return home at regular intervals, and not to a case where a man might very likely be away for a week or ten days at a time. It cannot be supposed that it was intended to apply to a case like the present

Anderson v. Buckton (1719) 1 Strange 192, *disapproved*

Danbney v. Cooper (1829) 10 B. & C. 237; 6 M. & Ry. 314, 8 L. J. (os) K. B. 21.

TENTERDEN, C. J.—I certainly was not aware of the case of *Anderson v. Buckton*, nor can I consider it as good law. It has never been cited in modern books of practice, nor noted on by the Court—p 881

Reg. v. Middlesex JJ. (1842) 12 L. J. M. C. 36—*BAILEY COURT, applied*

Reg. v. Handsley (1881) 7 Q. B. D. 398.—**FIELD, J. and HADDLESTON, B.**

Reg. v. Hutchings (or *Hutchings*) (1881) 50 L. J. M. C. 36; 6 Q. B. D. 800; 44 L. T. 954; 29 W. R. 724; 45 J. P. 504.—*C. A., applied*

Wristman v. Thomas (1884) 53 L. J. P. 109; 9 P. D. 210; 51 L. T. 848, 32 W. R. 842.—*C. A. BAGGALLAY, COTTON and LINDLEY, JJ.*
Walsfield Corporation v. Cooke (1901) 71 L. J. K. B. 257; [1902] 1 K. B. 188, 86 L. T. 198, 50 W. R. 254, 66 J. P. 282.—*ALVERSTONE, C. J., DARLING and CHANNELL, JJ.*

Walsfield Corporation v. Cooke, followed
Scott v. Lowe (1902) 86 L. T. 421, 66 J. P. 520.—*ALVERSTONE, C. J., DARLING and CHANNELL, JJ.*

Hamilton v. Walker (1892) 61 L. J. M. C. 134; [1893] 2 Q. B. 25, 67 L. T. 200, 40 W. R. 476, 56 J. P. 583, 17 Cox C. C. 638.

—*FOLLOCK, B. and WILLIAMS, J., discussed.*
Reg. v. Fry, Masters, Ex parte (1898) 67 L. J. Q. B. 712, 78 L. T. 716; 46 W. R. 649; 62 J. P. 457.—*WILLS and KENNEDY, JJ.*

O. O.

Clark v. Woods (1848) 17 L. J. M. C. 189; 2 Ex. 395; 3 New Seas Cas 253.—*EX. followed.*

Norton v. Monckton (1895) 48 W. R. 369.—*WILLS and WRIGHT, JJ.*

Reg. v. Tynemouth JJ. (1886) 55 L. J. M. C. 181, 16 Q. B. D. 647, 54 L. T. 386, 16 Cox C. C. 74, 50 J. P. 451.—*COLERIDGE, C. J. and HAWKINS, J., not followed*

Reg. v. Turnbull (1889) 16 Cox C. C. 110.—*COLERIDGE, C. J. and GAVE, J.*

PERCURIAM—The Court, in the case referred to, do not appear to have dealt with the point put before us, and, under those circumstances, as Mr Walton has shown us that there is ground for doubting the correctness of that decision, a rule nisi should be granted.

Reg. v. McKennie (1892) 61 L. J. M. C. 181, [1892] 2 Q. B. 619, 5 R. 10, 87 L. T. 20, 41 W. R. 141, 17 Cox C. C. 612, 56 J. P. 712.—*COLLINS and BRUCE, JJ., considered*

Wilkins, Ex parte (1895) 64 L. J. M. C. 221, 72 L. T. 567; 18 Cox C. C. 161, 59 J. P. 294.—*GAVE and LAWRENCE, JJ.*

Reg. v. McKennie, distinguished.

Wilkins, Ex parte, approved.

Smith v. Moody (1902) 72 L. J. K. B. 43, [1903] 1 K. B. 56; 87 L. T. 682, 51 W. R. 252; 87 J. P. 49.—*ALVERSTONE, C. J., WILLS and CHANNELL, JJ.*

Rex v. Sadler (1787) 2 Chitty 319. **Rex v. North** (1825) 6 D. & R. 143, 23 R. R. 598, and **Rex v. Pann** (1826) 7 D. & R. 678, 5 B. & C. 251, 29 B. R. 231, *followed*

Cotterill v. Lempiere (1890) 59 L. J. M. C. 133, 24 Q. B. D. 634, 62 L. T. 805; 17 Cox C. C. 97; 51 J. P. 583.—*COLERIDGE, C. J., and ESHBURN, M.R.*

Rex v. Elwell (1727) 2 Ld. Raym 1314, *questioned*

Rex v. Wilson (1835) 3 A. & E. 817.—*K. B., DENMAN, C. J.*—In *Rex v. Elwell* a conviction very like the present was brought before the Court and quashed. The objection was that imprisonment was awarded till fine paid, and no fine set. The form of that conviction is copied into Burn's Justice from the third volume of Lord Raymond, and was contradicted by my brother Patteson, in *Rex v. Oakley* (4 B. & Ad. 307), with that which was then held bad on another ground. It was thence inferred that he approved of the form in *Rex v. Elwell* in every other particular; but surely no mode of arguing can be less just.—p 828.

Rex v. Taylor (1826) 7 D. & R. 622.—*K. B., commented on and explained.*

Reg. v. Chaney (1838) 6 D. P. C. 281.
PATTERSON, J.—I . . . have looked at the case of *Rex v. Taylor*, and without at all meaning to say that what is there decided is not good law, yet it is not an authority binding upon me, because the Court merely said there that they would not look at defects in a commitment until they had before them the conviction itself; and when it was brought before them, it appeared to be as defective as the commitment, and therefore the defendants were discharged. It is not, therefore, an authority to show that a party cannot be discharged on the ground of an error in the commitment.—p 289.

Rex v. Taylor, distinguished
 Timson, in re (1870) 1 R. 5 Ex. 257; 39
 L. J. M. C. 129; 22 L. T. 614, 18 W. R.
 849.—EX

KELLY, C.B.—The prisoner is therefore entitled to his discharge, and my only doubt was caused by the case of *Rex v. Taylor*, where upon the authority of an old case (*Rex v. Haichin*, 4 Fortescue 272; Abbott, C.J. says, "We must suppose, until the contrary is shown, that there is a legal conviction to support the commitment. We must have the conviction brought up before we can take any notice of a defect in the warrant," and adds, "for this purpose you may have a certificate to bring up the record and views of habeas corpus to bring up the defendants." There, on the conviction being afterwards brought up, the prisoner was discharged. But that case is no authority for the present one. Here the habeas corpus has already been granted and the prisoner is brought up under it, and is, with the return, before the Court; and we cannot deal with it as if it were merely an application for a writ made upon matter shown by affidavits.—p. 260

Labalmondiere v. Addison (1858) 1 El. & El.
 41, 28 L. J. M. C. 35; 5 Jur. (N.S.) 183.—
 Q.B., distinguished

Pool and Forden Highway Board v. Gunning
 (1882) 51 L. J. M. C. 49, 51, 46 L. T. 163—
 FIELD and BOWEN, JJ., and Corbett v. Badger
 (1901) 70 L. J. K. B. 610; [1901] 2 K. B. 278;
 84 L. T. 602, 49 W. R. 539; 65 J. P. 552.—
 LORD ALVERSTONE, C.J. and LAWRENCE, J.

Labalmondiere v. Addison, referred to
 Elliott v. Russell (1902) 72 L. J. K. B. 15,
 [1902] 2 K. B. 745; 88 L. T. 201, 51 W. R.
 269; 67 J. P. 458.—ALVERSTONE, C.J., WILLS
 and CHANNELL, JJ.

3 APPEAL

South Staffordshire Waterworks Co. v. Stone
 (1887) 56 L. J. M. C. 122, 19 Q. B. D.
 105; 57 L. T. 368; 36 W. R. 76, 16
 Cox C. C. 300, 51 J. P. 602—COLERIDGE,
 C.J. and DENMAN, J., approved and fol-
 lowed

Lockhart v. St. Albans Corporation (1888)
 57 L. J. M. C. 118, 21 Q. B. D. 183; 36 W. R.
 800, 52 J. P. 420.—C.A. ESHER, M.R., LINDLEY
 and LOPES, L.JJ.

South Staffordshire Waterworks Co. v. Stone,
 and *Lockhart v. St. Albans Corporation,*
 applied.

Westmore v. Paine (1891) 60 L. J. M. C. 89,
 [1891] 1 Q. B. 482; 64 L. T. 55; 39 W. R. 468;
 17 Cox C. C. 244; 55 J. P. 440.—POLLOCK, B.
 and CHARLES, J.

Reg. v. Kesteven (1844) 13 L. J. M. C. 78;
 3 Q. B. 810, D. & M. 113; 1 New Sess.
 Cr. 151.—Q.B., adopted

Reg. v. Cambridgeshire, JJ. (1850) 19 L. J.
 M. C. 130, 1 L. M. & P. 4.

Reg. v. Salop (1810) 13 East, 95; 12 R. R.
 307, applied.

Reg. v. Marlton-cum-Grafton (1847) 10 Q. B.
 971, 46 L. J. M. C. 159, considered and
 applied.

Reg. v. Sutton Coldfield (or *L. & N. W. Ry.*)
 (1874) 43 L. J. M. C. 57; 1 L. R. 9 Q. B. 153; 20
 L. T. 840; 22 W. R. 324.—Q.B.

Reg. v. London Corporation (1887) 57 L. J.
 491, 52 J. P. 70.—COWIE, TIDDLER, C.J., and
 DENMAN, J., approved and applied

Reg. v. Glamorganshire JJ. (1892) 61 L. J.
 M. C. 169, [1892] 1 Q. B. 621; 66 L. T. 144;
 10 W. R. 436; 56 J. P. 137.—C.A. BURNETT, M.R.,
 FRY and LOPES, L.JJ.; *this case has, however,*
been overruled by Boulton v. Kent JJ. (1897) 66
 L. J. Q. B. 787; [1897] A. C. 556; 77 L. T.
 288; 46 W. R. 111; 61 J. P. 532.—H. L. (R.)
 LORDS HALSBURY, L.C., WATSON, HENDELL,
 SHAND and DAVEY. See "INTOXICATING
 LIQUORS"

Pennell v. Uxbridge Churchwardens (1862)
 31 L. J. M. C. 92, 8 Jur. (N.S.) 99; 5
 L. T. 685, 10 W. R. 319.—HALL, C.T.;
 and *Banks v. Goodwin* (1863) 32 L. J.
 M. C. 87; 3 B. & S. 648; 9 Jur. (N.S.)
 891; 7 L. T. 740; 21 W. R. 309.—Q.B.,
 hold inapplicable.

MacKinnon v. Clark (1898) 67 L. J. Q. B. 763;
 [1898] 2 Q. B. 251; 79 L. T. 83; 17 W. R. 19.—
 C.A. SMITH, RIGBY and WILLIAMS, L.JJ.

Jones v. Taylor (1858) 28 L. J. M. C. 201, n.;
 1 El. & El. 20.—Q.B., approved.

Ellis v. Kelly (1860) 30 L. J. M. C. 36; 6
 H. & N. 222, 6 Jur. (N.S.) 1113, 3 L. T.
 831.—EX

Jones v. Taylor, not followed.
Foulger v. Stedman (1872) 12 L. J. M. C. 3;
 L. R. 8 Q. B. 65; 26 L. T. 395.—Q.B.

L. C. C. v. West Ham (1892) 61 L. J. M. C.
 210, [1892] 2 Q. B. 173; 67 L. T. 364;
 40 W. R. 662; 56 J. P. 662.—Q.B.,
 followed

L. C. C. v. Woolwich Union (1893) 62 L. J.
 M. C. 136, [1893] 1 Q. B. 210; 68 L. T. 71; 41
 W. R. 227, 57 J. P. 202.—C.A. ESHER, M.R.,
 LOPES and KAY, L.JJ.

L. C. C. v. Woolwich Union, followed.
James v. Jones (1891) 60 L. J. M. C. 11;
 [1891] 1 Q. B. 304; 10 R. 10; 70 L. T. 351;
 42 W. R. 400; 17 Cox C. C. 726; 58 J. P. 230.—
 HAWKINS and LAWRENCE, JJ.

L. C. C. v. West Ham, followed.
Hai-yin District Mines Drainage Co. v. Holy-
well Union (1898) 9 R. 779; 69 L. T. 705.—C.A.
 ESHER, M.R., LOPES and KAY, L.JJ.

Rex v. Shaw (1898) 2 Salk. 482, overruled.
Rex v. Chichester Guardians (1780) 3 Term
 Rep. 406.

Rex v. Lancashire JJ. (1828) 8 B. & L. 559.—
 K.B., distinguished.

Reg. v. Barnet Rural Sanitary Authority (1876)
 45 L. J. M. C. 105; 1 Q. B. D. 558; 35 L. T. 362.
 —Q.B.D.

Reg. v. Flintshire (1846) 15 L. J. M. C. 50;
 3 D. & L. 537, 10 Jur. 475.—HALL, C.T.,
 overruled.

Johnson, Ex parte (1803) 32 L. J. M. C. 123,
 9 Jur. (N.S.) 1128; 3 B. & S. 947; 8 L. T. 275;
 11 W. R. 620.—Q.B.

Reg. v. Oxfordshire JJ. (1893) 62 L. J. M. C.
 155; [1893] 2 Q. B. 149; 1 R. 152, 159
 L. T. 368, 41 W. R. 615, 57 J. P. 712.—
 C.A. ESHER, M.R., BOWEN and KAY, L.JJ.,
 followed.

Reg. v. Leintun JJ. (1899) [1900] 2 Ir. R. 397.
 —Q.B.D.

Rex v. Monmouthshire JJ. (1825) 4 B. & C. 814, 7 Q. B. 834; 28 R. R. 478.—K.B., *inid applicable*

Evans, Ex parte (1893) 63 L. J. M. C. 81, [1891] A. C. 16; 6 R. 82; 10 L. T. 45, 53 J. P. 200.—L.L. (E) LORDS H. RUSSELL, L.C., ASHBOURNE and MORRIS.

Reg. v. Kent JJ. (1873) 12 L. J. M. C. 112, 1 L. T. 8 Q. B. 305; 21 W. R. 635.—Q.B., *distinguished*

Wilson v. Wallani (1860) 49 L. J. Ex. 437; 5 Ex. D. 155, 12 L. T. 375; 28 W. R. 597, 44 J. P. 475.—EX D.

Reg. v. Kent JJ., applied.

Whitley Partners, In re, Callan, Ex parte (1886) 55 L. J. Ch. 540; 82 Ch. D. 337, 340; 54 L. T. 913; 34 W. R. 605.—C.A.

Reg. v. Kent JJ., followed.

Finney v. Dutton (1891) 60 L. J. Q. B. 488, [1891] 2 Q. B. 208, 64 L. T. 793; 39 W. R. 710.—COLERIDGE, C.J. and MATHEW, J.

Rex v. Hertfordshire JJ. (1843) 4 B. & Ad. 561; 1 N. & M. 381, 2 L. J. M. C. 41, *inapplicable*

Reg. v. Essex JJ. (1894) 64 L. J. M. C. 39, [1895] 1 Q. B. 88, 71 L. T. 832, 18 W. R. 189; 59 J. P. 68; 14 R. 90.—C.A. HENSH, M.R., LOPES and KIRBY, J.J.

Reg. v. Anglesey JJ. (1892) 61 L. J. M. C. 143, [1892] 2 Q. B. 29, 67 L. T. 322; 17 Cox C. C. 563; 56 J. P. 552.—DAY and CHARLES, JJ., *followed*.

Reg. v. Cheshire JJ. (1896) 60 J. P. 585.—DAY and LAWRENCE, JJ.

Reg. v. Anglesey JJ., followed.

Reg. v. Durham JJ., Newton, Ex parte (1895) 64 L. J. M. C. 187, [1895] 1 Q. B. 801, 15 R. 319; 72 L. T. 165; 43 W. R. 423, 59 J. P. 264.—CAVE and WRIGHT, JJ.

Reg. v. Devonshire JJ. (1850) 1 L. M. & P. 520.—BAIL CT., *overruled*

Mawkes v. Field (1850) 20 L. J. M. C. 41.—Q.B. PATTERSON, J.—I have considered the points as to the practice in this case, and spoken to several of the other judges about it. We think that the terms of the Act of Parliament are sufficient to introduce a new practice, and that no *certiorari* is necessary.—p. 12.

Rex v. Hants JJ. (1830) 1 B. & Ad. 654.—K.B., *applied*.

Reg. v. Davidson (1871) 24 L. T. 22.—Q.B.

Reg. v. Hants JJ. and Reg. v. Smith (1860) 29 L. J. M. C. 216; 2 L. T. 437, 8 W. R. 589.—BAIL CT., *followed*.

Reg. v. Purdy (1861) 5 R. & S. 909, 34 L. J. M. C. 1; 11 Jur. (N.S.) 153; 11 L. T. 369; 13 W. R. 75.—Q.B.

4. LIABILITY OF, TO ACTION.

Hartley, In re (1862) 31 L. J. M. C. 232, *applied*.

Milnes v. Bale (1875) 44 L. J. C. P. 366; L.R. 10 C. P. 691; 33 L. T. 174, 23 W. R. 680.—C.P.

Gwynn v. Poole (1692) Lutw. App. 1580; *commented on and partly questioned*.

Calder v. Halket (1840) 3 Moore P. C. 28.

Gwynn v. Poole, distinguished

Houlden v. Smith (1850) 19 L. J. Q. B. 170, 14 Q. B. 311, 14 Jur. 598.—Q.B.

Gwynn v. Poole, considered and adopted

Kemp v. Neville (1861) 31 L. J. C. P. 158, 10 C. B. (N.S.) 523, 7 Jur. (N.S.) 913; 4 L. T. 640, 10 W. R. 6.—C.P.

Lowther v. Radnor (Earl) (1806) 8 East, 113. *And see* 20 R. 542, n., *adopted*.

Calder v. Halket (1840) 3 Moore P. C. 28.—P.C.

Lowther v. Radnor (Earl), distinguished

Houlden v. Smith (1850) 19 L. J. Q. B. 170, 14 Q. B. 311, 14 Jur. 598.—Q.B.

Pike v. Carter (1825) 3 L. J. (O.S.) C. P. 169; 10 Moore 376, 3 Bing. 78.—C.P., *adopted*.

Calder v. Halket (1839) 3 Moore P. C. 28.—P.C.

Basten v. Carew (1825) 3 L. J. (O.S.) K. B. 111, 3 B. & C. 649; 5 D. & R. 558, 27 R. R. 488.—K.B., *considered and adopted*.

Kemp v. Neville (1861) 31 L. J. C. P. 158; 10 C. B. (N.S.) 523; 7 Jur. (N.S.) 913; 4 L. T. 640, 10 W. R. 6.—C.P.

Calder v. Halket (1840) 3 Moore P. C. 28.—P.C., *considered and adopted*

Kemp v. Neville (1861).—C.P. (*supra*).

Calder v. Halket, considered.

Pense v. Chaytor (1863) 3 B. & S. 620; 32 L. J. M. C. 121, 9 Jur. (N.S.) 664, 8 L. T. 613, 11 W. R. 563.—Q.B.

Calder v. Halket, applied.

Reg. v. Williams (1865) 16 L. T. 290.—BLACKBURN, J.

Calder v. Halket, inapplicable.

Stucian v. Broughton (1882) 47 L. T. 170.—P.C.

Metcalf v. Hodgson (1832) Hnt. 120, and

Cave v. Mountain (1840) 9 L. J. M. C. 90, 1 Man. & G. 257; 1 Scott (N.B.) 132.—C.P., *considered and adopted*.

Kemp v. Neville (1861) 31 L. J. C. P. 158; 10 C. B. (N.S.) 523; 7 Jur. (N.S.) 913; 4 L. T. 640, 10 W. R. 6.—C.P.

Garratt v. Morley (1811) 10 L. J. Q. B. 259, 1 Q. B. 18, 1 G. & D. 275; 6 Jur. 259.—Q.B., *distinguished*.

Coomes v. Latham (1847) 16 L. J. Ex. 175, 16 M. & W. 718.—EX.

Garratt v. Morley, considered.

Pense v. Chaytor (1863) 32 L. J. M. C. 121, 8 B. & S. 620, 9 Jur. (N.S.) 664, 8 L. T. 613, 11 W. R. 563.—Q.B.

Garratt v. Morley, adopted.

London Corporation v. Cox (1867) 36 L. J. Ex. 225, L. R. 2 H. L. 239, 263; 16 W. R. 44.—H.L. (S.).

5. CLERKS OF THE PEACE.

Nicholson v. Ellis, 1 EL BL. & EL. 267, 2 L. J. Q. B. 569, 4 Jur. (N.S.) 996; *reversed*

(1850) 1 EL BL. & EL. 283, 28 L. J. Q. B. 298, 5 Jur. (N.S.) 385.—EX CH.